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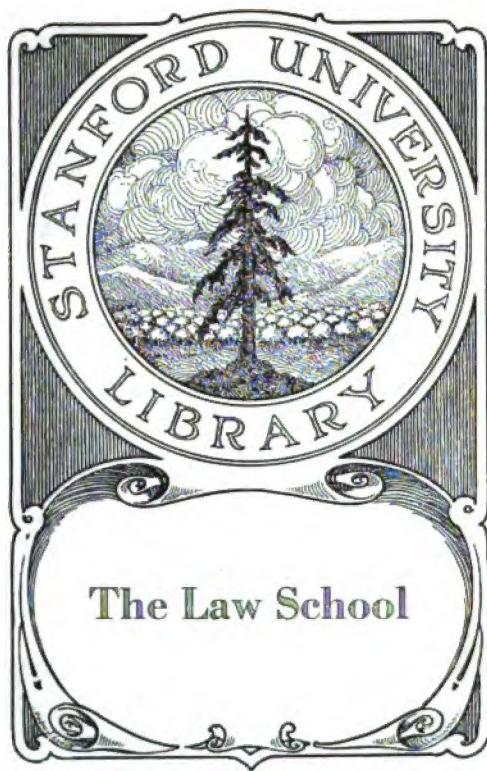
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.



HERETOFORE CONDENSED BY
THOMAS SERGEANT AND JOHN C. LOWBER, ESQRS.,
Now Reprinted in full.

VOLUME XI.

CONTAINING CASES IN THE COMMON PLEAS, FROM MICHAELMAS TERM,
6 GEO. IV. 1825, TO TRINITY TERM, 7 GEO. IV. 1826,
AND IN KING'S BENCH, THE CASES OF HILARY, EASTER, AND TRINITY TERMS,
IN THE 6TH AND 7TH YEARS OF GEO. IV., 1826.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 535 CHESTNUT STREET.

1873.

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BY
PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

VOLUME III.
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J U D G E S
OF THE
COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

**The Right Hon. Sir WILLIAM DRAPER BEST, Knt. Ld.
Ch. J.**

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir STEPHEN GASELEE, Knt.



A

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OF THE
NAMES OF THE CASES
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C O U R T O F C O M M O N P L E A S ,
A N D
O T H E R C O U R T S ,
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S I X T H Y E A R O F T H E R E I N G O F G E O R G E I V . , 1 8 2 5 .

C H O L M E L Y v . P A X T O N e t a l .

Demandant allowed to withdraw demurrer and reply *de novo* in a writ of *formedon*, upon showing good ground by affidavit.

This was a writ of *formedon* in which, in the last term, *Cross*, Serjt. had obtained a rule *nisi* to withdraw a demurrer, and reply *de novo*. Against this rule *Boranquet*, and *Peake*, Serjts., showed cause in the same term, objecting that there was no affidavit of any special cause for which the alteration was required; that there was no precedent for such a course; and that the courts were as averse to indulgence in a *formedon* as in a writ of right. They referred to *Scott v. Perry*, 3 Wils. 207, *Hull v. Blake*, 4 Taunt, 572, *Dums-²²ay v. Hughes*, 3 B & P. 453, *Charlwood v. Morgan*, 1 N. R. 64, and *Turner v. Palmer*, Cro. Car. 74, to show the rigor of the courts with regard to applications similar to the present.

The court required an affidavit at the hands of the applicant, and ordered the rule to be enlarged to this term; when the affidavit being produced, and disclosing, among other important matters, that the defendant's right accrued only in 1822.

Bent, C. J., said, The court never doubted that it had authority to amend, even in writs of right, and considering that the defendant's title accrued only in 1822, they thought it right to allow the amendment.

Rule absolute

ROWLEY v. HORNE.

To fix a plaintiff with knowledge of a general notice by which a coach proprietor had limited his responsibility, it was proved that the plaintiff had taken in for three years, a newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the court refused a new trial.

ACTION against a carrier for losing a parcel of bank notes which the plaintiff had forwarded by his coach. At the trial before Garrow, B., last *Stafford* assizes, the defence set up was, that the defendant had, by a general notice, given out that he would not be responsible for parcels of any value unless certified at the time of booking, and paid for accordingly; and that no intimation had been given of the value of the plaintiff's parcel. To bring the knowledge of this notice home to the plaintiff, it was proved on the part of the defendant that the plaintiff had taken in for three years a weekly newspaper in which the defendant's notice had always been advertised. The jury, [eg however, found a verdict for the plaintiff to the amount of the loss he had sustained.

Vaughan, Serjt. now moved for a new trial.

But the court thought the verdict perfectly right, and that it could not be intended a party read all the contents of any newspaper he might chance to take in. They said that carriers, who wished by means of a notice to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person who brought a parcel for conveyance a printed paper containing the notice.

Rule refused.

**TENNY, on the several Demises of HENRY GIBBS, CHARLES GIBBS,
GEORGE GUNNING, ROBERT GUNNING, and WILLIAM GUNNING, v. MOODY.**

In ejectment to recover premises forfeited for non-payment of rent, a difference between the amount of rent proved to be due and the amount demanded in the lessor of the plaintiff's particular is not material. C. devised lands to a *same* co-trustee for her life, and then to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, and attend to repairs; with power to distrain, lease, &c. By a codicil C. revoked the devise in the will, the trustees named therein having died, and devised the land to other trustees, to the same intents, and in the same manner in all respects, as if the new trustees had originally been named trustees in the will. Held, that the new trustees took the legal estate in the land.

This was an ejectment, brought to recover possession of two-fourths of certain mills, upon a forfeiture of a term in them, by non-payment of rent, according to the conditions of a lease under which they had been demised to the defendant by Miss *Callant*, entitled to two-fourths, and *Henry* and *Charles Gibbs* entitled to one-fourth.

At the trial before the Chief Baron, last *Kent* assizes, it appeared that six quarters' rent were in arrear; that the lessors of the plaintiff had in their particular claimed seven, and that the title of the Gunning's to the two-fourths arose on the following passages in the will and codicil of Miss *Callant*, who had died subsequently to the execution of the lease to the defendant.

1809. December 15th. *Mrs Callant*, of the city of *Rochester*, spinster, by will, of this date, gave and devised (*inter alia*) her moiety or half part of and

in a paper mill, with the appurtenances, at Hawley, in the parish of Sutton-st-Henr, in Kent, then in the occupation of James Robson, his assigns, or under-tenants,

Unto her niece, *Amelia Brooke Westcott*, otherwise *Amelia Brooke de Verreux*, wife or reputed wife of *John Baptiste Charles Count Touret de Verreux*, formerly of the kingdom of France, but then a French emigrant, residing in *Upper Norton Street*, in Middlesex, for life, (subject to the directions hereinafter mentioned and declared concerning the same estates and premises, and the rents and repairs thereof, and other matters relating thereto,) and immediately after the decease of her said niece, to the uses therein mentioned :

And said testatrix declared, that, notwithstanding she had given and limited said estates to her niece and her children, and to her nephew, upon the contingencies therein mentioned, yet, to the intent and purpose that she or he should not be entitled to receive of and from the several tenants the rents thereof, nor that any neglect of needful and proper repairs might happen, the testatrix did thereby nominate and appoint *George Gunning* and *George Hicks*, and the survivor of them, his "executors or administrators, *5] receivers of the rents of said estates, with full power to make distresses on non-payment thereof; and desired and directed that thereby and thenceout they should keep the same and every part thereof in good and tenantable repairs and condition; and that after discharge of this, and of every other necessary outgoing, they should pay the clear or net rents and profits to her said niece during her life, for her own sole and separate use, independent of said Count de Verreux, or any future husband, and free from his control, and all his debts and undertakings whatsoever; and for which rents and profits her receipts should be a sufficient discharge to said receivers or trustees.

Power to trustees to grant leases for life.

Ana Callant afterwards made a codicil, bearing date 1821, February 7th, reciting the before-mentioned will,—that said *George Gunning* and *George Hicks* had both departed this life,—and that testatrix was desirous to appoint the three sons of her late friend *George Gunning*, namely *George Gunning*, *Robert Gunning*, and *William Gunning*, to be trustees and executors of her said last will and testament.

And testatrix did thereby revoke and make void all and singular the devices and bequests in her said will and testament contained, of all her real and personal estates and every part thereof, to said *George Gunning* and *George Hicks*, upon and for certain trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and directions therein expressed and declared of and concerning the same; and in lieu thereof, testatrix gave, devised, and bequeathed all and singular the real and personal estates, goods, chattels, rights, and credits, and every part and parcel thereof, unto said *George Gunning* (the son,) *Robert Gunning*, and *William Gunning*, their heirs, executors, administrators, and assigns, according to the nature of the respective estates, *upon and for the several and respective trusts, and to *6] and for the intents and purposes, and with, under, and subject to the powers, provisoies, conditions, and directions in said will and testament expressed and declared, of and concerning the same estates and premises respectively, in the same manner in all respects as if the said *George Gunning* (the son), *Robert Gunning*, and *William Gunning*, had all of them been originally named as trustees and executors of said last will and testament, instead of said *George Gunning* and *George Hicks*, deceased.

And said testatrix did thereby nominate constitute, and appoint said *George Gunning* (the son,) *Robert Gunning*, and *William Gunning*, to be the executors of her said last will and testament.

The will and codicil were proved in the prerogative court of Canterbury 2d of December, 1821, by the three executors named in the codicil.

A verdict having been found for the lessor of the plaintiff,

Tuddy, Serjt., moved for a rule nisi to set aside this verdict, and enter a nonsuit, on the ground, first, that the variance between the sums claimed in the particular, and the sum proved to be actually due, was fatal. At common law, the demand preliminary to a forfeiture was required to be made with the utmost precision; and if there was any inaccuracy, either as to the amount or the mode of making the demand, it failed of its effect. The present mode of proceeding, having been substituted for that at common law, ought to be pursued with equal caution, and watched with equal jealousy. If the defendant had known the sum claimed to have been that which was really due, he might have paid it into court, under 4 G. 2. c. 28.

*Secondly, the trustees named in the will took no legal estate under it: [**7 the land is limited to Mrs. Varreux for life, and there is no devise to them, while they are invested with a power to distrain and lease, which would have been unnecessary if they had taken the legal estate. They have nothing to do but to pay money over to their *cestui que* trust; and where the functions of trustees are such as do not require them to be invested with the legal estate, the court will not confer it on them, unless there be an express devise; *Shapland v. Smith*, 1 Br. Ch. Cas. 75, *Doe dem. Leicester v. Biggs*, 2 Taunt. 109. Then the trustees named in the codicil are ordered to take in the same way as if they had been named in the will, which makes their interest the same as the trustees in the will would have taken.

BEST, C. J. There is no ground for either of the objections which have been raised against this verdict. With respect to the first, it has been insisted, that at common law a precise demand was a necessary preliminary to a forfeiture; it does not follow, however, that even at common law the precision which would have been necessary in the demand must also have been carried into the particular; but now the demand at common law is dispensed with under the provisions of 4 G. 2.; and if no demand is necessary the plaintiff's case cannot be affected by the mere amount claimed in the particular. Then it has been insisted, that three of the lessors of the plaintiff have no legal title by the will under which they claim. Whatever doubt, however, might exist as to the construction of the will, is cleared away by the codicil. In that, the testatrix clearly gives the estate to the lessors in question: "I give, devise, and bequeath all and singular my real and personal estates, goods, chattells, rights, and credits, unto *George Gunning*, *Robert Gunning*, and *William Gunning*, their heirs, executors, administrators, and assigns." [**8 These words give them the legal estate. If so, is it in this instance transferred to the *cestui que* trust under the statute of uses? That might be so, if, as in *Doe dem. Leicester v. Biggs*, the trustees had nothing to do. Here they have duties to perform: they are to receive rents and to see to repairs; and though the powers which have been given in the will were unnecessary to persons having the legal estate yet the very insertion of the powers shows that the trustees were intended to act.

PARK, J. The difficulty of making a demand correctly at common law, with a view to a forfeiture, was one of the reasons which occasioned the passing of the 4 G. 2., and I do not know that such a degree of precision was ever required for a particular as is now contended for. Though, under the 4 G. 2., the plaintiff must prove that at least half a year's rent is in arrear, it does not follow that he is confined to that sum in his particular.

BURROUGH, J. concurred.

GASLER, J. I have no doubt in this case. I am not satisfied that the trustees do not take the legal estate, even under the will, for if it can be collected from the whole will that they were intended to do so, particular words of devise are not necessary; but upon the codicil there can be no question. In *Doe dem. Leicester v. Biggs*, the trustees had nothing to do, but were merely to permit and suffer the devisee to receive the rent; and the distinc-

tion is this, that if there be anything for the trustees to do, beyond merely paying money over, they take the legal estate : here they are called on to lay out money in repairs. In *Silvester dem. Law v. Wilson*, 2. T. R. 445 [9] which followed *Shapland v. Smith*, the trustee was to apply the rents received, to the maintenance of the testator's sons, which *Ashurst*, J., relied on as a circumstance to show that the testator intended the trustees to have a control over the money ; and in *Shapland v. Smith*, where they were to see to repairs, they were helden to take the legal estate ; so that it is clear on this will, that the female was not intended to take an executed use. On the first point raised I entertain no doubt ; it is sufficient, if at the trial the lessor of the plaintiff shows half a year's rent to be due, and the defendant is not injured by any excess in the particular.

Rule refused.

REEDER v. BLOOM.

The circumstance that the plaintiff's cause has been conducted by one who is not an attorney does not deprive the plaintiff of his right to full costs against defendant.

When the costs were taxed for the plaintiff, who had obtained judgment in this case, it was objected, on the part of the defendant, that the person acting as attorney for the plaintiff had not taken out his certificate for the years 1819, 1820, and 1821 ; had never been re-admitted, and, therefore, under 37 G. 3. c. 90. was incapable of practising.

An application having been made to a Judge at Chambers, he ordered the defendant to pay the costs into court, subject to a motion to refund them ; this was done, and there were conflicting affidavits as to the fact, whether or not the party in question was an attorney.

Wilde, Serjt., now moved that such portion of the costs as would go to the plaintiff's attorney for his services as attorney might be refunded. He [10] urged, that the person who had acted for the plaintiff, not being an attorney, the plaintiff could not be called on to pay him for services in that capacity ; and that the defendant ought not to pay as costs an expence which the Plaintiff could never be called on to incur ; that it was as much the right and interest of the defendant as of the plaintiff that the plaintiff's cause should be conducted by a regular attorney, since the court had not, in case of misconduct, the summary jurisdiction over other persons which it possessed over attorneys ; and that in the King's Bench costs were not allowed to a person who conducted a suit, not being an attorney. He referred, also, to the statutes 2. G. 2. c. 23. s. 17., 22 G. 2. c. 46. s. 11., 37 G. 3. c. 90. s. 30, 31., by which attorneys who practice without due admission are rendered liable to punishment.

Bent, C. J. If we acceded to this motion, a plaintiff, in addition to his own cause, would also have, in every instance, to try another, to ascertain whether or not his agent were an attorney. But we think there is no ground for the motion. In cases like the present the court has always guarded against touching the right of the suitor, and has visited the offence on the party offending. It is now proposed, that the plaintiff should lose his costs because his attorney has no certificate ; but in what a situation would this place the plaintiff, if, as is usual, he makes at the outset advances to his attorney. The statutes show that the legislature never intended to touch the suitor, because

all the punishment they inflict is directed against the attorney, who, if he practises without a regular title, is disabled so sue for his costs. Our power is sufficient, without pursuing the course which has been pointed out, because if a person practises whose name is not on "the rolls, he is guilty of a [*11] contempt which the court may punish, and make him do justice to all [**11] parties.

PARK, J. It would be most dangerous to smitors at large, if we were to grant this motion. The meaning of the statutes is, that if a non-attorney sues for his extra costs, he shall not recover them against his client.

The rest of the court concurring, the rule was

Refused.

DOE Dem. UPTON et al v. WITHERWICK.

Several crops having been taken under an *habere facias possessionem* issued on an ejectment brought against a tenant for holding over, the court refused a rule for the lessors of the plaintiff to pay over the value of them to the defendant after deducting the amount of rent due.

The defendant's term having expired on the 6th of April, 1824, and he having refused to quit, the lessors of the plaintiff were put in possession of the premises under an *habere facias possessionem* in the ensuing August, at which time some grass crops were lying on the ground, together with nine bushels of oats, which the defendant had recently severed, alleging that he was entitled to them as a way-going crop. Some pigeons, a copper, and an oven were also taken.

Peake, Serjt., in the last term, had obtained a rule nisi for the lessors of the plaintiff to pay over to the defendant such sum as the prothonotary should allow for the value of the crops and other articles taken possession of by them under the writ of *habere facias possessionem* issued in this cause, deducting the amount of rent due to them from the defendant; against which

*Spanke, Serjt., now showed cause, alleging that the motion was of [*12] the first impression, and would, if made absolute, operate in the same way as a bill in equity, placing the court under the necessity of interfering in the most complicated concerns of landlord and tenant; that the defendant was himself a trespasser, and had no ground of complaint; and that as there had been no abuse of process, no reason could be adduced for the interference of the court. The claim for a way-going crop, if well founded, might be asserted in a different manner.

Peake, relied on the defendant's claim to the way-going crop, and insisted that the court had a discretionary authority over their own process for the purpose of preventing injustice.

The court were clearly of opinion that the motion was of the first impression; that to entertain it would be productive of pernicious consequences, and offer an inducement to tenants to hold over property; that if the defendant had any claim to a way-going crop he might assert it in an action against his landlord; but as in truth he appeared to have no merits, they discharged the rule, with costs,

*GLOVER v. MONCKTON.

Devise of lands and personalty, in trust out of the rents to apply 250*l.* a year to the maintenance of devisor's daughter till she should be twenty-one, or marry, and out of the residue as much as should be thought necessary for the maintenance of devisor's son till he should be twenty-one or his sister marry, and upon his attaining twenty-one or his sister's marrying, to raise 5000*l.*, and pay the interest of it to the daughter after her attaining twenty-one or marrying; and subject thereto that the trustees should stand seised of the residue in trust for the son till he attained twenty-one, and then to the use of the son, his heirs, executors, and administrators for ever. But in case the son should die under twenty-one and the daughter survive, or in case the son should live to twenty-one and afterwards die without lawful issue,—to the use of the trustees till the daughter attained twenty-one or married, and then to the use of the daughter for life, with divers remainders over:

Held, that the trustees took the legal estate till the 5000*l.* was raised, and that but for the intervention of the trustees the son would have taken a fee with an executory devise ever in the event of his dying without issue living at the time of his death.

THE Master of the Rolls directed the following case for the opinion of this court:

William Cheshire Glover by his last will and testament, duly executed and attested to pass real estates, devised all his real and personal estates to *T. Birk* and *W. E. Hammond*, and their heirs, executors, and administrators, upon trust, that they or the survivor of them, or the heirs, executors, or administrators of such survivor, should by and out of the rents, issues, profits, and produce of all or any part of the said real or personal estates, yearly and every year pay and apply the sum of 250*l.* towards the maintenance and education of the devisor's daughter, *Ann Julia Glover*, or so much thereof as would be necessary for that purpose, the residue thereof to accumulate for the use and benefit of his said daughter, and be paid or made payable to her, when she should arrive at the age of twenty-one years, or on the day of her marriage with the consent of the said trustees, whichever should first happen: and upon further trust, that they should pay and apply so much of the residue [14] of the rents, produce, and profits of the *said real and personal estates as they should in their discretion think necessary, for the maintenance and education of the devisor's son, *William Cheshire Glover*, (the above named plaintiff,) until he should attain the age of twenty-one years, or the day of marriage of devisor's said daughter, which should first happen; and when and as soon as his said son should have attained the age of twenty-one years, or his said daughter should be married with such consent as aforesaid, then upon this further trust, that they should with all convenient speed, by mortgage, sale or other disposition of all or any part of the said real or personal estates, levy and raise, or borrow and take up at interest the sum of 5000*l.*, and should stand possessed thereof when so raised as aforesaid, upon trust to pay the same and the interest thereon from the time when devisor's said daughter should arrive at the age of twenty-one years, or be married with such consent as aforesaid, unto the said daughter: but in case the said daughter should arrive at the age of twenty-one years, or be married in devisor's lifetime, then his will and meaning was, that the said sum of 5000*l.* should be raised and paid in manner aforesaid, as soon as conveniently might be after his decease, with interest from the time of his decease: and subject to the payment of the said sum of 5000*l.* so to be raised as aforesaid, and the interest thereof in manner aforesaid, then that the trustees should stand seised and possessed of the residue of the said real and personal estates after such sale or other disposition as aforesaid, in trust for the sole use and benefit of his said son until he should attain the age of twenty-one years, and when and so soon as he should arrive at the age of twenty-one years, then subject as aforesaid to the use of and in trust for his said son, his heirs, executors, administrators, and assigns for ever, according to the nature of the said

*estates respectively : but in case his said son should not live to attain such age of twenty-one years, and his said daughter should be living at the time of the decease of his said son, or in case his said son should live to attain such age, and should afterwards die without lawful issue, then as, to, for, and concerning all his said real estates, to the use of the said trustees and the survivors or survivor of them, and the heirs and assigns of such survivor, until his said daughter should attain the age of twenty-one years, or the day of her marriage with such consent as aforesaid, and then to the use of his daughter for life ; remainder to trustees to support contingent remainders ; remainder to the first and other sons of his daughter in tail male successively ; remainder to the daughters of his daughter as tenants in common in tail, with cross remainders between them ; remainders over in like manner to the devisor's brother and nephew successively for life, (with trustees to support contingent remainders,) and to their sons successively in tail general ; remainder to devisor's own right heirs. Then followed various dispositions of personal estate in case devisor's son "should not live to attain the age of twenty-one, or living to attain such age, should afterwards die and should not leave lawful issue of his body :" provided always, that in case it should be necessary for raising the said sum of 5000*l.* bequeathed to his said daughter, and for other the purposes contained in his will, either to make sale, or otherwise dispose of or mortgage all or any part of his said real and personal estates, then he thereby gave the trustees full power and authority so to do, and that their receipts should be a sufficient discharge to the purchaser ; and he thereby empowered them at any time to lay out and invest any part or parts of his personal estate at interest, on real or other securities, in some of the public funds, and from time to time to alter and transpose such securities or [*16] funds.

At the time of the commencement of the suit, *Ann Julia Glover* had attained twenty-one, but the 5000*l.* had not been paid or raised out of the real estate, and the testator's personal estate was not sufficient to discharge it.

The questions for the opinion of the court were :

What estate does the said *William Cheshire Glover*, the devisee, take in in the testator's real estate, under the limitations in his said will, he the said *William Cheshire Glover*, the devisee, having attained the age of twenty-one years ?

And if the court should be of opinion that the trustees, the said *Thomas Birch* and *W. E. Hammond*, take the legal estate in fee, under the limitations in the said will, then whether the said *William Cheshire Glover*, the devisee, would have taken any and what estate in the testator's said real estates, by virtue of his said will, in case the devise to him had been made without the introduction of trustees, he the said *William Cheshire Glover* having so attained his age of twenty-one years.

Peake, Serjt., for the plaintiff. *W. C. Glover* took under an estate tail. The court will not establish an executory devise in any case, where, as in the present, there is a sufficient freehold to support a contingent remainder ; and the rule is now settled, that where lands of inheritance are devised to one and his heirs, and if he die without issue, then over, that is an estate tail, because the words "if he die without issue" manifest an intent in favor of the issue. In *Doe dem. Ellis v. Ellis*, 9 East. 382, where the devise was to the devisor's son, his heirs and assigns, but in case his son should die *without issue, then over, it was holden the son took an estate tail. So in *Dansey v. Griffiths*, 4 M. & S. 61, and *Tenny v. Agar*, 12 East, 253, in which cases the expression was, "if he die and leave no issue ;" and Lord *Ellenborough* said the general rule was clear, that the words "in case he die without issue," must be construed to mean a general failure of issue. It is true, that in bequests of personality, the same words have been construed, to mean only a dying without issue living at the time of his death ; and in *Porter v. Bradley*,

3 T. R. 143 Lord *Kenyon* thought the same construction ought to be applied in real as in chattel interests; but in *Dainty v. Dainty*, 6 T. R. 314, he admitted the distinction; and in *Crooke v. De Vandes*, 9 Ves. 203, Lord *Eldon* confirmed the old rule. In *Roe v. Jeffery*, 7 T. R. 589, indeed, a devise similar to the present was adjudged to be a devise of the fee with an executory devise over, but in that case it was clearly collected from the whole of the will, that the failure of issue intended by the devisor, was a failure of issue at the death of the first taker. With respect to the trustees, they take a chattel interest, determinable on the devisee's attaining twenty-one. The general rule is laid down in *Doe dem. White v. Simpson*, 5 East, 162, confirmed by *Hawker v. Hawker*, 3 B. & A. 537, that trustees shall not take a fee where a lesser interest is sufficient to enable them to execute the purposes of the trust. Here, it was not necessary for them to take more than a term, in order to raise the 5000*l.*, and they are also furnished with a power which would not have been necessary had they taken the fee.

Wilde, Serjt., contra. The plaintiff took an equitable estate in fee, with *18] an executory devise over in case of "his not leaving issue living at the time of his death, and the trustee took a legal fee. Admitting the general rule to prevail, as laid down in the cases which have been cited, it may be controlled by an express intention appearing on the face of the will to the contrary, and such an intention appears in the present will, which contains provisions not to be found in any of those which have been the subject of former decisions. The will was evidently framed by a skilful person; many estates tail are properly created; from which it may be inferred, that the limitation in fee was designedly created. If the daughter had died first and then the son, before twenty-one, he must have taken an estate in fee, or no meaning can be attached to the words of inheritance. In most of the cases where the words on which the remainder over was limited, have been helden to give an estate tail to the first taker, the estate to the first taker has not been accompanied, as here, with words of inheritance. But in *Roe v. Jeffery*, where the estate was given to the first taker and his heirs for ever, the first estate was holden to be a fee, and the remainder over good, by way of executory devise. So also in *Doe v. Webber*, 1 B. & A. 713.

Peake, in reply, contended, that the devisor's intention, in the event of the daughter dying first, and then the son, before twenty-one, must be collected from the succeeding limitation and the whole context of the will, from which, including the provisions in respect of personal property, it was clear, that the estate was not intended to go over till a general failure of issue, and that would give the son an estate tail. In *Doe v. Webber*, 1000*l.* was ordered to be paid out of the estate to the executors of a person in being, by the person *19] "in remainder, which showed that the devisor did not mean an indefinite failure of issue, when she limited the remainder over on the first taker's leaving no child or children.

The following certificate was afterwards sent:

We have heard this case argued by counsel, and having considered it, are of opinion, that the legal estate in the real estates of the testator is in the trustees, *Thomas Birch*, and *William Henry Hammond*, and will continue so until the 5000*l.* shall have been raised as directed by the will. And that *William Cheshire Glover*, the devisee, would have taken an estate in fee in the said testator's real estates, by virtue of his said will, with an executory devise over, in the event of his dying without issue living at his death, in case the devise to him had been made without the intervention of trustees, he, the said *William Cheshire Glover*, the devisee, having so attained his age of twenty-one years.

W. D. BEST,
J. A. PARK,
J. BURROUGH,
S. GARNER.

*MARY DOWSE v. COXE et al.

Declaration., that a cause being depending in Chancery between *M. D.* and divers infants plaintiffs, and *T. B.* since deceased, and *J. R.* defendants, it was ordered, with the consent of the attorneys of the parties in the suit, that the matters in question in the suit and all disputes between *M. D.* and *T. B.* should be referred to the arbitrament of *W. C.*, who was to make one or more awards, and in case either of the parties should die, the death was not to abate the reference; that *T. B.* afterwards died before the making of the award; that the arbitrator awarded that the executor of *T. B.* should pay plaintiff 225*l.* out of *T. B.*'s assets, and that being so liable, the defendant, executor as aforesaid, promised to pay:

Held, on demurrer, that the action lay against the executor; that the promise sufficiently appeared to have been made in his representative capacity; that a sufficient authority to refer was shown, and a sufficient award to enable plaintiff to sue; and that the authority was not revoked by the death of *T. B.*

THE plaintiff declared, for that whereas, before the making of the promise and undertaking of the said defendants, as hereinafter next mentioned, certain differences had arisen, and a certain suit was then depending in the High Court of Chancery in which the said plaintiff *Mary Dowse*, widow, and divers other persons, including infants, by their next friend, were plaintiffs, and *Peter King*, *Thomas Biddell*, since deceased, and *John Reay*, defendants; And whereas, by an order of the Right Honorable Sir *John Leach*, Knight, Vice-Chancellor of *England*, bearing date the 14th of *June*, 1823, it was amongst other things ordered, with the consent of the attorneys of the parties in the said suit, that the several matters in question in the said suit, and all disputes and differences then subsisting between the said plaintiff *Mary Dowse*, *John Lightfoot Wilkinson*, and *Mary* his wife, *William Jones* and *Elizabeth* his wife, and *James May* and *Susannah* his wife (being certain of the plaintiffs) and *Peter King*, and *Thomas Biddell*, since deceased, (being certain of the defendant) should be referred to the award, arbitrament, and final determination of *William Cooke*, of *Lincoln's Inn*, Esquire, who was to be at liberty to make one or more award or awards of and concerning the matters thereby referred to him, as he should think fit; so as such award or awards should be made in writing under the hand and seal of the said *William Cooke*, ready to be delivered to the said parties, or to such of them as should require the same, on or before the 23d of *June* then next, or on or before such ulterior day or days as the said *William Cooke* should from time to time appoint, in writing, by endorsement upon the said order; and in case either of the said parties should happen to die before the making of the final award under the said reference, the said reference was not to abate, but the executors and administrators of the parties so dying were to be considered and taken as parties to the said order, in like manner as their testator or intestate; and the said plaintiff further said, that afterwards, and before the making of the award of the said *William Cooke*, thereafter mentioned, to wit, on, &c., the said *Thomas Biddell* died, to wit, at, &c.; and the said plaintiff further said, that the said *William Cooke* afterwards, and during the time for making his award, to wit, on, &c., at, &c., made his certain award in writing under the hand and seal of him the said *William Cooke*, between the parties aforesaid, of and concerning the said differences; and thereby then and there (amongst other things) awarded, that the said defendants, as executor and executrix of the said *Thomas Biddell*, deceased, should, out of the assets of the said *Thomas Biddell*, on the 27th of *July* then next, pay to the said plaintiff the sum of 225*l.*, of which award of the said *William Cooke*, the said defendants, as executor and executrix as aforesaid, afterwards, to wit, on the said 7th of *July*, in the year last aforesaid, had notice, to wit, at, &c.; by reason of which said premises the said defendants, as executor and executrix as aforesaid, became liable to pay to the said plaintiff the said sum of 225*l.*, according to the tenor of the said award, to wit, at, &c., and being so liable,

*22] they the said defendants, executor and executrix as aforesaid, afterwards, to wit, on, &c., at, &c., in consideration thereof, undertook, and then and there faithfully promised the said plaintiff to pay to her the said sum of 225*l.* at the time and in manner as in the said award was directed; and the said plaintiff in fact said, that though the said defendants, executor and executrix as aforesaid, were afterwards, to wit, on, &c., requested to pay the said sum of 225*l.* to the said plaintiff, according to the tenor of the said award, yet the said defendants, executor and executrix as aforesaid, not regarding their said promise and undertaking, so by them in manner and form aforesaid made, but intending to injure the said plaintiff in this behalf, did not nor would, when so requested as aforesaid, nor at any time before or since, pay the said sum of 225*l.*, or any part thereof, to the said plaintiff; but wholly neglected and refused so to do, to wit, at, &c.

To this count there was a demurrer, and the causes of demurrer assigned were, that it is not stated, nor does it appear in the said count, that the said defendants, before the making of the said award, had any notice of the said supposed submission, or were parties thereto, or were summoned to appear before the said arbitrator, or had any notice of the said supposed submission; and also, for that it is stated, in and by the said count, that the said defendants personally undertook to pay the said sum of money therein mentioned, whereas no liability or other consideration is stated to support such a promise; and also, for that it is not alleged, nor does it appear, in or by the said count, that the said defendants had at any time any assets of the said *Thomas Bidell*, out of which they could have paid the said sum of money in the said count mentioned, or any part thereof; and also, for that the said count is in other respects uncertain, informal, and insufficient.

*23] *Wilde, Serjt. in support of the demurrer.

First, the promise alleged to have been made by these defendants, is a personal promise, for which no consideration is stated. It is not stated that they promised as executor and executrix, or that they have assets, but that they, executor and executrix, promised; this language implies a promise which has no connection with the affairs of the testator, and on which, therefore, the defendants are not responsible. *Henshall v. Roberts*, 5 East, 150, *Bridgen v. Parkes*, 2 B. & P. 424.

Secondly, the order of reference is made by consent of attorneys only;—of all matters in difference;—and between certain, (not all,) of the parties. But *all matters* may comprehend matters out of the suit, which an attorney has not authority to refer;—the infants, in this case, could not appoint an attorney;—and supposing the interest of the infants to be omitted, then an award on part only of the matters referred, is insufficient.

Thirdly, the authority to refer was revoked by the death of *Billet*. It is only by statute that the death of a party, even after verdict, fails to abate a suit, but in every other case, death operates as a revocation of any authority. An agreement by a testator cannot bind his executor to a reference, for if it could, it might operate indirectly to affect the distribution of assets: an award made after revocation is unavailing, *Vinior's case*, 8 Rep. 82 a, even where the revocation is a contempt of court. *Clapham v. Higham*, 1 Bingh. 87. *Bac. Abr. authority E*; and a letter of attorney to deliver seisin after the death of the feoffor is void.

Fourthly, an action cannot be maintained on a non-observance of an order of court. *Emmerson v. Lashly*, 2 H. B. 248. **Smith v. Whally*, 2 *24] B. & P. 482. *Carpenter v. Thornton*, 8 B. & A. 52. The remedy for such a wrong can only be by application to the court which issued the order.

Taddy, Serjt., contra, was relieved by the court from arguing the first point.

On the second, he argued, that admitting the award had exceeded the authority, admitting the arbitrator had decided on matters not in difference, or

had omitted any that ought to have been included, it was sufficient on this declaration, if the court could see a *prima facie* authority, sufficient to constitute a consideration for a promise by the executors; that here such an authority sufficiently appeared in the attorneys for the parties, for it did not appear that they were merely attorneys in the suit, and the court would not minutely enquire into the nature of the authority, but would enforce an agreement which acknowledged its existence; *Filmer v. Delber*, 3 *Taunt.* 486; that it was sufficient for a plaintiff to set out so much of an award as made for him: *Bac. Abr. Arbitr. G. Banfill v. Leigh*, 8 *T. R.* 571; and that though the submission was by certain persons, and the award only mentioned some of them, it might be taken distributively, especially as the arbitrator was empowered to make more than one award. *Dyer*, 216. b. 217. a. 1 *Rol. Abr.* 246. l. 20. In *Bacon v. Dubarry*, 1 *Salk.* 70, which might appear conflicting, the award was bad for want of reciprocity. With regard to the infants, it appeared that the proceeding was in chancery, and it must be presumed, that court had not proceeded without due regard to the interest of the infants; besides, any defect of authority on their part would only render the award voidable, and not void, "and the infant might agree or disagree [25 at his full age. *Com. Dig. Arbitr. D.* 2.

As to the supposed revocation of the arbitrators' authority by the death of *Billett*, though a testator could not bind his executor to submit to arbitration, he might bind him to pay any sum which the testator owed, (*Powell v. Graham*,) 7 *Taunt.* 580, or which he should be found liable to pay under an arbitration already in progress; *Tyler v. Jones*: 3 *B. & C.* 144, and in orders at Nisi Prius, it has often been recommended by the court to insert a provision that the death of either of the parties shall not suspend the proceedings of the arbitrator. *Cooper v. Johnson*, 2 *B. & A.* 395.

The answer to the fourth objection, is, that this action is not brought on an order of court, but on an agreement made in consequence of the order.

Wilde, in reply. By the expression "their attorneys" must be meant attorneys in the suit, (although, technically speaking, there are no attorneys in chancery,) because there are no such words in the declaration as "authorised in that behalf," under which the court could extend the attorneys' authority to other matters. Although it may not be necessary to show the precise nature of the authority, some authority must appear, and none is shown here. In *Banfill v. Leigh*, the party distinctly showed he was entitled to claim under the award. But in *Cavendish v.* 2 *Ch. Cas.* 279, the court refused to bind an adult where an infant was concerned who might afterwards disagree. In *Mitchell v. Stavely*, 16 *East*, 58, the award was held bad, because all the matters referred were not decided on. Although the statement of the consideration for submitting, includes all the parties "submitting, the submission is void if there be not an authority from all. [26 *Antram v. Chase*, 15 *East*, 209. In *Filmer v. Delber*, there was a reference of the cause only. As to the revocation, it is true that the testator may bind his estate to pay a given sum, but a covenant not to revoke an authority is not a covenant to pay.

Best, C. J. The first objection which has been raised, is, that the promise in the declaration is a personal promise for which there is no consideration; I am of opinion that this is not so; that the promise is made by the defendants as executor and executrix, and is not merely personal; if so, the promise to pay is only a promise to pay out of funds which may come to them as executor and executrix. Looking, indeed, only at particular words, the case might fall within those decisions of the King's Bench, which have laid it down, that a promise by parties, executors, without saying *as* executors, is a personal engagement; but on looking to the whole declaration, there can be no doubt, that the promise sufficiently appears to have been made by the defendants in their character of executors. The declaration states the order

of the Vice-Chancellor to refer to arbitration certain matters in dispute ; it states the arbitrators' award, that the defendants should, *out of the assets of Thomas Bidell*, pay to the plaintiff 225*l.* on the 27th of July, then next, of which award the defendants, *as executor and executrix*, had notice ; by reason whereof they became liable *as executor and executrix, according to the tenor of the award* ; and being so liable, (that is, according to the tenor of the award,) they, executor and executrix as aforesaid, promised to pay ; that is, they promised to pay what the arbitrator ordered ; which was, a payment out of the assets.

*The second objection is, that as to some of the parties the arbitrator [27] was not properly constituted. If the arbitrator has no authority, that is a matter of substance to be urged on general demurrer ; but if he has some, and the objection is, that it is not sufficiently comprehensive, that objection ought to be made on special demurrer. I am of opinion, however, that it does sufficiently appear on the face of this declaration, that the arbitrator was regularly appointed to make the award he *has* made. Whether or not his authority extended to enable him to settle other matters which he might have deemed it expedient to enter on, is another question. The declaration states, that by an order of the Vice-Chancellor it was "ordered, with the consent of the attorneys of the parties, that the several matters in question, and all disputes and differences then subsisting between the plaintiff *Mary Dowse, J. L. Wilkinson*, and *Mary* his wife, *James May*, and *Susanna* his wife, and *Peter King* and *Thomas Bidell*, deceased, should be referred to the award of *William Cooke*, Esquire, who was to be at liberty to make one or more award or awards of and concerning the matters referred to him." It has been said, that as infants were concerned in the disputes between these parties, it ought to have been referred to the Master, to ascertain what course was most for the infant's benefit. Whatever was the proper course to be pursued, we may presume, till the contrary appears, that the Court of Chancery has followed it. It is stated, that the reference was ordered with the consent of the attorneys of parties in the suit, whence I conclude it was with the consent of persons properly authorised ; for, strictly speaking, there are no attorneys in the Court of Chancery. It is true that an infant cannot appoint an attorney, but it does not follow that he may not submit to arbitration, or that his next friend

[28] "may not have an attorney to act for him. It is urged, however, that supposing these attorneys to have been attorneys for the parties, the extent of their authority is not sufficiently alleged ; the declaration containing no such expression as "thereunto duly authorised" ;—but those words are not necessary in all cases ; by the demurrer, it is admitted that these persons were attorneys of the parties in the matter of the reference ; and if they were attorneys to refer, they had authority to choose an arbitrator. As to the argument that the infants cannot be bound,—what has been done is not void with respect to them, but only voidable ; and the supposed hardship of the infant's having an election unfairly to rescind the award does not exist, because at the time of the submission, all the parties knew they were dealing with infants.

It is not necessary for us to decide whether or not attorneys in a cause have authority to refer matters out of it, for it seems clear that these persons were attorneys for the parties generally ; and for aught that appears to the contrary, they may have been specially authorised for this purpose. If they were specially authorised, although their authority would be revoked by the death of their principal, yet acts done before his death, might affect his personal estate after.

Another objection which has been urged, is, that as all the parties referred differences in which they were mutually concerned, the arbitrator could not decide any question separately. But it does not appear that he has decided on any separate concerns, and he has authority to make one or more awards, in which he may include distributively the several matters referred. Even

if this were a distinct claim, the arbitrator might make a distinct award, according to *Athelstan v. Moon*, Co. Rep. 547, in which the arbitrator was to award on all matters that either "might have against the other." It has, [*29] however, been urged here, that the arbitrator cannot decide on all matters, because some of the parties are infants; and that if he cannot decide on all, his award is not final for any. But the old law is clear, that if the reference be general, without any express stipulation that the arbitrator shall decide on all the matters referred to him, the award may be good for part; and this law has not been altered; for the case of *Mitchell v. Stavely*, contained an express stipulation that the arbitrator should decide on all the premises; Lord *Ellenborough*, says, "It was a condition of the submission that they were to award upon all matters in difference between the parties." No such words are contained in the present submission, and they were probably designedly omitted, because the arbitrator might have found it impossible to decide between all the parties at once, and he is expressly empowered to make more awards than one.

The last objection is, that the authority to the arbitrator has been revoked. I have felt some difficulty about this, because it has been urged, that if such an authority be not revoked by death, a man might place his executor or his administrator (perhaps a creditor) in an awkward situation. But if he chooses to place them in such a situation, the convenience or inconvenience of his own act cannot be discussed here. In the present case he has said, in effect, "the arbitrator shall go on notwithstanding my death;" if any inconvenience ensue, he has brought it himself on his representative, who may elect whether or not he will accept the office. It has been said, indeed, that this is no more than a covenant not to revoke the authority by any act of the party covenanting; that death will operate as a revocation independently of any such covenant; and that the covenant does not abridge the covenantor's power to revoke, but only gives an action against him, in case he violates his "covenant." [*30] But the engagement is, not that the party will not revoke, but that death shall not abate the arbitration. It has been asked, whether an agreement that a suit shall not abate by death, would enable a court to proceed with the cause; it is not necessary to decide that; for though an agreement of the parties may not give a court jurisdiction, that doctrine does not apply to a domestic forum erected by the parties themselves. We cannot doubt that justice has been done in the present case; the objections which have been raised are merely formal; and our judgment must be for the plaintiff.

PARK, J., expressed his concurrence.

BURROUGH, J. We must presume that the order of reference given by the Vice-Chancellor was regularly made by the court, and the interests of the infants must have been in the hands of their guardians. There is nothing in the award contrary to the interest of those infants, and the arbitrator's authority was not revoked by the death of *Biddell*. The law touching revocation, does not apply to this case, which is not the case of a simple authority, but one in which the party expressly binds his effects to the result of the award, and the action is brought against the defendants, only in their representative capacity. Besides, the reference was in an equity suit, in which every person is joined who has the remotest interest in the matters in dispute, and the arbitrator has an equitable jurisdiction, which he does not possess in a reference at law: if this were an award at law, there might perhaps be objections to it, which cannot now be raised; our judgment must be *de bonis testatoris*.

GASELEE, J. As to the objection that there is no averment of the defendants having assets, it is expressly decided in the case of *Powell v. Graham*, that such an averment is not necessary, under [*31] circumstances like the present; and as to the supposed defect of the consideration, here is an express promise by the testator, that the award shall go on. An action might have been brought on that promise, but it has been

brought on the promise of the executor, who became liable on the engagement of his testator. If he had had no notice of the award, he might have made the objection; but, on the contrary, knowing the award to have been executed, he makes the promise which is the subject of the present action.

Judgment for the plaintiff.

SIR JOHN TYRRELL v. MARSH.

By a marriage settlement, an estate was limited to the use of husband and wife for life, with remainders over to the children of the marriage, and in default of issue, to the right heirs of husband and wife. There was a power in husband and wife to charge the estate during their lives, and a power to certain trustees, in whom the legal estate was vested, to sell on the direction of the husband and wife or the survivor.

The husband and wife borrowed money by way of annuity; created a term of one thousand years, and levied a fine to G. in fee, which, by a deed to lead the uses, was declared to be "in trust to secure the regular payment of the annuity, and to corroborate the said term;"

Held, that this fine did not extinguish the trustees' power to sell under a direction as above.

Assumptions for the purchase of money of an estate called *Collier's Hatch*, in *Essex*, which the defendant had purchased of the plaintiff. At the trial before *Graham B.* at the last *Lent assizes* for that county, a verdict was found for the plaintiff, subject to the opinion of this court on a case which stated, in substance, that by a marriage settlement of *May 1775*, the estate in question (subject to a charge of 1500*l.* secured by a term of one thousand years) was limited to the use of *Francis Stuart* and his assigns for life, *sans waste*, (with a limitation to *William Tod* and *Thomas Cheap* and their heirs during his life, in trust to support contingent remainders,) remainder to the use of *Mary Stuart* and her assigns for life *sans waste*, with a limitation to the said trustees and their heirs during her life, in trust to support contingent remainders, remainder to the children of the marriage, in such shares as *Francis Stuart* and *Mary his wife* should by deed or will appoint, and for default of such appointment,

To the use of the children of the marriage as tenants in common in tail with cross remainders, and for default of such issue, to the use of such person as *Mary Stuart*, notwithstanding her coverture, should by deed, attested by two witnesses, or by will appoint, and for default of such appointment,

To the use of the right heirs of the survivor of *Francis* and *Mary Stuart* for ever.

And it was provided that *Francis* and *Mary Stuart* during their joint lives, or the life of the survivor, might charge the estate to the extent of 2000*l.*

And it was further provided that it should be lawful for the said *William Tod* and *Thomas Cheap*, and the survivor of them, and the heirs of such survivor, at any time or times during the joint lives of the said *Francis Stuart* and *Mary his wife*, or during the life of the survivor of them, by the direction and with the approbation of the said *Francis Stuart* and *Mary his wife*, or of the survivor of them, to be testified by any writing or writings under their or either of their hands and seals to be attested by two or more credible witnesses, to make sale of or to convey in exchange, as therein mentioned, all, or any part or parts of the messuages, farms, lands, tenements, or hereditaments, which were thereby limited to strict uses as aforesaid, with their appurtenances to any person or persons, whomsoever, for

any such price or prices in money, or for such other equivalent in lands and hereditaments, as to the said *William Tod* and *Thomas Cheap*, or to the survivor of them, and his heirs as aforesaid, should seem reasonable; with full power, upon payment of the money which should arise by any such sale of the said premises, or of any part or parts thereof, to give and sign proper receipts for the same, which receipts should be a sufficient discharge to purchasers.

Francis Stuart and *Mary* his wife, had one child, a daughter; *Mary Stuart* survived her husband, and afterwards married *James Stuart*.

By a term of one thousand years created in *March 1782*, *Mary Stuart* with the consent of her husband charged the estate with 2000*l.*, borrowed of *Alexander Wood*, to whom the term was granted as a security.

By an indorsement on the back of this deed, and bearing date *April 1783*, *Wood* assigned this term to *Elizabeth Gordon*, of whom *Stuart* and his wife had then borrowed 2000*l.*

And by indentures of lease and release of the same date, to which, among other persons, *Stuart* and his wife, *Elizabeth Gordon* and *James Graham* were parties, (stating that 1000*l.* only, and not 2000*l.*, had been paid by *Elizabeth Gordon*, and that she had paid it in purchase of an annuity of 95*l.*, to be paid by *Stuart* and his wife,

And reciting that *Mary Stuart* was entitled to the reversion of the premises expectant on the death of her daughter under age and without issue; and that for better securing the annuity to *Elizabeth Gordon*, *Stuart* and his wife had agreed to grant this reversion to *Graham* and his heirs, in trust for *Elizabeth Gordon* and her assigns.)

*The premises were conveyed to *Graham* in fee, subject to the estate of *Mary Stuart's* daughter therein, and to the original charge of 1500*l.*, [*34 upon trust for *Elizabeth Gordon* and her assigns, to secure the regular payment of the annuity :

And *Stuart* and his wife covenanted to levy a fine of the premises to the use of *Graham* in fee, for corroborating and strengthening the said term, and subject thereto to *Graham* and his heirs, upon the trust before mentioned.

Stuart and his wife duly levied a fine *sur conuzance de droit*, &c. to *Graham*, as of *Easter* term in the 23 G. 3., of the premises in question, in pursuance of the said covenant.

In 1793, by indentures of lease and release (attested by two witnesses), to which *Tod* and *Cheap*, *Elizabeth Gordon*, *Graham*, *Stuart* and his wife, and various other persons, who had joined in executing the before-mentioned indentures, were parties,

Reciting the indentures of 1775, 1782, and 1783, and the fine levied in pursuance thereof,

It was witnessed, that in consideration of 3670*l.* paid by Sir *W. Smyth*, and by virtue and in execution of the power reserved to Mrs. *Stuart*, by the indentures of 1775, but subject and without prejudice to the aforesaid power of sale and conveyance limited to *Tod* and *Cheap*, and the exercise thereof, and the uses thereby created, Mrs. *Stuart*, directed and appointed, that if her daughter should die without leaving issue of her body, then after her daughter's decease and such failure of issue, the premises should remain, and the indenture of 1775, should operate to the uses thereafter limited; and Mrs. *Stuart*, then directed *Tod* and *Cheap*, to sell and convey the premises to the uses thereafter limited, and to *exercise the power of sale given them by the deed of 1775, and the fine levied in pursuance thereof. And *Tod* [*35 and *Cheap*, did thereby sell and convey the premises to the uses thereafter limited, and *Stuart*, and his wife, *Tod* and *Cheap*, and *Graham*, with the consent of *Elizabeth Gordon*, according to their respective interests, granted, bargained, sold, assigned, released, and confirmed the premises in question to Sir *W. Smyth*, and his heirs, to hold to the several uses thereafter mentioned,

which were such as Sir *W. Smyth*, should appoint, &c., with the usual trusts to bar dower, and for default of appointment, to the heirs and assigns of Sir *W. Smyth*, to whom *Elizabeth Gordon*, also assigned the residue of her term of one thousand years, and remitted the annuity of 95*l.*

Sir *W. Smyth*, devised the premises to the plaintiff and another, in fee, in trust to sell, and died in *May*, 1823.

Shortly afterwards the plaintiff contracted to sell the premises to the defendant.

The question for the opinion of the court was, whether the fine levied by *James Stuart*, and *Mary* his wife, in or as of *Easter* term, 23 *G. 3.*, operated to extinguish or destroy the right or power of the said *Mary Stuart*, to consent to a sale of the settled estates under the power for that purpose contained in the said indenture of the 27th of *May*, 1775, so as to prevent an exercise of such power of sale by the trustees of the same indenture; and if the court should be of opinion that the said fine did not so operate, then the verdict found for the plaintiff was to stand; but if the court should be of opinion that the said fine did so operate, a verdict was to be entered for the defendant.

Bosanquet, Serjt., for the plaintiff, relied on *Lord Jersey v. Deane*, 5 *B. & A.* 569, to show that the power in *Tod* and *Cheap*, was not destroyed [36] by the fine of 1783. That fine was levied, and the deed to lead the uses executed for specific purposes, and could not have an effect contrary to the intention of the parties, which was only to secure the annuity to *Elizabeth Gordon*, without affecting the trustees' power to convey. They were not the *conusors*, but *Stuart*, and his wife alone.

Taddy, Serjt., contra. It is true that a fine which unexplained will have the effect of destroying powers, and divesting estates, may be controlled by the agreement of the parties, and the court will so modify it as to further that intent: *Herring v. Brown*, *Carth.* 22. But in the deed to lead the uses of the present fine, no intent is expressed to preserve the power of the trustees, and to do so is rather inconsistent with the purpose of the *conusors*: it is not material that the trustees were not *conusors* to the fine, for their power was not one which they could exercise at their own pleasure or for their own benefit, but only in conjunction with *Stuart*, and his wife, who were to put the power in motion. The power, therefore, was extinguished, unless an intention to preserve it can be collected from the deed to lead the uses of the fine. The object of the fine was to convey a fee to *Graham*, and his heirs, with a view to secure the annuity to *Elizabeth Gordon*: the resulting trusts, if any, to *Mrs. Stuart*, cannot be looked at in a court of law; and in the deed to lead the uses, nothing is said about preserving the power, which distinguishes this case from that of *Lord Jersey v. Deane*, where the intention to preserve the power appeared in the declaration that the fine was to operate first for corroborating the uses in the antecedent settlement. But here the [37] intention to give **Graham*, a fee might have been entirely frustrated if this power remained in the trustees, for they might then have exercised it on the direction of the *conusors*, notwithstanding the conveyance to him. It may be said the *conusors* intention was only to secure the annuity, but if they chose to carry that into effect by conveying a fee to *Graham*, in such a manner as to destroy the power, their intention must be pursued, however injudicious it may appear; and a fine uncontrolled by the expression of an intention to control it, has the effect of extinguishing all powers. *Herring v. Brown*, *Digges's case*, 1 *Rep.* 173, *Albany's case*, *Ibid.* 110, *West v. Berry*, *Sugd. on Powers*, 8vo. ed. 1821, *Smith v. D'Aeth*, *Ibid.*

Best, C. J. This action was brought to recover damages for a breach of contract, by the defendant, in not purchasing an estate to which the plaintiff contends he has a good title; and that depends on the question whether or not the right to sell the estate has been destroyed by any act of *Mary Stuart*, and her husband.

By the deed of 1776, a power of sale was given to certain persons, which could only be executed under the direction of *Mary Stuart*; but subject to this power, *Mary Stuart*, and her husband had borrowed money of *Elizabeth Gordon*, by way of annuity, to secure which a fine was levied, according to a deed drawn up to lead the uses. We need not now consider what would be the effect of a fine without any deed to declare the uses; what has been laid down on the subject in the first volume of *Lord Coke's Reports*, is not disputed on the present occasion; namely, that where there is no deed, a fine "thoroughly ransacks the estate." But here there is a deed, and we need not take up the law earlier than *the case of *Herring v. Brown*. The decision of that case in the Exchequer chamber, upon which we shall now [*38] act, is consistent with justice, and has been confirmed by subsequent decisions; as by that of *Doe d. Odiarne v. Whitehead*, 2 Burr. 704. The principle laid down in that case is, that though the levying of a fine displaces existing interests, yet that where an accompanying deed shows with what object it was levied, the fine shall not destroy powers which it was the intention of the parties to retain. The intention of the parties in levying this fine was to secure the payment of an annuity to *Elizabeth Gordon*, and nothing else: the fee was not conveyed to *Graham*, as a separate and independent estate, but merely to secure the annuity; it was only to exist during the life of *Elizabeth Gordon*, and on her death was to return to the *Stuarts*. It has been urged that a court of law cannot take notice of a resulting trust. But upon the death of *Elizabeth Gordon*, the estate would be at once in Mrs. *Stuart* again, under the operation of the Statute of Uses, and recourse to a court of equity would not be necessary. An attempt has been made to distinguish this case from that of *Lord Jersey v. Deane*, because there the object of the parties was expressly stated in the deed; but it is equally clear here, upon the whole of the instruments taken together, that the intention of the parties was to limit the operation of the fine, and prevent the destruction of the power.

PARK, J. The only difficulty here has arisen from the number and length of the deeds; but when the deed of 1783, is considered, there is no room for doubt. It is clear from all the cases that the intentions of the parties must govern the operation of a fine, which if it be uncontrolled, will certainly effect the destruction of "powers"; but it may always be controlled, where the [*39] intention of the parties to that effect can be collected, according to the case of *Herring v. Brown*, confirmed in *Doe d. Odiarne v. Whitehead*. In the present instance the parties had no purpose but to secure the annuity, which was the express object of the conveyance to *Graham*. And when the trust in favor of *Elizabeth Gordon*, was executed, the property was to be again at the disposition of Mrs. *Stuart*.

BURROUGH, J. Every fine acknowledges the land comprised in it to be the land of the *conusee*, so that a power annexed is gone, if there be no deed to declare or lead the uses; but if there be such a deed, it is the same thing as if it were inserted in the fine: the two constitute one conveyance; must receive one construction, and transfer a unity of interest. Even when the deed has been executed at a different time, the courts have gone a long way to make the fine subservient to it; and we cannot now say that the fine, in this case, shall operate one way, and the deed to lead the uses another.

GASELEE, J., concurred.

Judgment for the plaintiff.

DORVILLE v. WHOOMWELL.

Where a first *capias* is issued on an affidavit of debt filed with the filacer of one county, if, instead of a *testatum*, a second *capias* is issued into another county, a new affidavit of debt must be filed with the filacer of the second county.

In this case a bailable *capias* was issued into *Middlesex*, grounded on an affidavit of debt, sworn before the deputy-filacer for *Middlesex*, and filed in the filacer's office.

*40] "On this writ the defendant was not arrested. The plaintiff, then, instead of suing out a *testatum capias* into *Yorkshire*, in which county the defendant resided, obtained an office-copy of the affidavit of debt, certified by the filacer for *Middlesex*, lodged it with the filacer for *Yorkshire*, and thereupon issued a *capias* into *Yorkshire*.

Bosanquet, Serjt., on the authority of *Anderson v. Hayman*, 2 B. Moore, 192, and *Dalton v. Barnes*; 1 M. & S. 230, obtained a rule *nisi* for delivering up the bail-boad to be cancelled, and for discharging the defendant on his entering a common appearance, on the ground that the plaintiff was irregular in not filing a new affidavit of debt, with the filacer for *Yorkshire*.

Vaughan, Serjt., who showed cause, cited *Boyd v. Durand*, 2 *Taunt.* 161.

But that case was distinguished, the filacer for the two different counties having been the same person;

And the court saying that the decision in *Hayman v. Anderson*, was founded on good sense,

Made the rule absolute.

*NORRIS, et al., v. POATE.

By the enacting clause of a turnpike act it was provided that there should be taken of every person attending any cattle or carriage, for every horse drawing any stage coach, the sum of 6d.

By an exempting clause it was added, "that if any person should have paid the toll for passing, the same person, upon producing a ticket, should be permitted to re-pass free with the same cattle or carriage."

Held, that the toll having been paid by the coachman on passing, for horses drawing a stage coach, a second toll could not be demanded for the same horses re-passing, though with a different coach and different coachmen, but belonging to the same proprietor.

This was an action of *assumpsit* upon the common money counts. The defendant pleaded the general issue; and upon the trial before *Abbot*, C. J., *Hampshire Summer assizes*, 1824, a verdict was found for the plaintiff with 20*l.* damages, subject to the opinion of the court upon the following case:

By an act of Parliament passed in the 12th year of the reign of Geo. 3, intituled "An act for repairing and widening the roads from *Sheet Bridge* to *Portsmouth*, and from *Petersfield*, to the *Allon* turnpike road, near *Ropley*, in the county of *Southampton*," trustees were appointed for the purposes of the act, with power to erect turnpikes upon the said roads; and it was thereby enacted, as to the tolls, as follows: "The respective tolls following shall be demanded and taken of the person or persons attending any cattle or carriage hereinafter mentioned, at every turnpike, by such person as shall be appointed for that purpose; before any cattle or carriage shall be permitted to pass through the same; that is, to say, For every horse, mare, gelding, mule, or ass, drawing any coach, or other pleasure-carriage, the sum of three-pence,

but if drawing any stage coach or machine, the sum of sixpence; for every wagon, wain, cart, or other carriage, drawn by four horses, oxen, or other beasts of draught, the sum of one shilling, and drawn by three horses, oxen, or other beasts of draught, the sum of nine-pence, and drawn by two horses, oxen, *or other beasts of draught, the sum of sixpence, and drawn by one horse, ox, or other beast of draught, the sum of three-pence." And it [^{*42}] was further enacted by the said act, "that if any person or persons shall have paid the tolls by this act granted and ascertained for the passing of any cattle or carriage through any turnpike erected by virtue of this act, *the same person or persons*, upon producing a note or ticket of the day, denoting such payment, shall be permitted to pass and repass through the same gate or turnpike, *with the same cattle or carriage*, toll free, at any time or times during the same day, to be computed from twelve of the clock in one night, to twelve of the clock in the next night; which said note or ticket the collectors or receivers of the said tolls are hereby required to give gratis, if demanded, on payment of such toll."

The said act of Parliament was continued by another act passed in the 36th year of the reign of His late Majesty for that purpose, and again for the term of twenty-one years, by another act passed in the 2d year of the reign of his present majesty.

The defendant on the 6th of July, 1821, and from thence during the whole of the year 1822, was a toll collector at, and keeper of, one of the turnpike gates erected upon the road from *Sheet Bridge* to *Portsmouth*, by virtue of the said acts.

The plaintiffs during the same time were the proprietors of two stage coaches, each called the *Hero*, which travelled, daily, between *Portsmouth* and *London*, and *London* and *Portsmouth*, along the said road. The coach which left *Portsmouth*, in the morning, on its way to *London*, was drawn by four horses through the gate kept by the defendant, to a place about two miles distant from the same, where the horses remained until the arrival of the coach which left *London*, the same morning, on its way to *Portsmouth*, and then that last-mentioned *coach, with different passengers and parcels, was [^{*43}] drawn by the same four horses in the evening of the same day, through the same gate to *Portsmouth*. In the morning the coachman who drove the coach from *Portsmouth* to *London*, paid the proper toll of sixpence for each of the said horses, and received a note or ticket of the day denoting such payment, and in the evening of the same day, the other coachman, who drove the coach from *London* to *Portsmouth*, drawn on its return by the same horses as aforesaid, produced the said note or ticket of the day, to the said defendant, at the said gate; but the said defendant always demanded a further toll of 2s., at the rate of sixpence for each of the horses drawing the said last-mentioned coach; and the last-mentioned coachman was obliged to pay the same to the said defendant, in order that the horses and last-mentioned coach might be permitted, by him, to pass through the said gate. The coaches and the horses belonged to the plaintiffs, and the coachmen were their servants, but the coachman who drove the horses in the evening was not the coachman who drove them in the morning. The money paid in the evening, as aforesaid, was paid by the coachman as the servant, and on the account of the said plaintiffs, and amounted in the whole to the sum of 19*l.* 16*s.*

On two days, namely, on the 11th and 15th of June, 1822, *William Norris*, one of the plaintiffs, who was well known to the defendant to be one of the proprietors of the coaches and horses as aforesaid, went with the coach and horses from *Portsmouth* in the morning, through the gate, and paid the toll of sixpence for each horse each of the said mornings, and received the notes or tickets of the day denoting such payments, and returned with the coach from *London*, and the same four horses to the gate in the evening of each of those days, and produced the said respective notes or tickets of the

*44] day *to the defendant; but the defendant, on each occasion, demanded of the plaintiff the further toll of sixpence for each of the horses, and plaintiff was obliged to pay the same, and did pay the defendant the sum of 2s., on each of those evenings, in order that the horses and coach might be permitted, by him, to pass through the said gate. On these two last-mentioned days, *William Norris*, (the plaintiff) went and returned with the coaches on the business of the respective journeys of the coaches on those days, but did not drive either the coach from *Portsmouth* to *London*, or from *London* to *Portsmouth*, the coaches being driven, as usual, by their respective coachmen, his servants as aforesaid.

The question for the opinion of the court was, whether the said sum of 19*l.* 16*s.* and the said two last-mentioned sums of 2*s.* were legally payable for toll. If the court should be of opinion that both the said sums were legally payable for toll, a verdict was to be entered for the defendant. But if the court should be of opinion that the said sum of 19*l.* 16*s.* was not legally payable for toll, the verdict for the plaintiffs was to stand, and the defendant was to account for all the sums received by him for toll, on the return of the same horses through the gate from the 10th of *July*, 1821, up to the time of signing judgment; and if the court should be of opinion that the sum of 19*l.* 16*s.* was legally payable, but that the said two sums of 2*s.* were not legally payable for toll, then the verdict was to stand for the plaintiffs, but the damages were to be reduced to the sum of 4*s.*

Wilde, Serjt., for the plaintiffs, contended that, by this statute, the toll was imposed on the horses, and referred to *Gray v. Shilling*, 2 B. & B. 31, when the court called on

*45] *Pell, Serjt., for the defendant: he argued that the toll was imposed on the carriage, and that the enumeration of the horses was only a means by which to measure the amount of the toll for each carriage. He relied on the 9th section, under which the tolls were to be paid by the *person attending* any cattle or carriage, and the language of the exempting clause, "if any person shall have paid, the same person shall be permitted to pass on producing a ticket;" and contended that a different coachman could not be called the same person, though he was servant to the same master and payment by a servant had been holden as payment by the master; *Williams v. Sangar*, 10 East, 66. But the words of the act, in that case, as in the case of *Gray v. Shilling*, differed from those of the present, which were clear, and, therefore, imperative, even though the consequences should be such as might not have been anticipated when the act passed: *Harrison v. Brough*, 6 T. R. 706. If the toll was on the carriage, the attendance even of the master himself, going and returning, could not entitle him to recover: *Loaring v. Stone*, 2 B. & C. 515.

Best, C. J. It has often been declared from the bench in *Westminster Hall*, that they who seek to exact tolls through the medium of the legislature must speak plain language: the toll receivers are before those who pass the act, but not the toll payers, and it is incumbent on the courts to take care of the interests of the payers.

However, I thought this act perfectly clear, and that the only question to be raised was, whether in order to claim the exemption, the hand that paid the toll in returning ought to be the same as the hand that paid it in going. About that there could be no doubt; for in both cases, though it is the coachman who offers the money, it is the master who pays; the money is his; he alone is entitled to recover for money had and received, *where it has been wrongfully paid; and he is so far, constructively present, as to be answerable for any negligence on the part of the coachman. It has been argued, however, that by this act of Parliament the toll is imposed on the coach, and not on the horses. I think it is imposed on the horses; and if we wanted authority, we should have it in the last case which has been cited, for

the words of the act, there, were the same as here, and the toll was holden to be on the horses, though the judgment turned on an expression which is not to be found in the act now before the court, namely, that the exemption on returning should exist only in cases where the same horses and coach returned. In the act before the court, the exemption is for the same person returning with the same cattle or carriage. The enacting clause of the present act gives "for every horse, &c. drawing any stage coach, the sum of sixpence;" and that the intention of the legislature was, on the passing of a carriage, to levy the toll for the horse, is plain from the distinction made with respect to wains, &c., where the toll is expressly imposed on the vehicle. If there were no preceding case, the present would be clear on the language of the act; but the point has been decided in *Gray v. Shilling*.

PARK, J. Under the language of this act the tax is not imposed on the vehicle but on the horse, where the vehicle passing is a pleasure carriage, or a stage coach. The case of *Brough v. Harrison* was decided with a view to prevent a fraud, and in *Loaring v. Stone*, the judgment of the court turned on the conjunctive *and*, in the exempting clause of the act: here the expression is, that the party who has paid shall be permitted to pass and repass with the same cattle or carriage, toll free.

BURROUGH, J. It was only intended that a party should pay once in the same day for the same horses. *It is perfectly plain that the toll is imposed on the horses, and as to the person attending, the coachmen are [**47] employed by the same proprietor, and the proprietor is always attending, and responsible in the person of his coachman.

GASELEE, J. concurred; adding, that he had formerly given an opinion to the same effect on the same trust.

Judgment for the plaintiff.

MARY PULLIN, Wife of S. PULLIN, by T. BARNES, her next Friend,
et al, v. SAMUEL PULLIN, PEARSALL, and ANDREWS.

By a will reciting that the testator was seised of divers freehold and certain copyhold estates in *I.*, under mortgage for a certain sum to *R.*, testator gave all his said freeholds and copyholds to *P.* and *A.* in trust for certain purposes; the residue of his freehold, leasehold, and copyhold estates he gave to *S. P.*

At the time of making his will and of his death, the testator was also seised of twenty-one acres in *I.*, not under mortgage, and of various leaseholds:
Held, that the twenty-one acres passed to *S. P.* under the residuary clause.

THE following case was sent from the Court of Chancery for the opinion of the Court of Common Pleas:

Samuel Pullin the elder, formerly of *Islington*, in the county of *Middlesex* (now deceased,) was at the respective times of making his will hereinbefore mentioned, and at his death, seised in fee-simple of certain freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the parish of *St. Mary, Islington*; and he was also, at the respective times aforesaid, seised to him and his heirs, according to the custom of the manor of the prebendary of *Islington*, of certain copyhold or customary lands and hereditaments within and holder of the said manor, which were also situate in the said parish of *St. Mary, Islington*, the whole of which said freehold and copyhold messuages, lands, tenements, and hereditaments, were at [**48] the respective times aforesaid subject to a mortgage thereof made by him the said *Samuel Pullin* the elder, to *Samuel Rhodes*, of *Islington* aforesaid,

Esq., by indentures of lease and release, bearing date respectively the 27th and 28th of *March*, 1812, and by a conditional surrender of the said copyhold lands and hereditaments, for securing to the said *Samuel Rhodes*, his executors, administrators, and assigns, the re-transfer into his and their name or names of the sum of 10,125*l.* 16*s.* 6*d.* 3 per cent. consolidated bank annuities; and also the payment until such re-transfer of such sum or sums of money as he the said *Samuel Rhodes* would have been entitled to receive as and for the dividends of the said sum of 10,125*l.* 16*s.* 6*d.* 3 per cent. consolidated bank annuities, if the same had remained standing in his name.

The said *Samuel Pullin* the elder was also, at the respective times aforesaid, seised in fee-simple of certain other freehold lands and hereditaments, containing twenty-one acres or thereabouts, also situate in the said parish of *St. Mary, Islington*, but lying separate from and unconnected with the other freehold and copyhold messuage, lands, tenements, and hereditaments, which were comprised in the said mortgage to the said *Samuel Rhodes*, as hereinbefore mentioned, and held under a title distinct and separate from the title to the other freehold and copyhold messuages, lands, tenements, and hereditaments: and the said freehold lands and hereditaments hereinbefore mentioned to contain twenty-one acres or thereabouts, were not at the respective times aforesaid, or at any time, subject to or comprised in the said mortgage to *Samuel Rhodes*, but the same were at the respective times aforesaid subject to a mortgage thereof made by the said *Samuel Pullin* the elder to *Sarah Pritchard*, by indentures of lease and *release, bearing date respectively *49] the 1st and 2d days of *January*, 1798.

The said *Samuel Pullin*, the elder was also, at the respective times aforesaid, possessed of certain leasehold closes of land situate in the said parish of *St. Mary, Islington*; and also of a considerable leasehold estate in the parishes of *St. James*, and *St. John, Clerkenwell*, in the county of *Middlesex*; and he was also, at the respective times aforesaid, seised of certain copyhold messuages and hereditaments situate at *Edgeware*, in the county of *Middlesex*; but he was not seised of or entitled to any other freehold messuages, lands, tenements, or hereditaments, either in the parish of *St. Mary, Islington*, or elsewhere.

The said *Samuel Pullin*, the elder, being so seised and possessed as aforesaid, duly made and published his last will and testament in writing, bearing date the 12th of *November*, 1814, which was duly executed and attested in the manner required by law, for devising freehold estates; and thereby, after giving a few small pecuniary legacies, and among others, to *Benjamin Pearsall*, and *William Andrews*, the sum of 105*l.* each, the said testator devised as follows: "And whereas I am seised in fee simple or otherwise entitled unto the inheritance of and in divers freehold messuages, lands, tenements, and hereditaments, situate within the parish of *St. Mary, Islington*, in the county of *Middlesex* aforesaid; and am also seised to me and my heirs, according to the custom of the manor of the prebendary of *Islington*, otherwise *Isledon*, in the county of *Middlesex*, of cert.ain copyhold or customary lands and hereditaments, within and held of the said manor (which copyhold or customary lands and hereditaments I have duly surrendered or intend to surrender to the use of this my last will;) and all which freehold and copyhold messuages, lands, and hereditaments, are subject to a mortgage thereof, made *50] by me to **Samuel Rhodes*, of *Islington*, aforesaid, Esq. for securing to him the re-transfer of the sum of 10,125*l.* 6*s.* 6*d.* 3 per cent. consolidated bank annuities, lent me by him; and also for securing to him the payment, until such re-transfer, of such sum or sums of money as he would have been entitled to receive for dividends on the said stock, if the same had remained standing in his own name; now I do hereby give and devise all and every my said freehold and copyhold or customary messuages, lands, and hereditaments, with their appurtenances, unto the said *Benjamin Pearsall* and *Wil-*

William Andrews, and their heirs, to the use of them and their heirs, nevertheless, upon the trusts, for the intents and purposes, and with, under, and subject to the powers and provisoies hereinafter declared and contained of and concerning the same."

The testator then proceeded by his will to declare the trusts of the said devise, which were for the benefit of his natural son, *Samuel Pullin*, the younger, and of *Mary Pullin*, then and now the wife of *Samuel Pullin*, the younger, and of any future wife of *Samuel Pullin*, the younger, and of the child or children, grandchild or grandchildren, or other issue of *Samuel Pullin*, the younger, in the manner therein mentioned, with benefit of survivorship among the children of *Samuel Pullin*, the younger; and in default of issue of *Samuel Pullin*, the younger, for the benefit of the appointees of *Samuel Pullin*, the younger; and in default of such appointment, for the benefit of the right heirs of the testator, with usual powers to the trustees, to apply the rents and profits of the said estates for the maintenance of any child or children of *Samuel Pullin*, the younger, during their respective minorities; and the testator thereby also gave a power to *Samuel Pullin*, the younger, during his life, and after his decease to the trustees, to grant such building and other leases as therein mentioned; the will [*51] contained usual clauses for appointing new trustees, and for indemnity to the trustees; and the testator, after giving to his servant *Mary Johnson*, during her life an annuity of 20*l.*, to be paid out of the residuary personal estate, proceeded as follows: "And all the rest, residue, and remainder of my freehold, copyhold, and leasehold estates, whatsoever and wheresoever, and of every nature and kind, with their respective appurtenances, and all my interest therein respectively, and also all my goods, chattels, and personal estate, whatsoever and wheresoever, I give, devise, and bequeath unto my said son *Samuel Pullin*, his heirs, executors, and administrators and assigns respectively, according to the respective natures and tenures thereof, to and for his and their absolute use and benefit. And I appoint him sole executor of this my will."

The testator died in the month of *January*, 1816, without having altered or revoked his will, and leaving the trustees, *Benjamin Pearsall*, and *William Andrews*, and likewise his son *Samuel Pullin*, him surviving.

The question for the opinion of the court was, whether the freehold lands and hereditaments hereinbefore mentioned as containing twenty-one acres or thereabouts, which were not comprised in the mortgage to *Samuel Rhodes*, passed by the devise to *Benjamin Pearsall*, and *William Andrews*, and their heirs; or whether the same passed by the residuary devise and bequest to *Samuel Pullin*, the younger, his heirs, executors, administrators, and assigns.

Wilde, Serjt. Under this devise the twenty-one acres passed to *Pearsall* and *Andrews*. The devisor gives them *all* the freehold and copyhold property, which the recital to the devise had described to be in *Islington*: the circumstance of the mortgage with which some of it was charged is a mere matter of description, and not [*52] of limitation; and where a thing has been sufficiently ascertained, the addition of some inaccurate particulars will not vitiate the devise, *Roe d. Conolly v. Vernon*, 5 East, 79. This description, too, is not in the substantive part of the devise, but in the introductory recital, where he states himself as being seised of *divers* freehold messuages, whereas he had but one freehold under mortgage. There is nothing from which any conflicting intention can be collected but the residuary clause; but there is personal property to which that applies; and the insertion of the word freehold in that clause is only one of those sweeping expressions, which being frequently inserted in wills without any specific object, was helden in *Marshal v. Hopkins*, 15 East, 319, (where there was no personality to which the residuary bequest could apply) to have no effect after a clear devise of the realty. It may be also inferred from the devisor's charging the annuity

on the personality, that he meant the whole of the realty to pass under the first devise.

Bosanquet, Serjt., contra, relied on the minute accuracy with which the mortgage was described, as indicating clearly the devisor's intention to pass no more than that which he had specified as charged with such mortgage; and under those circumstances no stress could be laid on the word *all* in the commencement of the devise: *Gascoigne v. Barker*, 3 Atk. 8, *Wilson v. Mount*, 3 Ves. 19. He also referred to, and distinguished in this respect, *Banks v. Denshaw*, 3 Atk. 584, there being in that case no doubt about the intention.

Best, C. J. We entertain no doubt on this case. In the construction of wills like the present, little assistance can be obtained from decisions on other ^{*53]} wills, except in "certain principles that have occasionally been laid down; and the ground on which we decide that the twenty-one acres in question passed under the residuary clause is, that looking at the whole of the will we find they cannot pass under any other. I agree with Lord *Ellenborough*, in *Rae v. Vernon*, that where the previous devise is clear, the property ascertained by it will pass, though there be a subsequent misdescription; but here the devisor has confined the extent of the *Islington* property he proposed to pass to that which was under mortgage to *Rhodes*, the particulars of which mortgage he has most minutely specified. As to his charging the annuity on his personal property, the object of that might be to facilitate the sale of the real property, pursuant to the trusts of the will, in case an occasion for selling it should subsequently arise.

The following certificate was afterwards sent.

We have heard this case argued by counsel, and having considered the same, are of opinion that the said freehold lands and hereditaments in the case mentioned, as containing twenty-one acres or thereabouts, which were not comprised in the said mortgage to the said *Samuel Rhodes*, did not pass by the said devise to the said *Benjamin Pearsall*, and *William Andrews*, and their heirs; but that the same passed by the said residuary devise and bequest to the said *Samuel Pullin*, the younger, his heirs, executors, administrators, and assigns.

W. D. BEST,
J. A. PARK,
J. BURROUGH,
S. GASELEE.

J. T., and *B.* were jointly concerned in the sale of butters. *J.* consigned them to *B.*, who sold them on the joint account.

T., being requested to accept bills for the firm, refused to do so without some security, when *B.* engaged, if *T.* paid the bills, to repay him out of the proceeds received for butters already sold.

T. having accepted and paid the bills: Held, that he might sue *B.* for money had and received to his use.

THOMAS COFFEE the plaintiff, *John Coffee*, and *Brian*, the defendant, were jointly concerned in the Irish butter trade; *John Coffee*, consigned the butters to *Brian* in London, who sold them, and *Thomas Coffee*, accepted bills drawn by *John*, to the amount of the butters sent. The profits of the various transactions were divided between the three parties.

Brian, having received the proceeds from a certain quantity of this butter,

Thomas expressed uneasiness at accepting bills in his own name without some security for the risk he incurred; when *Brian*, engaged to provide for the bills at maturity, out of the proceeds already received.

Thomas Coffee, having been obliged to pay the bills, now sued the defendant for the amount in an action on the bills, and for money had and received, and in his declaration alleged the bills to be drawn on account of the defendant, and *John Coffee*.

At the trial before *Best*, C. J., it turned out that the bills were drawn on the account of the defendant, *John Coffee*, and the plaintiff, and it was objected that this was a fatal variance; but *Best*, C. J., thought, that, under the circumstances, the plaintiff might recover on the count for money had and received.

A verdict having accordingly been found for him,

Pell, Serjt., obtained a rule *nisi* to set it aside, and enter a nonsuit instead.

Vaughan*, Serjt., who showed cause, relied on the count for money had and received; the bill transaction being a business separate from [55 the partnership, and the money which the plaintiff sought to recover having been put by and expressly appropriated to his use.

Pell, relied on the variance; and as to the count for money had and received, insisted, that the whole transaction was one partnership concern, and that, therefore, an action did not lie by one of the partners against his fellow, no balance having been struck, nor any agreement entered into to pay separately.

Best, C. J. I abstain from giving any opinion on the question of the variance, because it is clear that this action may be maintained on the count for money had and received. It has been objected that this is a partnership transaction, and no doubt the money came to the defendant as the money of all three of the partners; but that has happened which divests them of the joint property in it, and vests it in the plaintiff. The defendant says, I have money in my hands, the produce of these butters, and if you will accept certain bills, I will hold the money on your account, in case of your being called on to pay the bills. When the bills were paid, therefore, the money in the defendant's hands became separated from the partnership account; and where a contract is executed, as by the payment of these bills, a party may recover on the common counts, though it is necessary to resort to a special count where the contract is executory.

Park, J. It is not necessary to discuss the question of variance, for this action may be sustained on the count for money had and received. According to the "case of *Foster v. Allanson*, 2 T. R. 479, a partner may sue for a balance due to him upon an account closed, and an agreement to pay [**56 the amount; and this is a case of the same description. The butters were consigned on the account of three, but it was necessary that one of them should accept bills, and *Thomas Coffee*, refused to do this without some kind of security; upon which the defendant agrees to appropriate for that purpose money already in his hands.

Burrough, J.† That is the true construction of what has passed between these parties; but I think the plaintiff could not have recovered on the special counts.

Rule discharged.

† *Gaselee*, J., was absent at chambers.

BAKER v. GARRATT, and VENABLES.

In an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond cannot recover as special damage (beyond the penalty of the replevin bond,) the expenses of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them.

Case against the sheriff for taking insufficient sureties in replevin.

The declaration stated, that the plaintiff, as bailiff to one *John Blacket*, and by his command, in August, 1822, distrained the goods of one *Henry Bowman*, in his house in *Clerkenwell*, for 25*l.* 17*s.* 4*d.* rent due from one *Elkanan W. Vidler*, in respect of the premises, by virtue of a demise of them to him from *Blacket*; that the defendants, as sheriff of *Middlesex*, upon the complaint of **Bowman*, caused the same goods to be replevied and delivered to *Bowman*; that *Bowman*, at the next county court, appeared and levied his plaint against the plaintiff for taking his goods, and then and there found pledges, as well for prosecuting his plaint as for returning the goods, if return should be adjudged, to wit, one *Josiah Harding*, and one *William Adams*; that the plaint was afterwards, at the instance of the plaintiff, removed by *re. fa. lo.* into the King's Bench, where *Bowman* was nonsuited, and a return of the goods was awarded to plaintiff. That although it was the duty of the defendants before making delivery of the distress to *Bowman*, in pursuance of the statute in such case made and provided, to take from *Bowman*, and two responsible persons, as sureties, a bond in double the value of the goods distrained, conditioned for prosecuting the suit of replevin with effect, and for returning them, if return should be adjudged; nevertheless, the defendants intending to injure the said *John Blacket*, and to deprive him of the benefit of his distress, did not, before making deliverance of the goods, take a bond from *Bowman*, and two responsible persons, conditioned as aforesaid, but took in the name of the defendants, as such sheriff as aforesaid, a bond, conditioned as aforesaid, from *Bowman*, *Harding*, and *Adams*, when *Harding* and *Adams*, at that time, and ever since, were, and are wholly insufficient for that purpose, and the goods were never returned to the plaintiff, or *Blacket*, nor the arrears of rent paid, nor the judgment in replevin in any way satisfied. By means of which premises the plaintiff was deprived of the goods, and of the benefit of the distress, and of the means of satisfying the arrears of rent and the costs and charges by him expended about his suit in that behalf, and about endeavoring to obtain a return of the goods; and was also obliged to lay out a large sum, to wit, 200*l.*, in endeavoring to compel *Harding*, and *Adams*, *to pay him the value of the goods distrained.

* At the trial before *Best*, C. J., London sittings, after *Hilary* term last, it appeared, that *Bowman* having become bankrupt, the plaintiff took an assignment of the replevin bond, upon which he issued a writ against *Bowman*, and the two sureties; but being unable to serve *Bowman* or *Harding*, was compelled to proceed against *Adams* alone, against whom he obtained judgment, for damages and costs, 80*l.* 9*s.* 7*d.*, and issued a *fi. fa.*, to which there was a return of *nulla bona*. He afterwards obtained a judgment against *Harding*, for damages and costs, 82*l.* 5*s.* 7*d.*, and issued thereon a writ of *fi. fa.*, to which there was also a return of *nulla bona*.

It appeared, also, that both *Harding* and *Adams*, who were clearly insufficient, had in 1820, been discharged under the insolvent debtor's act, paying little or nothing to their creditors; that process had repeatedly issued against them, and that the sheriff's officer had given *Adams*, who had a previous acquaintance with *Bowman*, a guinea to become one of the sureties in the bond.

However, under the authority of the case of *Evans v. Brander*, 2 H. Bl

547, and the direction of the Chief Justice, a verdict was taken for only 521. the amount of the penalty in the bond executed by the sureties, with leave for the plaintiff, to move to increase the damages to the amount of the loss he had incurred in suing the sureties to no purpose.

Wilde, Serjt., having accordingly obtained a rule nisi to that effect,

Vaughan, Serjt., who showed cause, relied on *Evans v. Brander*, and the 11 Geo. 2, c. 19., which limits the responsibility of the sureties to double the value of the goods distrained, and contended that the plaintiff could not be placed in a better situation than if he had obtained sufficient pledges, who could have been called on to pay no more than the amount of the bond.

Wilde, in support of his rule, admitted the principle laid down in *Evans v. Brander*, that the plaintiff was entitled to no more in this action than he could have obtained against good sureties; but he contended that if the sureties had been good, the plaintiff would have recovered from them the costs of his action against them, which he was, therefore, equally entitled to claim against the sheriff, if the sureties were insufficient to pay either debt or costs. He observed that *Evans v. Brander*, which confirmed the case of *Yea v. Lethbridge*, 4 T. R. 433, was decided upon a compromise, and without argument, while *Concannon v. Lethbridge*, 2 H. Bl. 36, which overruled *Yea v. Lethbridge*, was decided on solemn argument.

The court here intimated that the sheriff ought to have received notice of the actions against the sureties.

To which it was answered, that the demanding an assignment of the replevin bond was an express notice that the assignee proposed to put it in suit, and the sheriff could not say that costs had been wantonly incurred by the assignee in suing sureties whom he knew to be insufficient, since the sheriff, by resisting this action and going down to trial, undertook to show that they were sufficient.

BEST, C. J. The case of *Evans v. Brander*, which has confirmed that of *Yea v. Lethbridge*, has decided, as a general principle, that in an action against the sheriff for taking insufficient sureties, no more can be recovered against him than the party could have recovered against sufficient sureties. We think the case of *Evans v. Brander*, rightly decided; but the question in that case arose on the subject of costs in the replevin, whereas in the present it arises on the subject of expenses, which have been incurred in suing the insufficient sureties. Cases may occur in which the party injured may be entitled to recover such costs, but he is not entitled here, because he has given no notice to the sheriff that he intended to sue the pledges. Had the sheriff received such notice, he might have prevented the expense of the action, by paying all he was liable to pay under the sureties' bond. It has been said, that the assignment of the bond cannot but operate as such a notice; but this is not so, because the sureties might be solvent at the time of their executing the bond, and of the assignment, and might become insolvent before the assignee commenced his suit. In point of justice, the sheriff has a right to be furnished with an opportunity of preventing all the expense with which it is now sought to charge him. If a man becomes surety for a debtor, the creditor, in case the debtor fails, may recover the debt against the surety, but not the costs of a fruitless suit against the debtor, unless he gave notice of his intention to sue. The sheriff stands in the same situation, and has equally a right to notice: if there is any distinction, it is that the sheriff being a public officer, and often placed in situations of great difficulty, is entitled to more protection than an ordinary individual. He has received no notice in this case, and, therefore, the plaintiff's rule must be discharged.

PARK, J. The decision in *Evans v. Brander*, is undoubtedly correct; but this case is distinguished, as the expenses sought to be recovered are not the expenses of the replevin, but of an action against the insufficient

sureties. This is a serious question for the sheriff, and he is, at all events, entitled to notice of the action against the sureties, to enable him to pay the amount of the bond, if he thinks fit to do so.

BURROUGH, J. The sheriff ought to have had notice of the actions against the sureties, and the declaration against him ought to have averred it. He might perhaps have come in, and defended in the name of the sureties, or have paid the amount of the bond, but as he has had no such opportunity, this rule must be discharged.

GASELEE, J. The want of notice prevents us from making this rule absolute. If the plaintiff proceeds against the sureties without enquiry as to their ability to pay costs, and without notice to the sheriff, he must proceed at his own peril. Besides, it is not alleged in this declaration, that the sheriff took the sureties knowing them to be insufficient.

Rule discharged.



ELLIOTT v. HARDY.

In replevin, avowry was made in respect of a right of common claimed by the corporation of *Alnwick*, under a grant from the *De Vesci*.

The plaintiff pleaded that the corporation had been accustomed to appoint a reasonable number of herds for, among other things, superintending the common and beasts on it, and also to appoint, for the pains of each herd, a reasonable and proper number of stints of each such herd, to be depastured upon the common : Held, sufficient after verdict.

This was an action of replevin for taking two cows in a certain common called *Alnwick Moor*, otherwise *Aydon Forest*.

[⁶²] The taking was justified by *Hardy*, under the following avowry (among many others to the same effect) : "Because the town or borough of *Alnwick*, in the county of *Northumberland*, is and from time whereof the memory of man is not to the contrary, hath been an ancient town or borough, in which there is, and for all the time aforesaid, whereof the memory of man is not to the contrary, hath been a body politic and corporate, known by divers names of incorporation, and amongst others, by the name of the burgesses of *Alnwick*; and the said town or borough is, and from the time whereof the memory of man is not to the contrary, hath been situated within a certain manor or barony called the manor or barony of *Alnwick*; and the said place in which, &c., is, and at the said time when, &c., was, and from time whereof the memory of man is not to the contrary, hath been a large tract of land, common, or waste ground, and the same lies within, and from time whereof the memory of man is not to the contrary, hath been, and is parcel of the said manor or barony, and *William De Vesci*, being lord of the said manor or barony, and being seized of the said place in which, &c., in his demesne, as of fee, long before the time when, &c., to wit, in the reign of *Hen. 2.*, gave and granted, in and by his certain instrument in writing (the date whereof is unknown to the said defendant,) to the burgesses of the said town or barony of *Alnwick*, common of pasture in the said place, in which, &c.; and by subsequent grants of certain succeeding lords of the said manor or barony, the said grant of the said *William de Vesci*, was confirmed by them to the said burgesses forever; to wit, by a certain grant in writing, made long before the said time, when, &c., (the date whereof is unknown to the said defendant,) of *William de Vesci*, son and heir of Lord *Eustace de Vesci*, and grandson of the first-named *William de Vesci* and by a certain other grant,

in writing, of *William de Vesci*,^{*} brother and heir of *John de Vesci*, and son of the last named *William de Vesci*, bearing date long before the said time, when, &c., to wit, on the *Sunday* after the feast of *St. Michael*, in the year of our Lord 1290: and the said body corporate, ever since the making of the said first-mentioned grant, and at and long before the said time, when, &c., have had, and have used and been accustomed to have, and of right ought to have had, and still of right ought to have, by virtue of such grants for each of the several burgesses of the said town or borough of *Alnwick*, inhabiting therein, common of pasture in and upon the said place in which, &c. And the said defendant in fact saith that long before the time when, &c., to wit, on the 24th of *April*, in the year of our Lord, 1823, &c., he became and continually from thence, and until, and at, and after the said time, when, &c., was, and hath been, and still is one of the burgesses of the said town or borough of *Alnwick*, and at the said time when, &c., inhabited, and still doth inhabit therein, and was at and during all the time aforesaid, and still is, entitled to common of pasture, as aforesaid, in the said place in which, &c.: and because the said two cows, in the said declaration mentioned, were at the time when, &c., depasturing and destroying the grass then there growing and being, and doing damage to the said defendant, so that he the said defendant could not have and enjoy the aforesaid common of pasture there in so large and ample a manner as he then and there ought to have had and enjoyed the same, he well avows the taking of the said two cows in the said place, in which, &c., and justly, &c., as and for a distress for the said damage, so by them there done and doing, as aforesaid; and this he the said defendant is ready to verify; wherefore he prays judgment, and a return of the said cattle, together with his damages, &c., according to the form of the "statute in such case made and provided to be adjudged to him," &c.

To this avowry the plaintiff pleaded, among other pleas, the following: "That from time whereof the memory of man is not to the contrary, hitherto, the said body politic and corporate, in the said avowry mentioned, hath consisted of, amongst other persons, divers, to wit, four chamberlains and twenty-four common councilmen, being burgesses of the said town or borough, in the said avowry mentioned; and from time whereof the memory of man is not to the contrary, hitherto, such common councilmen, and chamberlains, or the greater part of them, being in common council assembled, have appointed, and have been used and accustomed to appoint, and of right ought to have appointed, and still of right ought to appoint, a reasonable and proper number of herds, for (*amongst other things*) the herding, tending, and taking care of the cattle put upon the said place in which, &c., under, and by virtue, and in the exercise of such right of common, as in the said avowry is mentioned: and also for and during all that time have appointed, and of right ought to have appointed, and still of right ought to appoint, for the pains and trouble of each such herd, a reasonable and proper number of stints, of each of such herds, as last aforesaid, to be depastured in and upon the said place in which, &c.; and that for and during all the time aforesaid, the said last-mentioned body politic and corporate hath had and used, and been accustomed to have and use, and of right ought to have had and used, and still of right ought to have and use, for each of such herds as last aforesaid, common of pasture in and upon the said place in which, &c., for such and so many stints as were so appointed as aforesaid, of each of such herds as last aforesaid. Upon which plea a verdict was found for the plaintiff.

*The sufficiency of this plea was argued twice, (once in *Hilary*, and after an alteration in the entry of the verdicts, again, in the present term,) upon a rule *nisi*, which was obtained on the part of the avowants to enter up judgment for them, *non obstante veredicto*, on the ground that the plea was not sufficiently certain. *Wilde*, and *Taddy*, Serjts., for the plaintiffs; and *Pell*, and *Cross*, Serjts., for the defendant.

Argument for the plaintiff. The objection which has been made to these pleas is, that there is nothing in them by which it can be ascertained what is a reasonable number of herds, and what a reasonable number of stints; but after verdict the objection comes too late, supposing, even, that it was one which might have been successfully urged on demurrer. A verdict will cure the omission of the important allegation of levancy and couchancy, *Cheadle v. Miller*, 1 Lev. 196, or of a custom, *Stables v. Mellon*, 2 Lev. 246, and it may be presumed the jury have ascertained what was a reasonable number of herds and stints. In strict pleading, however, there is nothing uncertain in the word "reasonable," thus applied. In the common count for goods sold, the plaintiff declares that the defendant was indebted to him, as much as the goods were reasonably worth: when a *parcener* claims her share in an estate, though it is known what the amount of the share is, the writ is *de rationabili parte*: Copyhold fines must be reasonable; and in *Rastal*, 530, there is a writ for *reasonable estovers*. In *Abbot v. Weekly*, 1 Lev. 176, a custom was pleaded to dance in a close at all times of the year; and when it was objected that this was unreasonable, as it would admit of dancing when the close was laid down for hay, that plea was holden sufficient after verdict.

*66] So in *Finch v. Rawling*, 2 H. Bl. 394, in a plea to have games at seasonable times of the year, it was, after verdict, holden not necessary to have shown what were seasonable times. In all such cases, what is reasonable or seasonable is a question for the jury to determine. But on the present plea, the measure is sufficiently ascertained, even, for demurrer. The measure for the cattle is ascertained by levancy and couchancy; the herd is to have his reasonable reward for attending the cattle, and that reward must be according to the measure of the cattle. The measure for the corporation cattle will also be the measure for the herd cattle. Then it is not competent to the avowants to raise this objection, whoever else might raise it. Taking this avowry and the plea together, it appears that the original grant of common, was to the corporation for the benefit of the burgesses and servants to be appointed by them; they, therefore, cannot contest their servants' right, which is, indeed, parcel of their own, parcel of the same grant. This is not a power to the corporation to assign over a right of common, but a grant to the corporation and its servants: as, where a copyholder prescribes for common in the manor of another; he prescribes in the lord, and the lord claims for himself and his tenants. If the avowants say the original grant was bad, they have no title to distrain; if it was good, the plaintiff's right is the same as the avowants.

Argument for the avowants. The pleas set out a void prescription which no verdict can cure. The quantity of land and cattle to be superintended being certain, there is no excuse for leaving in uncertainty the number of herds to superintend. Besides, the functions of the herds are no where ascertained: superintending the land and cattle, might have formed but a small portion of *them, for they are appointed to do this "among other things," and what the other things were, no where appears; they might have been to support the interests of the corporation at an election, or any other object equally unconnected with the land. Then it does not appear to have been left to the jury to find, nor have they found what was a reasonable number of herds or stints; and the kind of common claimed for these herds, is of a species new to the law: a right of common in gross,—for an indefinite number of persons,—for an indefinite number of cattle,—without any allegation whose cattle they are to be,—or whether commonable or not,—or of the times of the year at which they are to be turned on,—or any other qualification. According to *Mellor v. Spateman*, 1 Saund. 346, *c. per Kelynge*, J., a plea of common *sans nombre* cannot be supported for the inhabitants of a town. This is in effect such a plea, and equally uncertain, though it does not in terms, claim a right to that extent.

BEST, C. J. The principal objection which has been urged against these pleas, is, that the right of the herds has not been alleged with sufficient certainty. However, it is not necessary for us to determine whether or not this right has been alleged with sufficient certainty to withstand the scrutiny of a special demurrer, because the objection is made after verdict. But by analogy to the instances which have been put on the part of the plaintiff, the allegation appears to be sufficient, and it could not easily have been made with greater certainty; because the reasonableness of the number of herds must vary from time to time, must depend on the number of cattle the common can bear in any one year, and no greater certainty has been required in the various instances cited. Thus in a claim by one of three *parceners* she is not bound to demand a third part, but her reasonable part of the "property." If that mode of pleading be sufficient for *parceners*, it ought surely to be sufficient for these herds. Again, where a custom is pleaded to exist at all seasonable times of the year, a jury may find what are the seasonable times. So that it is probable this objection would not have been sustained on demurrer. Then comes the question as to the validity of the custom itself; and in considering this, the avowry and the plea have been properly connected by the counsel for the plaintiff. If the custom as it appears on the face of both, is consistent with reason and justice, and has subsisted time out of mind, it cannot now be impugned. In this avowry the corporation state a grant, the existence of which the plaintiff admits in his plea, but he says, in effect, I must add something to that statement. When the grant was first proposed, the burgesses of *Alnwick*, may easily be imagined to have said, such a grant will be useless to us, unless we have herds to superintend our cattle, and as we have no means of paying for their service, the remuneration must be, by allowing them, under the same grant, certain stints, i. e., a right to feed a certain number of cattle on the same land. There is nothing unreasonable in such a supposition, or such a grant; and if the grant were of this nature, which is now determined by the verdict of the jury, it is a grant to the herds as well as to the burgesses, and there remains no foundation for the objection that what the plaintiff's claim, is an assignment of a right of common existing in the burgesses only. It is true that such a right cannot be assigned, but there is no rule of law which prohibits a grant such as that which is here pleaded.

PARK, J. I think this case is concluded by the verdict, though I do not think it clear that the plea could have been sustained upon special demurrer.

*BURROUH, J. We may intend that the grants to these burgesses and their herds were contemporaneous. *De Verbi*, gives a right of common to the burgesses of *Alnwick*, and at the same time, he says, you shall have herds to superintend your cattle, and pay them by a participation in the use of the common. There is nothing unreasonable or illegal in that; and as to the alleged uncertainty in pleading that the burgesses were to appoint a *reasonable* number of herds, it is precisely what the plea ought to state, because the number ought to vary according to times and circumstances. The verdict which has been found is consistent with sense and justice; and the rule for a judgment, *non obstante*, must be discharged.

GASELEE, J. The right which has been pleaded stands on prescription, and it does not appear but that both grants might have been made at the same moment. Whether the pleas would have been sufficient on special demurrer, it is not necessary now to decide, neither is it necessary to notice the objection that the times at which the right is to be exercised, have not been stated, because that was a point which the jury were competent to ascertain. There is nothing illegal in a grant of common to the burgesses, with a concurrent grant to the herds who might be necessary to superintend the common. It has been urged that the grant is bad in the present instance, because it amounts to a grant *sans nombre*; but this is not so, for the nomination of the herds is

entrusted to a select body, and it is not to be presumed that they will appoint more than a reasonable number; if they had done so, it might have been pleaded; if any of the numerous allegations in the plea are untrue, they might have been traversed: but in finding that the herds were accustomed to have [70] their stints, the jury have in effect found all the other allegations. There is no ground for the court to interfere, and the rule which has been obtained by the avowants must be

Discharged.

HELLING v. JONES.

An attorney who stays proceedings upon an undertaking to pay costs, is bound to fulfil his engagement, although his client dies before bail is put in.

The defendant's attorney in this cause, soon after the writ was sued out, applied to stay proceedings, and entered into an undertaking to pay the costs, but before the time for putting in bail arrived, the defendant died insolvent, when the attorney thinking himself exonerated, refused to fulfil his engagement.

Pell, Serjt., having obtained a rule *nisi*, calling on him to do so,

Wilde, Serjt., who showed cause, contended that the death of the party discharged the attorney from his undertaking. And the

Prothonotary saying there was no settled practice on the subject, the court took time to enquire.

BEST, C. J., now said, that upon enquiry they found there was no settled practice; but they thought the attorney bound to fulfil his engagement, after such an admission of the plaintiff's claim.

Rule absolute.

T. having a banking account with plaintiffs, on which he was indebted to them 10,000*l.* in 1822, defendant then executed a bond, conditioned to secure plaintiffs for any sums which for ten years plaintiffs should advance on bills, &c., which T. should from time to time draw on them or make payable at their house, and all checks, &c., not exceeding 5000*l.* in the whole. It was agreed that this bond should not affect a prior security given to plaintiffs by T. in 1817; but no notice was given to defendant by plaintiffs that T. was indebted to them 10,000*l.* at the time the defendant executed his bond; T., however, saw the accounts every fortnight, and received the vouchers half-yearly. At the close of his account, T. was indebted to the plaintiffs more than 10,000*l.*, but subsequently to the executing of the defendant's bond he had paid into the plaintiff's bank more than 5000*l.*:

Held, that the defendant was liable to the extent of 5000*l.*

Held, also, that the defendant's bond did not require a 25*l.* stamp.

ONE Threlfall, having a banking account with the plaintiffs, bankers in London, and being indebted to them on that account 10,247*l.* 9*s.* 1*d.*, under a balance struck in January, 1822, the defendant and others then executed to the plaintiffs a bond on a 9*l.* stamp, in the penal sum of 10,000*l.*, the recital

to the condition of which bond stated, that the said *John Threlfall*, had for some time past had a banking account with the obligees; that the defendant and others had agreed to join *Threlfall*, in the above bond, for the purposes and on the conditions thereunder written; and that it had been expressly agreed between the above parties, that such bond should not in anywise prejudice or affect a certain bond bearing date the 29th of November, 1817, which was executed and given by the said *John Threlfall*, and others to the above obligees, and their late partner *William Moffatt*, the younger; but that all rights and remedies under or by virtue thereof, should remain in full force and effect;

And the condition was, that if *Threlfall*, his heirs, executors, or administrators, should from time to time and at all times thereafter reimburse to the obligees or the survivor of them, and every other person who should become partner with them in the banking business, their executors or administrators, all and every sum and sums of money, which the obligees or the survivor of them, or any partner in their banking-house, should within ten years thereof advance or pay, or be liable to advance or pay on account of accepting, indorsing, discounting, paying, or satisfying any bill or bills of exchange, drafts, notes, orders, or other engagements whatsoever, that the said *Threlfall*, should from time to time draw or cause to be drawn on them, or make payable at their banking-house; and also all other sums of money which the obligees or the survivor of them, or any partner in their banking business, should lay out or advance or become liable to pay on the credit of *Threlfall*, or on his account, and all such charges and allowances for advancing and paying such bill or bills, drafts, notes, acceptances, advances, payments, engagements, and accommodations, not exceeding the sum of 5000*l.* in the whole, together with interest for such sum and sums of money as they or any of them should at any time within the period aforesaid be in advance on account of *Threlfall*, as is usually charged by bankers in such and the like cases; and should from time to time and at all times within the period, and to the amount aforesaid, indemnify the obligees or the survivor of them, or any partner in their banking business, from all actions, suits, losses, costs, charges, expenses, and demands which should be occasioned by their accepting, indorsing, discounting, paying, &c., for *Threlfall*, as aforesaid, then the bond was to be void.

In an action on this bond, the breach of condition suggested, was, that after the making of the bond in January, 1822, and before the commencement of this suit, the plaintiffs had advanced and paid, and were liable to advance and pay a large sum, to wit, 20,000*l.* for accepting, indorsing, discounting, paying, &c., bills, &c., which *Threlfall*, during the time last aforesaid had drawn upon and made payable at their banking-house; and that they had otherwise laid out and were liable to pay on the credit of *Threlfall*, other sums to a large amount, to wit, the amount of 10,000*l.*, and that the charges and allowances upon such payments, &c., at the rate usually charged by bankers, amounted to a further large sum, to wit, 5000*l.*; that the several sums so advanced and paid, and the charges upon them, amounted to a large sum, exceeding the sum of 5000*l.*, to wit, to 35,000*l.*, of which premises *Threlfall* had notice, and yet neither he, the defendant, nor the other obligors, had reimbursed the plaintiffs the 5000*l.*

At the trial before *Best*, C. J., *Guildhall* sittings, after *Hilary* term last, it appeared that subsequently to the execution of the bond in 1822, the plaintiffs had continued their advances to *Threlfall*, and at the close of the account afterwards, upon his becoming bankrupt, he stood indebted to them 10,732*l.* 12*s.* 11*d.* But subsequently to the first advances to the extent of 15,000*l.* after the execution of the bond, he had paid into the plaintiff's bank more than the sum of 5000*l.*; and it did not appear that at the time of executing the bond the defendant had received any notice that *Threlfall*, then owed the

plaintiff 10,247*l.* 9*s.* 1*d.* *Threlfall*, however, saw the accounts every fortnight, received the vouchers half-yearly, and knew how the payments were applied.

The jury found a verdict for the plaintiffs for 3978*l.* (1022*l.* having previously been paid on account,) subject to a motion to be made to this court to reduce the amount to 485*l.* 2*s.* 10*d.* (the difference between the first balance above mentioned and the last,) if the court should think fit.

**Cross*, Serjt., accordingly moved for a rule *nisi* to that effect, on the ground, first, that if this bond were intended to secure successive advances of 5000*l.* each, to an unlimited extent, it ought to have had a 25*l.* stamp. Secondly, that however the law might be as between the creditor and the debtor, yet, as between the creditor and the surety, (who was ignorant of the debt of 10,247*l.* 9*s.* 1*d.* outstanding at the time of his executing the bond,) and according to the true construction of the bond, the sums paid in by *Threlfall*, after the execution of the bond, ought to be applied, first, in liquidating advances made also after the execution of the bond, and not to the preceding debt of 10,247*l.* 9*s.* 1*d.*; and that the bond was intended to cover only one advance of 5000*l.*

The court said there was nothing in the first objection, but granted on the second a rule; against which

Wilde, Serjt., now showed cause, and referred to *Clayton's* case, 1 Merivale, 572, *Brooke v. Enderby*, 2 B. & B. 70, and *Bodenham v. Purchase*, 2 B. & A. 39, to show that either the creditor or the debtor must have applied the sums paid after the execution of the bond to the liquidation of the sums advanced after that time, in order to enable the surety to say that they had been so applied; when the court called on

Cross, to support his rule. He urged, that the principle with respect to the application of payment by creditor or debtor did not apply to this case, in which the chief question was, what was the intention of the plaintiffs and defendant as far as it could be collected on the face of the bond. The intention was, that the "defendant should give security, not for a past, but for

*75] a future account; this appeared from the recital, which referred only to future accounts, and which expressly stated that the new security should not prejudice the old one already in the plaintiff's hands, whence it must be inferred that the old debt was to be covered by the old security. In *Bodenham v. Purchase*, the intention to secure the old balance was expressly stated, but the banking account contemplated by these parties, was an account to commence from the time of executing the bond; and as against the defendant, the plaintiff had no right to alter that mode of accounting without the defendant's consent. The defendant, too, was a surety; a species of insurer, in whose case all the rules of insurance apply, and if there be any misrepresentation or any concealment, no claim can be made against him. In *Pidcock v. Bishop*, (K. B. *Hilary* term last,) the plaintiff refused to supply a customer with certain iron, unless he procured the guarantee of the defendant. The defendant having given his guarantee, the plaintiff, in order by that means to cover an old debt due to him from the customer, charged the customer for the iron, a sum far beyond the regular price; and it was holden, that this contrivance exonerated the defendant from his guarantee: in the present case it nowhere appears that the plaintiff apprised the defendants of the fact, that *Threlfall*, was already 10,247*l.* 9*s.* 1*d.* in their debt, and that his first advances must be applied to liquidate that sum, which, if they had done, it is possible the defendant might have declined to enter into the bond.

Bent, C. J. On the part of the defendant, this case has been put on the only ground which it was possible to urge. If I could collect on the face of the bond, that it was intended that the various sums paid in to the plaintiff's bank by *Threlfall*, subsequently to the *execution of the bond, should

*76] go to the new account, the defendant would be entitled to make his rule

absolute. But the contrary appears; and it was impossible for the plaintiff to have entered into such an agreement, for had they done so, the 10,000*l.* already due might never have been paid, and in the absence of any agreement touching the debts to which the subsequent payments were to be applied, the plaintiff had a right to apply them first in discharge of the earlier account. The bond recites, that *Threfall*, had had a banking account with the obligees, and that the defendant and others had agreed to join *Threfall* in the bond for the purposes and on the conditions therein contained, and that it had been agreed that the bond should not prejudice a prior bond given by *Threfall*, to the obligees;—These words are not very clear, but I cannot collect from them any agreement, that money subsequently received should not be applied in discharge of the prior debt. When the money was paid, nothing was said as to the account to which it was to be applied, and if the two accounts were blended, the course of business is to apply the payments to the earlier; that is the principle laid down in *Clayton's* case, and confirmed in *Bodenham v. Purchase*; but here, the accounts must have been blended, for the defendant's principal agreed to such an application of his payments; his accounts were settled half yearly, and he must have seen that the remittances subsequent to the bond had been applied to the 10,000*l.* If so, *cadit questio*; for, unless by distinct agreement, the surety can have no control over the way in which the principal shall make his payments, and no such agreement appears on the face of the bond. The case of *Pidcock v. Bishop*, as it has been stated, does not apply to the present, for the whole transaction between the creditor and the debtor was a direct fraud upon the surety, and there is no pretence for imputing fraud to the present plaintiffs. It has been argued, that the *defendant's undertaking is analogous to an insurance; a transaction, in which, according to Lord *Manufield*, there must always be *über rima fides*; but the same learned person, upon the occasion in which he established that position, referred also to the maxim, *aliud est tacere aliud celare*. But there has been nothing like an improper concealment in this cause; it might have been pleaded, if there had; the bond was expressly given for the continuance of an old banking account, and it is well known that such accounts are not carried on till the old balance has been secured.

PARK, J. There is no color for reducing the verdict which has been given; if the defence had been founded on fraud or undue concealment, the result might have been very different; and in *Pidcock v. Bishop*, as the case has been stated to us, the decision of the court must have turned on the fraud practised on the surety. In the present instance nothing has been done which was not warranted by the course of business.

BURROUGH, J., concurred.

GASKELL, J. I feel considerable difficulty in this case, and am not prepared to say that the judgment the court is pronouncing is altogether satisfactory to me; but I can find no authority the other way, and therefore, concur in the decision we have come to. The bond was to run for ten years. *Threfall*, was to commence a new account; and it is not clear that it was not the intention of the parties that all sums paid in by him subsequently should be carried to that account, or that the partners should rely on the old securities for the payment of the old account; but I can see no agreement on the part of the bankers to let the payment of the 10,000*l.* stand by for so many years; and if there had been any undue concealment on that head, it might have been pleaded. *Had the bond clearly stated the existence of the former balance, there could have been no difficulty; but even as the case stands at present, the defendant's rule must be

[77] Discharged.

Cross, then moved in arrest of judgment, that, according to the terms of the bond, the plaintiffs were not to allow *Threfall*, to be more than 5000*l.* in

their debt at one time; whereas it was averred that he owed them a sum exceeding 5000*l.*, to wit, 35,000*l.* at the time of the action. If they had limited their credit to 5000*l.*, as the defendant intended, *Threfall*, might never have been involved in difficulty, and the defendant never have been called on. He might have known enough of *Threfall*, to be willing to trust him with a limited credit of 5000*l.*, but might have foreseen, as he had refused to incur, the risk of a more extended credit.

But the court thought there was nothing in the objection, the meaning of the bond being clearly that whatever the plaintiffs advanced, the defendant would contribute 5000*l.* towards indemnifying them; and *Cross*,

Took nothing.

PIKE v. CARTER.

Trespass does not lie against a magistrate for any thing done in the discharge of his duty, unless he is made acquainted with all the circumstances under which he is called on to act.

This was an action of trespass *vi et armis* for taking the money of the plaintiff, to which the defendant pleaded the general issue. At the Summer [79] assizes, 1824, "for the county of Southampton, a verdict was found, by consent, for the plaintiff, with 6*l.* 14*s.* 6*d.* damages, subject to the opinion of the court upon the following case:

The plaintiff was at the time of the trespass complained of, and still is, the treasurer of a friendly society, called "The General Benefit Society," holding its meetings at *Portsea*, within the borough of *Portsmouth*. The defendant was a magistrate of the borough of *Portsmouth*.

The General Union Benefit Society was instituted in the year 1818, and the rules of the society (which were to be considered as part of the case, and referred to if necessary) were allowed and confirmed at the general quarter sessions of the peace, helden in and for the county of Southampton at *Winchester*, on the 25th of *October* in that year.

Among these rules was the following: "In order to settle any case in dispute between this society and any of its members, their executors, administrators, or other person or persons claiming under any member or members relating to the breach of any of the clauses of these regulations, or the withholding of the benefit, or expelling any member from the society, or any other account; It is hereby finally agreed, that the dissatisfied party or parties shall have such case fairly arbitrated, upon leaving notice at the society-house within two months after such dispute, or notice of expulsion, if such dissatisfied party or parties live within three miles from the society-house, but if such dissatisfied party or parties live more than three miles from the society-house, then within three months after such dispute, or notice of expulsion; and for that purpose such dissatisfied party or parties shall choose three persons who are members of this society, and the audit or general committee shall choose three other members of this society; and the six members so chosen, or the majority of them, shall appoint three more members of this society, which nine members so appointed, shall act as arbitrators, and meet and consider the case in dispute within one month from the time the notice of such arbitration was so left at the society-house. And whatever award, order, or determination shall be made by the said arbitrators, or the major part of them, shall be binding and conclusive on all parties, and shall

be final to all intents and purposes without appeal, or being subject to the control of two or more justices of the peace, provided such an award be made in writing by the said arbitrators, or the major part of them, within one hour next after such case shall be determined. Any person desiring his case to be arbitrated, shall deposit in the hands of the treasurer 10s. 6d.; and in case such arbitration shall be given in his favor the 10s. 6d. shall be returned, and the expenses paid by the society, but if the case is decided against him, the expense shall be paid from the deposit."

In 1818, *Thomas Spragge* was admitted a member of this society. In September, 1823, *Spraggs*, who then had been for some months in the receipt of relief from the society, applied for further relief, which was refused on the ground of an alleged violation by him of one of the rules of the society. In consequence of this refusal, *Spraggs*, upon two several occasions, applied to the magistrates of *Portsmouth*, who having duly summoned the officers of the society, made two several orders for his relief, (to be referred to, if necessary, as part of the case) which orders not having been complied with, the defendant, as a magistrate, signed two several warrants of distress, under which, money collected from the society, and vested in the plaintiff as treasurer, was on the 6th of December, 1823, and the 27th of February, 1824, forcibly taken from a box in the custody of the plaintiff as treasurer of the society.

On the 10th of April, 1824, the plaintiff by his attorney gave the defendant a notice, duly signed and *indorsed, according to the statute in that behalf; and on the 12th of May, 1824, the action was commenced by suing out a writ in this court.

At the trial no evidence was offered on either side, but it was agreed between the counsel, that the admissibility of any of the evidence should be open to argument on the case.

The question for the opinion of the court was, whether this action could be maintained. If the court should be of opinion that it could, then the verdict was to stand; if not, a verdict was to be entered for the defendant.

By the 33 G. 3. c. 54. s. 15. it is enacted, "if any member of such society shall think himself aggrieved by any act done or omitted to be done by such society, or any person acting under them, it shall be lawful for the justices near unto the place where such society shall be established, on complaint made upon oath or affirmation, to issue their summons to the presidents, stewards, or other officers of such society, or one of them, in case such complaint shall be made against such society collectively; and in case it be made against any person appointed to such office, then to summon such person to appear before such justices, at a time and place to be named in such summons, and also to summon at the same time and place, if there be occasion, all persons who shall appear to such justices to have the custody of the rules of such society; and such justices, at the time and place named in such summons, whether the person summoned shall or shall not appear, on proof upon oath or affirmation of such summons being served, or left at his abode, shall proceed to hear and determine, in a summary way, the matter of such complaint, according to the meaning of the rules of such society confirmed by the justices according to this act, and shall make such order therein as shall seem just, which shall be final and *not subject to appeal, or to be removed into any court of record at Westminster." By section 16. it is further enacted, "that if provision shall be made by one or more of the general rules or orders of any such society, and confirmed as required by the act, for a reference by arbitration of any matter in dispute between any such society, or any person or persons acting under them, and any individual members thereof, the matter so in dispute shall be referred to such arbitrators as shall be named and elected, in such manner as shall be prescribed by such general rules or orders, and whatever award, order, or determination shall be made

by the said arbitrators, or the major part of them, according to the true purport and meaning of the rules and orders of such society, confirmed by the justices according to the directions of this act, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without appeal, or being subject to the control of two or more justices of the peace in the manner hereinbefore prescribed."

The case was argued at great length by *Bosanquet*, Serjt. for the plaintiff, and *Wilde*, Serjt. for the defendant, exclusively on the construction to be given to the statute: viz. whether the 16th section, connected with the rule of the society did not exclude the defendant's jurisdiction: but as the decision turned on another point, the arguments are here omitted.

The court having taken time to consider, found, in the order issued by the defendant and another magistrate for the relief of *Spraggs*, (and appended to the case,) the following passage: "The said John *Holmes* (the treasurer of the society) having appeared before us to answer the matters of the said complaint," (which was stated to have been twice made on oath,) "but not making any defence, we do order," &c.; and the judgment of the court was this day delivered by

*^{83]} Best, C. J., who, after reading the case, and referring to the various orders of the magistrates appended to it, said, There is only one fact which it is necessary to advert to in these orders, namely, that when the parties were first summoned before the magistrate, one of the members attended on behalf of the society, and made no defence, although it is stated that the magistrate heard the charge proved on oath; and that upon the second summons no one attended, but the charge was again proved on oath. It is not necessary for us now to decide, whether or not it was imperative on *Spraggs* to have applied for an arbitration, according to the rule of the society, because an action of trespass will not lie against a public officer for any thing which, in the discharge of his duty, he has been called on to do, without an opportunity having been afforded him of judging of all the circumstances under which he is to act, and here no defence was made on the part of the society, nor was the attention of the magistrate called to the society's rule for arbitration.

This case arises on the 33 G. 3. c. 54., and I have reason to think that the framers of that measure thought unfavorably of its results, when it was found that, after the hard earnings of poor persons had been invested in benefit society's as a provision against disease and age, the funds of those society's were often squandered in useless litigation, or otherwise improperly dissipated. By the fifteenth section of that act, however, the magistrates are invested with a general jurisdiction in the case of all societies whose rules have been confirmed at the quarter sessions, but the sixteenth section sets up as an exception, that where the rules of the society contain a clause enabling the members to refer their disputes to arbitration, the disputes shall be referred, and the award be final, without its being in the power of the magistrates to interfere. Now when a party relies on an exception from a general law, the burthen is on him to show that *his case falls within the exception; *^{84]} and if the society had produced before the magistrate the clause in their rules enabling them to refer their disputes to arbitration, the magistrate would have had an opportunity of judging whether he possessed any jurisdiction or not; but they omitted to do this, and the magistrate's attention was never called to the denial of his jurisdiction: was he then, without notice, bound to be acquainted with a private regulation of the society, forming no part of the general law of the land? If he had pleaded his general jurisdiction in the concerns of the society under the fifteenth section of the statute, the plaintiff, in order to establish his case, must in his reply have averred that the defendant had notice of the society's rule, and he would have been left to establish by proof that exemption which he claims only under a particular exception.

'This is like the case of a privileged person, who, upon being arrested, omits to give notice of his privilege: can he in such case maintain an action of trespass against the officer who arrested him? Undoubtedly not. So if a man resides within the ambit of a local jurisdiction, can he complain of a violation of his franchise, if he himself has omitted to apprise the party against whom he complains of the right which he proposes to assert? Upon every principle of common sense and justice, I should determine that this action could not be maintained, even if there were no decision on the point; but in *Lowther v. The Earl of Radnor*, 8 East, 113, it was holden that magistrates could not be affected as trespassers, if facts stated to them on oath by a complainant, were such whereof they had jurisdiction to enquire, and nothing appeared in answer to contradict the first statement.

Nothing of this kind was done in the present case before the magistrate's order was made; the rule of the *society was not presented to his notice, nor was his jurisdiction questioned. *Grose*, J., doubted whether in [*85] such a case the court could take notice of anything but what appeared on the face of the order, 8 East, 118, and *Lawrence*, J., whether, if the magistrates made an order against the evidence laid before them, the party injured would not have another sort of remedy, 8 East, 118. So that we have the opinion of the whole Court of King's Bench, that, before any action can be brought against a magistrate for anything done in the discharge of his duty, it must appear that his attention was called to all the facts necessary to enable him to form a judgment as to the course he ought to have pursued.

Therefore, without touching the question whether the clause in the 33 G. 3, c. 54, concerning arbitration for Friendly Societies is optional or imperative on the dissatisfied member, our judgment in the present case must be for the defendant.



SAME CASE.

*Here, in a special case, judgment was given for the defendant upon a point not mentioned in the case or argument, and on a supposed state of facts, collected by the court from a document appended to the case, but the reverse of those which really took place.—the court refused to stay proceedings or reconsider the case without the defendant's consent.—although a statement of the real facts as to this point, contained in the case when agreed on by the defendant's junior counsel, engrossed, and signed by the plaintiff's leading counsel, had been afterwards struck out by the defendant's counsel, because not enumerated in a collection of facts agreed on at the trial of the cause with a view to the special case; but the statement was never disputed; and the defendant's counsel had been instructed to direct, and had directed, the argument exclusively to another point.

PELL, Serjt., now produced affidavits, which stated, that this case had been taken on admission at the assizes, the sole object of the action being to ascertain *whether or not the magistrates had jurisdiction over the concerns [*86] of the society;

That when the treasurer of the society was summoned before them on *Spraggs's* complaint, he had expressly contested the magistrates' jurisdiction, and had exhibited to him the rule of the society, enabling it to settle disputes by arbitration;

That the special case, as first agreed on by *Selwyn*, the defendant's junior counsel, engrossed, and signed by *Pell*, Serjt., the plaintiff's leading counsel, contained the following passage;

"The treasurer of the society, when he appeared before the magistrate,

refused to enter into the merits of Spraggs's case, contending that, under 33 G. 3, c. 54, s. 16., the magistrates had no jurisdiction in the matter ;"

That this passage was afterwards struck out by the defendant's counsel ; That, with a view to avoid a renewal of delays, occasioned entirely on the part of the defendant, which had at that time been very prejudicial to the plaintiff's society, and in the understanding (existing on both sides, as the deponent believed) that no point would be argued but the construction of the stat. 33 G. 3, c. 54., the plaintiff's agent forbore to insist on the restitution of this passage to the case :—

He then moved, that, under these circumstances, proceedings might be staid until the case had been reconsidered, upon a restitution of the passage so struck out as above ; especially as the decision of the court had turned on a point never adverted to in argument, and on which the plaintiff had never been heard.

Wilde, Serjt., on being applied to by the court, admitted, that his instructions were, to argue the case solely on the construction of the statute, but that [he was not instructed to relinquish any point which might turn up to the advantage of the defendant. He said, that the various facts proposed to be inserted in the special case had been enumerated and reduced to writing before the Judge who presided at the assizes, and that the passage in question had been struck out, because it stated a fact which did not appear among those so enumerated.

BEST, C. J. The motion which has been made is of a novel description, and if acceded to might establish a precedent most prejudicial to the suitors of the court. We cannot allow it, for it would lead to endless disputes as to what took place before each case was presented to the court. My Brother *Wilde*, now says, that the passage in question was struck out, because it stated a fact which was not among those taken down at the trial of the cause, with a view to the framing of the special case ; there is, therefore, no ground for the application which has been made. If, however, the defendant will consent to put the case in a new shape, so as to bring the question of the magistrates' jurisdiction neatly before us, I will not refuse, upon this single occasion, to reconsider the case ; but I will never allow, such a course to be pursued again.

The defendant having afterwards been applied to for his consent, said he must consult his counsel, and the consent having never been given, *Pell Took nothing.*

But the defendant having obtained the decision of the court in the way above described, signed judgment, and applied to the Prothonotary for his double costs as a *magistrate*.

Plaintiff, a surgeon, petitioned Parliament against quacks.

Defendant, a journalist, commented severely on the contents of the petition, and charged the defendant with ignorance of his profession, pointing out ignorance of chemistry, which, he said, appeared on the face of the petition.

Plaintiff then sued defendant for libelling him in his profession of a surgeon ;—the Judge directed the jury, that if they considered the defendant's attack a fair comment on the plaintiff's petition.—if the charge of ignorance was collected from the petition alone, and was not the spontaneous effusion of malice in the defendant,—the writing in question was no libel ; he also directed them to consider whether the defendant had imputed

to the plaintiff ignorance in his profession of a surgeon, or ignorance of chemistry, for if they thought the latter, the declaration was not adapted to the plaintiff's case. The jury having found a verdict for the defendant, the court granted a new trial, costs to abide the event.

Quare, Whether a petition to Parliament on matters of general importance is such a publication as renders the petitioner an object of fair criticism and comment.

THE declaration stated that plaintiff, long before and at the time of the publishing the libels by defendant thereinafter mentioned, was and still is a surgeon, and the profession of a surgeon used, exercised, and carried on, to wit, at *Westminster*, in the county of *Middlesex*; and in the course and exercise of such his profession, had always conducted himself with great skill, knowledge, fairness, regularity, and ability, and had not only never been guilty of quackery, empiricism, puffing, and humbugging, or other dishonorable, unlawful, or disgraceful practices, but, until the time of publishing the libels thereinafter mentioned, was never suspected of having been guilty of such practices or any of them; and by means of the premises was daily acquiring great gains and profits in the way of his said profession, to the comfortable support of himself and his family, and the great increase of his riches, and had acquired and enjoyed the friendship, good opinion, regard, and esteem of all his neighbors, patients, and other good and worthy subjects of this realm, to wit, at, &c., &c.

That before and at the time of committing the grievances thereinafter mentioned, plaintiff was and *still is a member of the Royal College of Surgeons in *London*;

That before that time plaintiff had established, set up, and carried on, and still did carry on, in *Regent Street, Westminster*, a certain establishment by and under the name of the *Athenée and Royal Institute*, a branch of the *Athenaeum*, from the carrying on of which he was daily deriving sundry great gains and profits;

That before that time plaintiff had presented to the Honorable the Commons of the United Kingdom of *Great Britain* and *Ireland*, in Parliament assembled, a petition for, among others, certain purposes, to wit, for its Parliamentary sanction and legislative authority against the practice of empiricism in *England*, for supporting the just privilege of real professional merit, for enforcing the honest discharge of their duty by medical persons towards the public, and to associate the profession to give gratuitous advice in the different districts or counties, by branches, on the same plan as pursued in the National Vaccine establishment: yet the defendant, well knowing the premises, but contriving, and wrongfully and maliciously intending, wilfully and maliciously to injure plaintiff, not only in his said profession of a surgeon, but in his general character; to destroy his good name, fame, credit, and reputation; to bring him into great public scandal, infamy, and disgrace with and amongst all his neighbors, patients, and other good and worthy subjects of this realm; and to cause it to be suspected and believed by those neighbors, patients, and subjects that plaintiff was a quack and empiric, and had been and was guilty of the offences and misconduct thereinafter mentioned, and to vex, harrass, and oppress him, theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did publish, and cause and procure to be published, of and concerning plaintiff, and of and concerning him as a surgeon as *aforesaid, a [**90] certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, libellous, and defamatory matter following of and concerning plaintiff, and of and concerning him as a surgeon as aforesaid, that is to say,

"Humbug petition to Parliament; (meaning said petition of plaintiff,) a Mr. Dunne, of *Regent Street*, (meaning plaintiff,) has taken up the idea started by us, and petitioned Parliament to abolish quackery and the sale of patent medicines. Had this been a genuine straight forward thing, we should have

been the first to hail it as a symptom of reform in the grossest of our national grievances. Had it been, in short, a petition from the people, who suffer in purse and person by the legal robberies of quacks, legitimate and illegitimate, it would have been all very well. But coming thus, in the shape of a humbug puff (meaning that said petition was a humbug puff) from an unknown and an ignorant man (meaning plaintiff,) who has set up a Royal Medical Institute, (meaning said *Athenée* and Royal Institute, set up in *Regent Street*, aforesaid) in rivalry of *Jordan's* Medical Establishment, or *Nisbet's* Army Board, or *Eady's* *Soho* concern, or *Kiernan's* Humbug, in *Leicester Square*, (meaning certain quack and empirical establishments before then established, set up, and carried on by divers persons, and meaning that the said establishment of plaintiff was an establishment of the same description as the said various quack and empirical establishments aforesaid,) we must pause.—This petition (meaning said petition of plaintiff) indeed is the most barefaced puff we recollect to have ever seen, and by a person (meaning plaintiff) who, though he may have passed muster at the College (meaning the Royal College of Surgeons in *London*) after paying his guineas, is profoundly ignorant of the science of his profession, (meaning the said profession of a surgeon, *91] which he plaintiff so used and *exercised and carried on as aforesaid,) and would be put to the blush by any one of the quacks whom he evidently wishes to rival. We should not hesitate to match against his (meaning plaintiff's) chemical knowledge either *Eady, McDonald*, (meaning certain quacks and empirics,) or the quack letter-puffer of the *French* tonic wine ; (meaning a certain quack medicine called or known by the name of the *French* Tonic Wine;) and yet has this Mr. *Dunne*, (meaning plaintiff,) a member, as he tells us, of the Royal College of Surgeons, the assurance to come before the House with a petition, praying the abolition of all quack medicines until they shall have been analysed. As for his college membership, we hold that cheap ; as *Taylor & Son, Cuton, Goss, & Co.*, and many others equally notorious, can claim, we understand, the same distinction. But you must hear the humbug petitioner (meaning plaintiff) himself, to understand the very deep knowledge which is possessed by a member of the Royal College of Surgeons. “On the Continent no medicines (similar to those with us called Patent) are permitted to be sold without first having been analysed by the constituted chemical authorities, and duly examined by the respective faculties of medicine. If this plan were adopted in *Britain*, your petitioner humbly submits many valuable lives would be saved annually, and not one-twentieth of the miserable objects would be found in our streets, or in our hospitals, as at present, and this might be effected without lessening materially the revenue produced by such poisonous means ; for the reporters would naturally limit the use of such medicines to those diseases only in which they would be useful, and they would also prevent any improper article being introduced into the composition.” After this display of chemical ignorance by the College Member (meaning Plaintiff) we would scarcely add a word : it is only *92] matched by the grammatical blunders which *abound in this Parliamentary puff, (meaning said petition of plaintiff,) as we may call it, of his Royal Medical Institute. Pray may we ask this analyser of quack medicines (meaning plaintiff) what test he had discovered for hemlock, *digitalis*, *hellebore*, *aconite*, night-shade ? And not to go into the dark regions of vegetable chemistry, may we ask him what analysis he can make of *James's* Powder ? We advise him (meaning plaintiff) to try to get an engagement in the Tonic Wine establishment, (meaning a certain quack or empirical establishment for the sale of a certain quack medicine called or known by the name of Tonic Wine,) to write puff letters for the concern, (meaning said last-mentioned quack or empirical establishment,) as it seems much more in his (meaning plaintiff's) line than chemical analysis, of which, according to his o'reeidence, he knows nothing.”

The defendant pleaded the general issue.

At the trial before *Best*, C. J., at the last *Middlesex* sittings, the plaintiff proved the publication of the alleged libel by the defendant in a periodical journal, of which he was the proprietor. And also that he persisted in selling it, and in refusing to disclose the author's name, notwithstanding a remonstrance by the plaintiff.

It was also proved that the plaintiff was a member of the Royal College of Surgeons; it did not appear, however, that he was practising as a surgeon, but that he was proprietor of an establishment in *Regent Street, Westminster*, called the *Athenaeum*, the precise objects of which were not distinctly shown; but it seemed that lectures of various kinds had been given there, and that, in some way connected with it, an entertainment, consisting partly of music, and partly of poetry or lectures, had been announced at the *Argyle Rooms* in the same street.

*The plaintiff's petition to the House of Commons, which it was [93] proved had been read there, was as follows:

"To the Honorable the Commons of the United Kingdom of *Great Britain and Ireland*, in Parliament assembled.

"The humble Petition of *Charles Dunne*, member of the Royal College of Surgeons in *London*, subscribed by other members of the same College,

"Showeth,—That the present charter, whereby the functions and privileges of the members of the Royal College of Surgeons in *London*, are regulated, so far from protecting regularly bred practitioners, often subjects them to injury and insult, by the tolerance of ignorant, disqualified, and unworthy persons, to practise the art and science of surgery in the very heart of our metropolis; the college, though a chartered body, not being authorised to prevent any person whatever from practising surgery, although it possesses sufficient power to punish its own members for any breach of its bye-laws.

"That for the better protection of the public and the community at large against the immorality and the horrors daily committed by quack doctors, and to secure the medical profession in general in its rights and immunities, as well individually as collectively, it is become necessary (from the extraordinary inundation of audacious empirics, who, of late years, have so shamelessly assumed the professional character,) that an application be made to Parliament for arresting the progress of so much moral turpitude in a country, whose laws are supposed to flow spontaneously to meet anticipated wrong.

"That, with a view to remedy, as much as possible, the baneful effects of medical quackery (practised by the very dregs of the people) it is amongst other things intended, that stations, after the plan of the *National Vaccine Establishment*, shall be formed in various districts throughout the kingdom, where three members at least of the Royal College of Physicians and Surgeons in *London*, shall attend every morning to give advice, without remuneration, to the indigent of both sexes, and that the institution, for these and other reasons equally cogent and irresistible, shall be intituled 'The Royal Medical Institute.' That one of the principal objects of this society be to preserve the dignity and just privileges of the respective classes of the physician, the surgeon, and the apothecary, and to support the credit of those persons who honorably demean themselves in their respective branches,—to promote useful and scientific communications, and fair and honorable practice,—to prevent abuses in the profession,—to punish pretenders to it, and to adopt such other measures as may be best calculated to ensure respectability to its members, and advantage to the community.

"That during ten years extensive practice on the continent of *Europe*, your petitioner never heard of any quack doctor being tolerated for an instant; on the contrary, if it were found that even any member of the profession acted in any way derogatory to his professional character, he would be immediately

handed over to justice, to be dealt with according to a specific law in the code *Napoleon*, for the punishment of medical men and impostors pretending to medical knowledge. Your petitioner further humbly begs leave to observe, that, however speculation may be allowed to extend and ramify itself in other concerns of life, it should never be permitted in a well regulated government, in what regards the health and lives of our fellow creatures. Your petitioner has every reason to believe that, at the most moderate calculation, several thousands of lives are annually sacrificed through the ignorance and improper treatment of quack doctors, not to say any thing ^{*95]} of the numerous miserable objects of disease in our streets and in our hospitals, the effects of their deadly nostrums.

"That the malpractices of quack doctors are wisely guarded against in every country of *Europe*, except *Britain*;—for no person (under pain of fine and imprisonment,) is allowed to take the charge of the sick, or even to direct the application of medicines, without having gone through the proper ordeals of examination as to his professional knowledge and acquirements. In *England*, it is notorious that we have not only carpenters, tailors, bricklayers' laborers, lead-pencil-makers, *Jews* old clothes men, journeymen linendrapers, and men of color, but even women quacks, who practise their duplicities on the unwary and unthinking part of the public, by plundering all those who have the folly to approach them, whilst many are absolutely deprived of life by them, and others, who have the misfortune to escape death, are left to drag on a miserable existence with an entirely broken constitution for the remainder of their days. The baneful effects too of patent medicines, as they are called, deserve particular notice, the composition of which is formed in such a manner as to render their administration at all times dangerous, and but too often fraught with death: whereas on the continent no medicines (similar to those with us called patent) are permitted to be sold, without first having been analyzed by the constituted medical authorities, and duly examined by the respective faculties of medicine.

"That if this plan were adopted in *Britain*, your petitioner humbly submits many valuable lives would be saved annually, and not one twentieth of the miserable objects would be found in our streets, or in our hospitals as at present; and this might be effected without lessening materially the revenue produced by such poisonous means,—for the reporters would naturally ^{*96]} limit the use of such medicines to those diseases only in which they would be useful, and they would also prevent any improper article being introduced into their composition. Your petitioner, however, whilst he acknowledges that there are efficacious remedies for some few diseases, the mode of whose operation by which they cure is unknown, and such remedies are called specifics, as arsenic and cinchona in intermittents,—mercury in and sulphur in psora, denies that quack medicines not composed of these ingredients, and applied in those diseases just mentioned, have any specific effects, and even if they had, he humbly submits, nevertheless, that it would not only be repugnant to reason, but prejudicial to society, to give a latitude to the unlearned, ignorant, unworthy and unprincipled quack, to do mischief by those pretended specifics for different maladies, which have no foundation in fact:—and whilst it shows the freedom of our laws in this respect, it affords an opportunity to those impostors to commit every species of fraud and depredation on the public, particularly to the ruin both of the pocket and constitution of the lower classes, always eager to flock for relief to those daring empirics, whose trade it is to hold out extraordinary promises to their dupes of their cures, which they know themselves totally unable to perform.

"Your petitioner therefore, most humbly prays that this Honorable House may, in its wisdom, rescue the *English* nation, from the obloquy thrown upon it by foreigners of all nations, of being a nursery for those vipers denominated quack doctors, by making a law, rendering it a misdemeanor for any person

(for the sake of gain or reward) to prescribe for the sick, without the necessary qualification of a diploma—and enable the present institute to prosecute to conviction disqualified persons so prescribing; or to adopt such other measures as may tend to eradicate this great evil, as in *the superior judgment of this Honorable House may seem meet. [97]

“ And your petitioner, as in duty bound,
will ever pray,

“ Charles Dunne.”

“ 164, Regent Street, 10th of May, 1824.”

Best, C. J., told the jury, that if the publication complained of was a libel, it was aggravated by the defendant's conduct at the time of the plaintiff's remonstrance; it was, however, for the jury to consider whether that publication was a malicious and wanton attack upon the private or professional character of the plaintiff, or whether it was no more than a fair comment on the plaintiff's petition to the House of Commons. If the writer, without any ostensible cause for an attack, had come forward, as of his own knowledge, to impute to the plaintiff ignorance in his profession of a surgeon, that would have been a libel for which, unless justified by proof of its truth, the writer would have been liable to answer in damages. But if he had not imputed ignorance to the plaintiff, except in so far as he had collected the existence of ignorance from the contents of the plaintiff's petition; if the attack was only through the sides of the petition, and not spontaneous; in short, if what had been written was no more than a fair comment on that petition, the defendant was entitled to a verdict; for where a man obtruded himself on the public by proposing measures to affect the interests of the community at large, his proposals were legitimate objects of observation and criticism; and, if professing to instruct and reform the world, he manifested an incompetence for the task he chose to impose on himself, there could be no offence in warning the public against the incapacity of such a self-constituted instructor. The jury would also consider, whether the ignorance which the alleged libel [98] imputed to the plaintiff, meant ignorance in his profession of a surgeon, or ignorance in the profession of a chemist; for if they should be of opinion that the ignorance imputed, meant ignorance in the profession of a chemist, their verdict must be for the defendant, inasmuch as the charge in the declaration was only for imputing ignorance to the plaintiff in his profession of a surgeon.

The jury found a verdict for the defendant.

Vaughan, Serjt., moved for a rule *nisi* to set aside this verdict and have a new trial, on the ground, first, that the alleged libel clearly imputed to the defendant ignorance in his profession of a surgeon; and, secondly, that a petition to the House of commons was a communication so far privileged as to protect the petitioner from action or prosecution for libel by reason of any allegations contained in it (*Lake v. King*; 1 Saund. Rep. 131,) and therefore, could not be deemed such a publication or obtrusion of the petitioner upon the notice of mankind, as to justify them, according to the principle of *Carr v. Hood*, 1 Camp. 355, n, in making him the object of criticism or comment.

Park, J., said, he could not see that the present case fell within the principle of *Carr v. Hood*, as he was not prepared to say that a man who presented a petition to Parliament placed himself in the situation of a publisher: the alleged libel also clearly imputed to the plaintiff ignorance in his profession of a surgeon.

Burrough, J., thought that ignorance in his profession of a surgeon was manifestly imputed to the plaintiff, and that, if the fact of his practising [99] was not disputed, the jury ought not to be permitted to find a verdict against him.

GASELEE, J., also thought there was sufficient ground for a rule *nisi*, which was granted accordingly.

Spankie, Serjt., now showed cause against the rule, and after exposing the solecisms and ignorance of the common rules of grammar conspicuous on the face of the petition, contended, that, taking the whole of the alleged libel together, it only proposed to impute to the plaintiff ignorance of chemistry, when it stated, that "he is profoundly ignorant of the science of his profession, and would be put to the blush by any of the quacks whom he evidently wishes to rival;" for the very next sentence explained the foregoing, by adding, "we should not be afraid to match against his *chemical knowledge, Eady,*" &c.; and then, after an extract from the plaintiff's petition, the writer proceeded, "after this display of *chemical ignorance* by the college member,"—

He then urged that the construction of an alleged libel, and the ascertaining the motives with which it was published, was a compound question of law and fact, exclusively within the province of the jury; and that, therefore, a new trial ought not to be granted, because the court might happen, in construing the writing in question, to draw a conclusion different from that to which the jury had come; for supposing the writing *did* impute to the plaintiff ignorance in his profession of a surgeon, yet if this were done without malice, and in fair comment upon the plaintiff's own productions, (a matter of fact which the jury alone were competent to ascertain,) there could be no ground for a new trial where the jury, as here, had determined that

[100] *such was the fact. Admitting that the presentation of a petition to Parliament, or to an officer of state, (*Fairman v. Ives*, 5 B. & A. 462,) was not such a publication as would subject the petitioner to proceedings for libel on account of any allegations contained in the petition, yet, if the petition related to matters affecting the community at large, it was a publication that invited and justified fair criticism more than any other. If, according to the principle laid down in *Carr v. Hood*, the author of a book on ordinary topics became, by publishing it and offering himself to the notice of mankind, a fair object of criticism and comment, much more so did the author of a petition to the legislature, proposing measures extensively affecting the interests of the community. It was of the utmost importance not only that such measures should be fully and freely examined, but that the proposers of them should be exposed, if by a manifestation of weakness and ignorance they proved themselves incompetent to the task they had undertaken; such pretenders were the most dangerous enemies of improvement, by deterring men of real talents and knowledge from presenting themselves to the notice of the public, and it was, therefore, not only permissible, but a duty in every journalist to expose their ignorance.

[*Gaselee, J.* That argument might perhaps apply, if the alleged libel had been a counterpetition to the legislature.]

There was nothing in the present publication from which malice could be inferred, and the court would not grant a new trial where it was not likely 2*W. damages* would be recovered. *Marsh & Ux v. Bower & Ux*, 2 W. Bl. 851.

[*91] **Vaughan*, supported his rule upon the grounds on which it had been obtained, and *the court*, without expressing any further opinion, made the rule absolute; the costs of the former trial to abide the event of the new trial.

Rule absolute.

Upon the second trial the plaintiff recovered one farthing damages.

STEAD, DAKER, JACKSON, WAINWRIGHT, and SOWDEN v. SALT.

One of several partners cannot bind the others by a submission to arbitration, even of matters arising out of the business of the firm.

The five plaintiffs declared against the defendant for work, labor, and materials, and on the common money counts.

The general issue was pleaded; and at the trial before Bayley, J., York Lent assizes, 1825, the defendant put in an award upon the matter touching which the action had been brought. The articles of agreement, however, which contained the submission, were signed in the first instance only by the defendant *Salt*, and the plaintiffs *Stead*, *Daker*, and *Jackson*. The time limited in them having expired without any thing being done, they were signed a second time with altered dates by *Stead*, who added the words, "for ourselves and partners, *William Wainwright, Isaac Sowden*."

It appearing that the plaintiffs were not general partners, but partners only in the dealings to which the award referred, the learned judge thought the instrument of submission insufficient; and a verdict was taken for the plaintiff, subject to an application to this court to set it aside and enter a nonsuit, on the ground of the defect in the submission.

*Pell, Serjt., obtained a rule *nisi* to this effect, on the ground that [102] there was no difference between the incidents of a general partnership and a partnership in a particular transaction;—that a payment to one of several partners would operate as a discharge of a debt due to the whole firm;—that a release of such a debt, executed by one of several partners, would be valid against the others; as also a release of an action;—that an admission by one of several partners would be equally binding on the others;—that each partner had authority to act for the firm in all matters relating to the business carried on by them;—and that although an authority could not be implied to one of them to bind the others by a submission to arbitration on matters foreign to such business, (*Sandeland v. Marsh*, 2 B. & A. 673), yet a submission to arbitration on matters arising out of it, seemed to be as much within the scope of the partnership authority, and as necessary to its success, as the ordinary conduct of their trade.

Vaughn, and *Wilde*, Serjts., for the plaintiffs relied on *Com. Dig. Arb. D. 2.* "If there be a controversy between *A.* of the one part, and *B.* and *C.* of the other, and *B.* submit for himself and *C.*, and there be an award that *B.* shall pay, this is good, though *C.* be a stranger. So if *B.* submit for himself and his partner;" from which they argued that *B.*'s having been holden singly liable, must have proceeded on the ground that his engagement did not bind his partner: they referred to *Strangford v. Greed*, 2 Mod. 228, as an authority to the same effect: urging that the executing a submission to refer to arbitration was not an act within the ordinary course of business, but a delegation of an authority, and that an award might call on the partners to perform acts which by law they could not be called on to perform; as to "execute deeds, &c. That they could not revoke the authority which [103] had been given, and therefore, ought not to be bound by it.

Pell, was heard in support of his rule, and the court having taken time to consider, judgment was now delivered by

Best, C. J. The only question in this case was, whether the plaintiffs were concluded by an award which had been made on the subject of the demand, to enforce which the action was brought. The plaintiffs are five in number, but the submission to the award was signed by no more than three of them, and the question is, whether a submission by the three will bind the five. The court are of opinion that it will not bind them. It has been urged that a release by one of several partners will bind the others, and that is true,

because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment. It has further been urged that the admission of one partner is binding on his fellows, this, however, is not exactly so; such an admission is evidence against all the partners, and as such evidence, it may affect them more or less, but it does not affect this case, for even in the case of a general partnership, one of the partners cannot bind the others without an authority express or implied, and an authority can only be implied for what is necessary to carry on the trade in which the partners are concerned. Now to enter into a submission for arbitration is no part of the ordinary business of a trading firm, and there is nothing in the present case to show that either of the parties had authority to bind the others to such a submission. It is true that in *Strangford v. Greed*, the point now determined was not exactly in issue, but it was almost inseparably connected with the point which was there decided: it was laid down in that case *104] "that partner *A.* may engage for the performance of an agreement by his co-partner *B.*, and if *B.* fails to perform, it will be a breach of *A.*'s engagement; if it is a breach of *A.*'s engagement, it seems to be implied that *B.* was not jointly bound with him, for had he been bound, it would have been a breach of the engagement of both."

The language of *Comyn's Digest* is to the same effect. "If there be a controversy between *A.* of the one part, and *B.* and *C.* of the other, and *B.* submit for himself and *C.*, and there be an award that *B.* shall pay, this is good, though *C.* be a stranger." We should be sorry to establish a principle by which those who are concerned in joint contracts should be rendered more extensively liable than at present.

Rule discharged.

THOMAS v. JACKSON.

To say of one who carries on the business of a corn vendor, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage.

THE declaration stated, that the defendant was a husbandman, and farmer of a certain large farm of arable and other lands, with the appurtenances, and a vendor of the corn by him raised and grown in and upon his said farm and lands, and carried on the business of a husbandman and vendor of corn with great integrity, and with the good opinion of his neighbors and other good subjects; and that the defendant slandered him, by saying to him and of him, as such husbandman, farmer, and vendor of corn, in the presence and hearing of others, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for;" whereupon one *Marr*, who, before the speaking of the words, was about to make a purchase of the plaintiff, refused to do so. The defendant pleaded the general issue, *105] and justified the charge of selling oats 6d. a bushel worse than those bargained for.

At the trial before *Buylly*, J., last York assizes, the plaintiff proved the speaking of the words, as alleged in the declaration, but failed in establishing the existence of the special damage.

Whereupon the learned judge told the jury, that unless special damage was proved, the action could not be maintained; and that therefore they must find

a verdict for the defendant. But in order to save the parties the expense of coming to trial again, in case the court above should dissent from his direction touching the special damage, they might also say what damage they thought the plaintiff had sustained by the speaking of the words only.

The jury found a verdict for the defendant, and said they could find no damages for the plaintiff, "because he had not substantiated the charge."

Bosanquet, Serjt., obtained a rule *nisi* to set aside this verdict and enter a verdict for the plaintiff, or to allow him a new trial, on the ground that the words alleged in the declaration having been spoken of the plaintiff in his business or calling of a corn vendor, were actionable, and entitled him to a verdict without proof of special damage.

Vaughan, Serjt., showed cause, but

The court were clearly of opinion, that these words spoken of a corn-factor were actionable, without proof of special damage; and *Best*, C. J., said, that such would be the case with any words which imputed to a man fraudulent conduct in the business whereby he gained his bread.

The rule, therefore, for a new trial was made absolute, unless the defendant consented within a week to allow a verdict to be entered for the plaintiff with 40s. damages.



*COLLIER v. JACOB.

[106]

An agreement to take tithes of wheat by one sheaf taken at varying intervals out of each of many shocks of ten, is not illegal.

This was an action on the stat. 2 & 3 Edw. 6. c. 13., for improperly setting out the tithe of wheat.

At the trial at the last *Lent Bury* assizes, before *Gaselee*, J., certain witnesses whom the jury believed, stated that the plaintiff had at a vestry agreed that the tithes should be taken in the following manner, viz. the sheaves were to be set up in shocks of ten each, and the plaintiff was to have one sheaf out of each shock, taken by the defendant at varying intervals; as, the first sheaf in the first shock, the second in the second shock, the third in the third shock; so that out of the sheaves in the field he was to take the first, the twelfth, the twenty-third, and so on.

Gaselee, J., told the jury, that if they believed the plaintiff had made this agreement, and that the defendant had in consequence taken the trouble to set up shocks which he would not otherwise have done, they ought to find a verdict for the defendant. This was done; and

Bosanquet, Serjt., who had obtained a rule *nisi* for a new trial, on the ground that the verdict had been given against the weight of evidence, now contended, also, that this mode of tithing was illegal, and likely to lead to a fraud on the parson; that the parson had no right to select any particular sheaf, and that, therefore, it could not be allowed to the farmer to do so.

Best, C. J. Though I might have disbelieved witnesses who stated that a man had made an agreement so prejudicial to his own interests as this must have been to the interest of the plaintiff, the jury have believed them, and have confirmed the existence of the agreement, in which I think, in the way it was put to the jury by my brother *Gaselee*, there was nothing illegal, although the mode of tithing adopted was more likely to lead to fraud than any I ever heard of.

[107]

BURROUGH, J.† The legal mode of tithing wheat is by the sheaf; but it is also very common, especially in the west of *England*, to tithe it by the shock; an agreement to which effect has here been given by the jury, without any imputation of fraud. The verdict, therefore, ought not to be disturbed.

GASELEE, J., concurring, and adding that no fraud had been practised, the rule was

Discharged.

† Park, J., had gone to Chambers.



MORLEY et al v. BOOTHBY.

SAME v. BOOTHBY and CLARKE.

"Messrs Morley and Co.—We hereby promise that your draft on *William Clarke, Son and Co.*, due at Messrs. Mastermans', at six months, on the 27th of November next, shall be then paid out of money to be received from St. Philip's church, say amount 174*l.* 13*s.* 5*d.*—W. Clarke, W. Boothby:"

Held, that this undertaking was void within the statute of frauds, no consideration appearing for *Boothby's* promise.

The plaintiffs declared, that, in consideration that the said plaintiffs, at the request of the said defendants, would sell and deliver to certain persons using "the style of *William Clarke, Son, and Co.*, certain goods, wares, and merchandises, of certain value, to wit, of the value of 174*l.* 13*s.* 5*d.*, to be used in and about building a certain church, to wit, *St. Philip's church, at Sheffield*, in the county of *York*, to be paid for by a bill of exchange, to be drawn by the said plaintiffs upon the said *William Clarke, Son, and Co.*, to be payable at a certain day then to come, to wit, at a day not earlier than the 27th of *November* then next, the said defendants undertook, and then and there faithfully promised the said plaintiffs that the said bill should be paid when due out of such moneys as the said defendants should receive before the said bill should become due, for and on account of the building of the said church; and the said plaintiffs aver that they, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on, &c., at, &c., sell and deliver to the said *William Clarke, Son, and Co.*, divers goods, wares and merchandises of the value aforesaid, to be used in and about the building of the said church, and did afterwards, to wit, on the 27th of *May*, in the year aforesaid, draw a certain bill for the said sum of money on the said *William Clarke, Son, and Co.*, payable to the order of the said plaintiffs, at a certain day not sooner than the 27th of *November* in the year aforesaid, to wit, on the 30th day of the month last aforesaid; and the said *William Clarke, Son, and Co.* then and there duly accepted the said bill; and although the said bill afterwards, and when the same became due and payable, to wit, on the 30th of *November* in the year aforesaid, in the county aforesaid, was duly presented for payment thereof; and although the same was then and there dishonored by the said *William Clarke, Son, and Co.*, the said acceptors thereof, of which said premises the said defendants afterwards, to wit, on, &c., at, &c., had notice; and although the said defendants received "before the bill became due, and from thence hitherto have had sufficient moneys for and on account of the building the said church, to satisfy the said bill, yet the said defendants, not regarding their said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiffs in this respect, have not, (although often requested so to do) guaranteed the payment of the

said bill, or paid or caused to be paid the sum of money therein specified, or any part thereof to the said plaintiffs.

There were various other counts, but all stating in substance the same undertaking.

The defendants pleaded, that the supposed promise was a special promise to answer for the debt of other persons, to wit, the said persons using the style of *William Clarke, Son, and Co.*; and that no agreement in respect of or relating to the supposed cause of action, or any memorandum or note thereof, wherein the consideration for the said promise was stated or shown, was, according to the form of the statute in such case made and provided, in writing or signed by the said defendants, or by any other person or persons by them thereunto lawfully authorized. The plaintiffs replied, that a certain agreement in respect of and relating to the said cause of action, wherein the consideration for the said promise was stated and shown, was, according to the form of the statute in such case made and provided, made in writing and signed by the said defendants, which said last mentioned agreement was and is to the effect following; that is to say,

"Messrs. Morley and Co.

"We hereby promise that your draft on *William Clarke, Son, and Co.* due at Messrs. *Masterman's* at six months, due on the 27th of November next, shall be then paid out of money to be received from *St. Philip's Church*; say amount 174*l.* 13*s.* 5*d.*, say 27th November.

"Sheffield,
"May 26, 1824."

"We are, yours,

W. Clarke, W. Boothby."

And this the said plaintiffs are ready to verify.

Demurrer, assigning for cause, that the supposed agreements in writing mentioned in the replications, do not state or show, according to the form of the statute in such case made and provided, any such considerations or consideration for the promises or promise as in and by the declaration are alleged to have been the consideration of such promises respectively; and also for that the supposed agreements in the said replications mentioned, do not, according to the form of the statute in such case made and provided, state or show any considerations or consideration for the promises mentioned and set forth in the declaration, or for any or either of those promises. Joinder in demurrer.

The action against *Boothby* alone was upon an undertaking in substance the same as the above, and the pleadings were framed accordingly.

Onslow, Serjt., in support of the demurrer, relied on *Wain v. Walters*, 5 East, 10, *Lyon v. Lamb*, Fell. Merc. Guar. 260, *Saunders v. Wakefield*, 4 B. & A. 595, and *Jenkins v. Reynolds*, 3 B. & A. 14, and contended that no consideration for the defendants' promise appeared on the face of these instruments, the language respecting *St. Philip's Church* not being intelligible without recourse to oral testimony, which it was the express object of the statute of frauds to exclude.

Pell, Serjt., contra, said, that admitting the correctness of the principle laid down in *Wain v. Walters*, there had always been much indecision in the application of it, as it frequently led to great injustice, and promoted breach of faith. He referred to the language of *Dallas*, C. J., in *Pace v. Marsh*, 1 Bingh. 216,—“These cases ought not to be encouraged beyond what the law strictly warrants; because parties too frequently by entering into such engagements occasion extensive credit to be given, and then get out of their obligation in any way they can;”—and to the disapprobation expressed by the Chancellor in *Ex parte Minet*, 14 Ves. jun. 190, on the subject of the doctrine laid down in *Wain v. Walters*. A very slight indication of the consideration for the defendants' promise had been held sufficient; and the case of *Boehm v. Campbell*, 3 B. M. 15, where the guar-

antee was sustained, could not be distinguished from the present, in which, from the date of the guarantee, and the language of the bills, the consideration was sufficiently connected with the building of the church.

Onslow, replied, that *Boehm v. Campbell* was anterior to *Saunders v. Wakefield* and *Jenkins v. Reynolds*, and that the consideration in that case was more apparent than in the present.

Cur. adv. vult.

BEST, C. J., now delivered the judgment of the court, and after stating the pleadings, and observing, that though a sufficient consideration for the defendants promise was stated in the declarations, the instruments set out in the replication did not contain any proof of the averments in the declarations,— said,—

The common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it. In all other cases the contract was invalid, unless the party making the promise was to obtain some advantage, or the party to whom it was made, was to suffer some inconvenience in consequence of the one making, or the other accepting such promise.

If the contract was oral, the benefit or inconvenience, as well as the other parts of the contract, could only be proved by parol testimony. When the contract was reduced to writing, it was required not only that the obligatory part, but that the inducement or consideration should also be in writing, because it was always a rule in the law of evidence, that no parol testimony could be admitted, either to supply the defects, or explain the contents of a written instrument. If the writing did not prove the consideration, it could not be proved in any other manner, and thus the contract failed, because the consideration, without which it was altogether inoperative, could not be shown. When the statute of frauds declared that no person should be charged with the debt of another except on an agreement in writing; if the clause in the statute had not expressed (as I think it does) that the whole agreement should be in writing, the law of evidence would have rendered it necessary the whole should have been in writing, by declaring, as it uniformly has done, that nothing could be added to the terms expressed in writing by parol testimony. Applying the principles of common law to the statute, which is a safe mode of construing acts of the legislature, I say, as I said in *Saunders v. Wakefield*, that if I had never heard of *Wain v. Walters*, I should have held, that a consideration must appear on the face of the written instrument. It must also occur to any one, that to attain the avowed object ^{of} the statute of frauds (namely, the prevention of perjury,) it is more necessary to require that the consideration of a bargain should appear in writing, than any other term or condition of it. That the consideration should appear on the instrument, not in any set formal terms, but with clearness enough for the courts to judge of its sufficiency, is now fully established by *Wain v. Walters*, and *Saunders v. Wakefield*, in the King's Bench, and *Jenkins v. Reynolds* in this court.

The present Lord Chancellor is reported to have expressed himself, in *ex parte Minet*, dissatisfied with the judgment of *Wain v. Walters*. I think his lordship must have been mistaken by the reporter, who has made the Chancellor say, "The undertaking of one man for the debts of another does not require a consideration moving between them." No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough if the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is

given suffer inconvenience, as an inducement to the surety to become guaranty for the principal debtor.

The Chancellor did not decide this point in that case. In *ex parte Gardom*, 15 Ves. jun. 288, this question came again before the Chancellor, and his lordship again expressed his dissatisfaction at *Wain v. Walters*, but his judgment is not in opposition to the authority of that case. The judgment of the Chancellor was, that there was a sufficient consideration expressed in the guarantee.

I must observe, that *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, have been decided by the King's Bench and the Common Pleas, since the cases in equity.

*In the cases of *Boehm v. Campbell*, and *Pace v. Marsh*, this court did not mean to over-rule them, but gave their judgments on the ground that there was a sufficient consideration expressed on the written instruments. In both those cases a by-gone consideration was expressed on the guarantees; whether such consideration was sufficient, it is not now material to inquire because in the instruments set in these declarations there are neither past nor future considerations. It does not appear that the credits which had previously been given to the original debtors were excused in consequence of those guarantees. When the bills which had been given were at maturity, the debtors could be sued as well after as before the giving of the guarantees. The debtors had no benefit, nor did the creditors put themselves to any inconvenience in consequence of the execution of those instruments. Although one of the papers speaks of money for *St. Philip's church*, it does not appear that the persons subscribing such paper had anything to do with any such money. The replications setting forth these guarantees do not support the declaration, and we are of opinion there must be judgment for the defendants.

Judgment for the defendants accordingly.



*LIVETT v. WILSON.

[*115]

Defendant pleaded a grant of right of way by deed, subsequently lost. Plaintiff, in his replication, traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted user of the way, the Judge directed the jury, that if upon this issue they thought defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; if they thought there had been no way granted by deed, they would find for the plaintiff: Held, that this direction was right.

TRESPASS for breaking and entering the plaintiff's close, called the yard, in the parish of *St. Andrew*, in the town of *Cambridge*.

The defendant pleaded that before and at the said several times when, &c., he was seised in his *demesne* as of fee of and in a certain messuage and yard in the parish aforesaid, and that long before any of the several times, when, &c., to wit, on the 1st of *January*, 1764, at the parish aforesaid, by a certain deed then and there made between *John Waterfield*, the then owner of the said close of plaintiff, called the yard, and who was then seised thereof in his *demesne* as of fee, and *Thomas Blanks* and *Mary* his wife, who were then seised in their *demesne* as of fee, in right of the said *Mary*, of and in the messuage and yard, now of defendant, and whose estates therein he, defendant, now hath, but which said last-mentioned deed hath since been lost and destroyed by accident, and therefore, cannot be produced to the court here, and the date whereof is for that reason wholly unknown to defendant,

the said *John Waterfield*, so being owner of the said close, in which, &c., did grant to the said *Thomas Blanks*, and *Mary* his wife, in right of the said *Mary*, so then being the owner of the said messuage and yard, now of defendant, and to the heirs and assigns of the said *Mary*, as aforesaid, a certain way from the public highway or street called the *Petty Cury*, into, through, over, and along the said close called the yard, in which, &c., unto and into the said messuage and yard of defendant, and so back again from the said last mentioned close into, through, over, and along the said close, in which, [116] &c., called the yard, unto and into the said public king's highway to go, return, pass, and repass on foot in and along the said last mentioned way at seasonable hours in the day time.

The plaintiff replied, that the said *John Waterfield*, so being owner of the said close, in which, &c., did not grant to the said *Thomas Blanks* and *Mary*, his wife, in right of the said *Mary*, being the owners of the said messuage and yard, now of defendant, a certain way to pass on foot from the said public highway or street called the *Petty Cury*, into, through, over, and along the said close called the yard, in which, &c.

Upon this replication issue was taken, and there was also a new assignment, upon which judgment was suffered by *nil dicit*. At the trial before *Gazelee*, J., at the last Cambridge assizes, it appeared that the premises occupied by the plaintiff and defendant adjoined each other, and were formerly in the hands of a single owner who divided them in the year 1734, by a conveyance of part to a person under whom the defendant claimed, but the right of way now asserted was not reserved in that conveyance. As to the undisputed use of the way, there was conflicting testimony, but the weight of evidence showed that the alleged right had been pretty constantly contested, and the defendant upon recently taking some adjacent premises the approach to which was by the entrance he claimed into the yard, said, "My right of way from the street to the yard can now no longer be resisted."

Gazelee, J., referred to *Doe d. Fenwick v. Read*, 5 B. & A. 232, and told the jury that if upon this issue they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, [117] "and that deed had been lost, they would find a verdict for the defendant; if they thought there had been no way granted by deed, they would find for the plaintiff."

The jury said they could not find any deed, and gave a verdict for the plaintiff.

Taddy, Serjt., obtained a rule *nisi* for a new trial upon an objection to this direction, against which rule *Wilde*, Serjt., was to have shown cause, but the court stopped him, and called on *Taddy*, to support his rule. He contended that the jury ought to have been told, that if they thought the way had been used uninterruptedly for a sufficient length of time, they might from that circumstance presume a deed; and he referred to *Campbell v. Wilson*, 3 East, 294, where it was holden that upon an uninterrupted use for twenty years the jury might presume a grant. In *Doe d. Fenwick v. Read*, the commencement of the defendant's title appeared, and as that title was not sufficient unless confirmed by a subsequent conveyance, the jury were properly directed to consider whether or not any such conveyance had been made; but even in that case *Holroyd*, J., said, "In cases of rights of way the original enjoyment cannot be accounted for, unless a grant has been made, and therefore, it is that from long enjoyment such grants are presumed." In *Holcroft v. Heel*, 1 B. & P. 400, where the grantee of a market had suffered another to erect another market in his neighborhood, and use it without interruption for above twenty years, *Eyre*, C. J., thought it was a bar to an action on the case for a disturbance of the franchise, though it was clear that the user originated without any rightful authority. Therefore, where there has been a user ad-

verse to the *plaintiff, it is not for a jury to find a deed, but for the judge to direct them whether or not the facts are sufficient to authorize them to presume one. [*118]

BEST, C. J. I think that the direction of the learned Judge was perfectly right, and that he went far enough. I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a Judge would not be justified in saying that they must, but that they may presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly. In the present case the way which was pleaded had not been reserved by the deed under which the premises to which it was said to belong were separated from the plaintiff's premises; the user, so far from having been uninterrupted, had almost always been the subject of contest; and the expression employed by the defendant upon acquiring a way to the premises recently taken, showed that he was distrustful of his claim before.

PARK, J. Nothing but uninterrupted usage can raise a presumption of a grant; here the usage was always interrupted, and the learned Judge's charge was perfectly correct.

BURROUGH, J. The charge to the jury was so proper that I shall adopt it for the future. It was of the essence of the plea and replication that the jury should enquire whether or not the deed stated in the plea ever had existence. If there had been such a deed it is not probable the usage of the way would have been constantly disputed, as it appears to have been according to the *evidence at the trial. There is no ground for wishing to alter the verdict of the jury, and the defendant's rule must be

[*119] Discharged.



COLLEDGE v. HORN.

The following letter from the defendant to plaintiff's attorney, was given in evidence by a plaintiff in answer to a plea of the statute of limitations. "I have received your's respecting plaintiff's demand; it is not a just one; I am ready to settle the account whenever plaintiff thinks proper to meet on the business; I am not in his debt 90L., nor any thing like that sum; shall be happy to settle the difference by his meeting me;" Held, that the Judge was justified in directing the jury, "that after this letter the statute of limitations was out of the question."

Per Burrough, J. A statement made by a counsel upon his address to the jury, but in the hearing of his client, is binding on the client if he makes no objection.

THIS was an action to recover money alleged to be due from the defendant to the plaintiff. The defendant pleaded the statute of limitations; and as to a part of the demand, proposed at the trial before the Chief Baron, at the last *Hertford* assizes, to prove an admission made in the presence of the plaintiff, by the plaintiff's counsel, in his opening address to the jury on a former trial; when, however, the witness, who was called to prove this admission, was asked "what was said by the counsel for the plaintiff," the learned Chief Baron prohibited the witness from answering, and rejected the evidence.

In answer to the plea of the statute of limitations, the plaintiff gave in evidence the following letter from the defendant to the plaintiff's attorney.

"Sir,
"I this day received yours respecting Mr. Thomas Colledge's demand,

*120] it is not a just one. I am ready to "settle the account whenever Mr. T. C., thinks proper to meet on the business. I am not in his debt 90^l, nor any thing like that sum : shall be happy to settle the difference, by his meeting me in *London*, or at my house.

" Yours,

"January, 10, 1820.

"Geo. Horn.

"I shall write Mr. Colledge, on the subject."

The learned Judge told the jury, that after this letter the statute of limitations was out of the question, and a verdict was thereupon found for the plaintiff.

Vaughan, Serjt., objecting that the learned Judge ought to have left it to the jury to determine whether or not this letter was an acknowledgment of any existing demand, and particularly whether it applied to the demand on which the action was brought, instead of taking upon himself to decide, that after the letter the statute was out of the question,—and objecting that evidence of the admission by the plaintiff's counsel ought not to have been rejected,—obtained a rule *nisi* for a new trial.

Upon reading the Judge's notes it did not appear, nor could it be distinctly ascertained in what part of the court the plaintiff stood at the former trial, when the alleged admission was made by his counsel, nor whether he was within hearing of what was said.

Tuddy, Serjt., however, who showed cause, insisted, that whatever might be the law as to admissions which were formerly made and taken down in the Judge's notes as part of the plaintiff's case, under no circumstances could evidence be given, as against the client, of statements made by his counsel in *121] the course of an "address to the jury. These statements were often no other than the embellishments of the imagination; or, at all events, so mixed up with such embellishments as not to be easily distinguishable from them. The statements contained in a bill in equity were not evidence against the party who filed the bill, solely on the ground that they were supposed to be the suggestions of counsel.

As to the language used by the judge touching the defendant's letter, it had no such object as that of superseding the functions of the jury, and amounted to no more than leaving the consideration of the letter to them, accompanied with a strong expression of his own opinion.

Vaughan and *Wilde*, Serjts., in support of the rule, insisted that the defendant's letter had not been sufficiently left to the jury, as it ought to have been, *Frost v. Bengough*, 1 Bing. 266, and that it contained no admission of any demand. *Rowcroft v. Lomas*, 4 M. & S. 457, *Hellings v. Shaw*, 7 Taunt. 608, *Beale v. Nind*, 4 B. & A. 568.

That if the declarations of an agent were admissible in evidence against his principal, there could be no reason for excluding the evidence of counsel. [Best, C. J. I cannot allow that the counsel is the agent of the party.] At all events, the witness upon the present occasion was stopped too soon, and before he was rejected ought to have been permitted at least to have shown the circumstances under which the alleged admission was made.

Best, C. J. With respect to the statute of limitations none of us entertain *122] any doubt. In effect, the "consideration of the defendant's letter was left to the jury, though with a strong observation from the learned judge, which was well warranted, because upon the face of the letter there is a clear admission of an existing cause of action. If it had been simply left to the jury to say whether or not this letter took the plaintiff's case out of the statute of limitations, and the jury had found for the defendant, we must have granted a new trial.

The other question is one of great difficulty, and I avoid saying anything on it till we have all the facts fully before us ; at present it does not appear

whether or not the plaintiff was within hearing of the statement made by his counsel, or how far that statement was authorised.

PARK, J. Even if there had been an omission to leave the defendant's letter to the consideration of the jury, yet if no possible doubt arises on the construction of it, that omission would be no ground for granting a new trial.

Upon the other question there must be a new trial to ascertain the facts ; till they are known, I abstain from coming to any conclusion on the subject.

BURROUGH, J. Where a letter is so clear as this, a judge is justified in telling the jury it is an admission of a debt. Upon the other question, I see no difficulty at all ; parties are every day bound by the acts and declarations of their counsel ; if the plaintiff was in court, heard what his counsel said, and made no objection, I think he was bound.

GASELEE, J. There is nothing in the question upon the statute of limitations. Upon the other question I *forbear to give any opinion under [123] the present imperfect statement.

The rule for a new trial was then made absolute, with an agreement to discharge it if the plaintiff would consent to accept 3*l.* in full of his demand.

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
TRINITY TERM
IN THE
SIXTH YEAR OF THE REIGN OF GEORGE IV., 1825.

JONES v. DE LISLE.

The court will not interfere with the allowance of a writ of error.

TADDY, Serjt., upon an affidavit showing that a writ of error in this case had been sued out expressly for delay, and that the defendant had fled to Paris, moved for a rule nisi to set aside the allowance of the writ, over which allowance, as being the act of the court, the court, he insisted, might exercise its discretion.

Sed per Curiam. We cannot interfere. If the writ has been improperly sued out, you may move against the attorney,—apply to chancery, whence the writ issues,—or move to proceed with execution notwithstanding ;—but [126] the officer of this court is bound to allow the writ, and might be attached if he refused. Such a motion was never made before.

Taddy, not finding it expedient, under the circumstances of the case, to move to issue execution notwithstanding the writ of error,

Took nothing.

BARNARD v. NEVILLE.

Affidavit to hold to bail on the ground that defendant was indebted to plaintiff in trust for deponent, under a deed by which the defendant had covenanted to pay "at certain times and on certain events now past and happened." Held, sufficient.

The affidavit to hold to bail stated that the defendant was indebted to the plaintiff in trust for the deponent, under a deed by which the defendant had covenanted to pay, "at certain times, and on certain events now past and happened."

Pell, Serjt., moved to discharge the defendant on filing a common appearance, on the ground that this affidavit was not sufficiently explicit; that perjury could not be assigned on it; and that, for aught that appeared, the consideration for the debt, and the whole transaction, might be illegal. He cited the language of *Le Blanc*, J., in *Bosanquet v. Fillis*, 4 M. & S. 330, to show that in such a case breaches ought to be assigned, and that it should appear the plaintiff was damaged.

Best, C. J. We think this affidavit sufficiently certain; it states a deed under which a debt was to accrue at certain times, and on certain events, and it alleges that those times and events have passed and happened. If [*127] they have not, the deponent may be indicted for perjury. The case which has been referred to was very different, for there it was left to the court to infer that a debt might be due; here it is expressly stated that a debt is due. As to the possible illegality of the consideration, that is a matter to be pleaded or proved if it exists, but not decided summarily on motion.

Park, J. The consideration is never stated in affidavits to hold to bail on bills of exchange, and there is no reason for requiring it in a case like the present.

Burrough, J. If we acceded to this motion, affidavits to hold to bail must be made as long as declarations.

Gaselee, J., concurred, and *Pell*

Took nothing.



HOULISTON v. SMYTH.

Where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessaries furnished for her support.

Assumpsit to recover against the husband 17*l.* for board and lodging provided for his wife by the plaintiff, from the 18th of *May* to the 13th of *July*, 1824.

At the trial before *Best*, C. J., *Middlesex* sittings after *Easter* term last, it appeared that the defendant having treated his wife with unusual cruelty, she had quitted him under the apprehension of further violence, and had taken refuge with the plaintiff. Among other facts, it was proved that the defendant, sanctioned by the opinion of a young medical man, had, in 1823, confined his wife in a mad-house, although she was perfectly sane, and was afterwards released under a *habeas corpus*. She then returned to her husband, and the immediate occasion of her flight to the plaintiff's, was personal violence on the part of her husband, he having struck her with his fist in the face, having threatened her with a pistol, and with another confinement in the mad-house. [*128]

On the part of the defendant it was proposed to show that in December, 1824, the ecclesiastical court had, in a suit for a divorce, decreed the defendant's wife alimony from the 8th of May preceding; and also that about two years previously to the trial she had committed adultery. The Chief Justice, however, dismissed these two grounds of defence, as affording no answer to the action; the alimony not having been decreed till some months after the period of the plaintiff's claim, and the defendant having received his wife again after the commission of the alleged adultery; and he directed the jury that if they thought the defendant's wife had left his house with reasonable grounds for apprehending personal violence, she was entitled, wherever she went, to credit for her support.

The jury having found a verdict for the plaintiff with 17*l.* damages,

Vaughan, Serjt., moved for a rule *nisi* for a new trial, on the ground that the jury had been misdirected; he urged that no case had gone so far as to decide that the wife was entitled to credit if she left her husband upon a mere apprehension of violence. In *Horwood v. Heffer*, 3 *Taunt.* 421, *Mansfield*, C. J., said, "Nothing short of actual terror and violence will support *129] this action." And *Lawrence*, J., thought the circumstance of a "prostitute being placed at the husband's table not sufficient to justify the wife's departure, so long as she could obtain support in his house.

If mere apprehension of violence were sufficient to authorize such a course, a fantastic woman might elope without any just cause of complaint, or upon fear of that degree of chastisement which the law allowed.

Then the alimony which had been decreed to the Defendant's wife had relation back to a period anterior to the plaintiff's claim; and if he could recover in this action, she would have the credit obtained against her husband, as well as her alimony.

With respect to the adultery, it might be that the husband upon receiving his wife again knew nothing of it, and in that case he would be discharged from any claim upon her subsequently quitting his roof.

Best, C. J. There is not the least pretence for this motion; the only ground on which a new trial can be asked for is a supposed mis-direction on my part. I told the jury that if they were of opinion the defendant's wife had reasonable ground to apprehend personal violence, she was justified in leaving her husband; that the man who received and supported her under such circumstances acted like a Christian, and in a Christian country was entitled to compensation. I am still of that opinion, and it is warranted even by the case of *Horwood v. Heffer*; for *Lawrence* J. says, "You did not state any apprehension of her personal safety;" from which it may be inferred that if evidence had been adduced of such apprehension, the decision of the court would have been the other way. But a woman is not bound to wait till actual violence is committed, and if she has reasonable ground for apprehending danger, may fly from the presence of her husband. It has been objected, that the establishment of this principle may lead fanciful women to quit their *130] homes without "sufficient reason." The apprehension, however, is not to be merely such as a fanciful woman may entertain, but such as a jury shall esteem to have been felt upon reasonable grounds. It was put to the jury in the present case, whether they thought the woman had reasonable ground for apprehending personal violence. The jury were warranted in concluding she apprehended a repetition of the violence offered to her the year preceding; and more horrid treatment no female had ever experienced. If I had recollect ed the cases decided by Lord *Ellenborough*, I should have decided, even *Nisi Prius*, against the case of *Horwood v. Heffer*. The doctrine in that case cannot be law. Is a decent woman to stay under the same roof with a prostitute? to sit at the same table with her? or to give place, and receive her meals in a separate apartment? The law can never require any woman to act contrary to decency:—If a wife remains in the house with

her husband and an adulteress, I doubt whether she could afterwards obtain a divorce for the adultery of her husband; her continuance in the house with her husband under such circumstances, might be considered as an assent to his conduct, and prejudice her case in the Spiritual Court.

As to the act of adultery which has been imputed in this case to the defendant's wife, it can be no defence to an action arising out of transactions subsequent to her return to, and reception by her husband. In order to render adultery on the part of the wife a defence for the husband in an action like the present, she ought to be repudiated at the time of the adultery, and not received again.

The alimony was not decreed till many months after the flight of the defendant's wife, so that she must have starved if the husband were not holden liable for her support in the mean time.

PARK, J. There is no ground whatever for interfering with this verdict. The direction to the jury was "perfectly correct, and the true question [*131] was, whether the conduct of the defendant was such as to occasion on the part of his wife a reasonable and strong apprehension of personal violence. From what had passed before, she had a reasonable ground for apprehending such violence, and the jury have drawn the proper conclusion. I am surprised at the language ascribed to the court in *Horwood v. Heffer*, because it is abhorrent from every feeling of a man and a Christian. It is not to be endured that the mistress of a house should confine herself to a chamber with bare necessaries, when a prostitute is sitting at the same table with her husband. That cannot be the law of *England*, because it is not the law of morality and religion.

BURROUGH, J. It is not necessary for us to consider the case of *Horwood v. Heffer*: the only question here is, whether there was evidence at the trial from which the jury might presume the wife had a reasonable ground to apprehend personal violence. I am of opinion there was enough to warrant this, and that the verdict ought not to be disturbed.

GASELEE, J. It is not necessary for us to enquire now what species of violence will justify a wife in leaving her husband's house, for it is impossible to doubt that the improperly confining her in a madhouse, is of itself a sufficient cause. It was for the jury to say whether or not a reasonable ground of apprehension existed, and they having found the fact, I do not feel myself called upon to give any opinion on the case of *Horwood v. Heffer*. I have always considered the law on this subject to be as laid down by Lord Kenyon, that if a man renders his house unfit for a modest woman to continue in it, she is authorised in going away.

Rule refused.



*ABBOTT v. RICE.

[*132]

Where an attorney, without a regular authority from the plaintiff, commenced an action of replevin, and the plaintiff, knowing of the proceedings, suffered the cause to be carried down to trial, but afterwards, concerting with the defendant, entered up satisfaction on the record without securing the attorney his costs, the court refused to vacate the entry of satisfaction.

THE plaintiff was the occupier of a farm which had been mortgaged to the defendant. There being also a subsequent mortgage of the same property, the defendant was appointed receiver of the rents. John Mills, who claimed under the second mortgage, and under a purchase of the equity of

redemption from the mortgagor, came to an account with the defendant, promised to pay him the amount of his claim on the property, caused his authority as receiver to be revoked, and gave the plaintiff notice to pay rent to him, *Mills*.

Mills having failed to discharge the defendant's claim, the defendant in August 1823 (having been for some time preceding in receipt of the rents,) distrained for an arrear which he had allowed to accumulate under the expectation that *Mills* would have discharged all the incumbrances on the property.

Mills and his attorney then sent for the plaintiff, and having, under a promise of indemnity, induced him to sign a replevin bond, which they themselves also executed as his sureties, commenced in the plaintiff's name, an action of replevin against the defendant.

The defendant upon applying to the plaintiff found that he was not aware of the nature of the instrument he had signed, and had no intention of prosecuting a replevin.

The plaintiff and defendant then concerted measures for terminating the proceedings, and obtained a judge's order for transferring the papers in the action from *Mills's* attorney to plaintiff's attorney, upon paying *Mills's* attorney his costs up to that time.

*These costs not having been paid, the order was rescinded, and *133] *Mills's* attorney having received no further notice from the plaintiff, proceeded to trial.

At the trial the defendant put in an admission by the plaintiff (signed just before the cause was called on,) that the plaintiff held the premises as tenant to the defendant; and the judge who presided having left it to the jury to decide whether or not this admission had been executed fraudulently and with a view to deprive *Mills's* attorney of his costs, the jury found a verdict for the plaintiff.

The plaintiff then, without communicating with *Mills's* attorney, caused an entry of satisfaction to be made on the record.

The foregoing facts appeared in affidavits made by *Mills* and his attorney on the one side, and the plaintiff and defendant on the other; the plaintiff, further, expressly denying that he had ever given *Mills's* attorney any authority to commence a suit; affirming that *Mills* and his attorney had omitted to give him any indemnity; that, therefore, he and the defendant had, without fraud, concerted measures to terminate the action as quickly as possible; the plaintiff never having had any intention to contest the defendant's title, and having told *Mills's* attorney's agent that he would not allow the proceeding.

Wilde, Serjt., having upon the affidavit of *Mills* and his attorney, obtained a rule nisi for vacating with costs the entry of satisfaction on the judgment roll, upon the ground that the plaintiff and defendant had colluded together to deprive *Mills's* attorney of costs to which he was fairly entitled,

Spankie, Serjt., now showed cause, and relied on the fact that *Mills's* attorney had never any authority for commencing the suit.

*134] *Wilde*, however, urged, that the suit must be deemed to have been carried on with the plaintiff's concurrence, inasmuch as it appeared that though he was fully aware of the proceedings, he never interfered to prevent *Mills's* attorney from carrying the cause down to trial. The case, therefore, fell within the principle of *Payne v. Rogers*, Doug. 407., and *Hickey v. Bart*, 7 Taunt. 48., and the court would interfere for the protection of its officer.

Best, C. J. Notwithstanding the case of *Payne v. Rogers*, which goes a long way, I doubt the power of the court to follow up the blow they are now called upon to strike; for if we were to set aside the entry of satisfaction, and execution were thereupon to issue, could we grant an attachment against

the plaintiff if he chose to discharge the goods in the hands of the sheriff? But the ground of my decision in the present instance, is, that if an attorney will sue for a tenant against his landlord, he ought to make it appear distinctly that he had authority for his proceeding, and that the tenant knew what he was about. This court should always require that, in a case like the present, the tenant should receive an indemnity on the one hand, and sign a contract in writing on the other, not to release the action, in which case, should he afterwards violate his engagement, he might be sued by the party aggrieved. If an attorney calls on the court to interfere summarily against an individual who has deprived him of his costs by entering satisfaction on record, he must make it distinctly appear that every thing has been rightly done. That does not appear in the present case; but as both parties are to blame, the rule must be

Discharged without costs.



*WEATHRELL v. HOWARD.

[*135]

Declaration for assault, battery, and tearing clothes.

Plea, that defendant was not guilty of the said supposed assaults in manner and form as the plaintiff complained:

Held, that the *modo et forma* included a denial of the battery and *laceravit*, as well as the assault.

THE plaintiff declared in trespass for an assault and battery with a tearing of clothes; the defendant pleaded that he was not guilty of the said supposed assaults in manner and form as the said plaintiff above thereof complained against him. At the trial at the last *Kent assizes*, it appearing that the defendant had only collared and shaken the plaintiff, the jury found a verdict with 20*s.* damages. Nothing was said about costs, nor did the judge certify that a battery had been proved.

The associate entered on the *postea* 20*s.* damages and 20*s.* costs, but under some misapprehension as to the supposed admission of a battery on the pleadings, he afterwards altered the 20*s.* costs, unto 40*s.*

Judgment for increased costs having thereupon been signed by the plaintiff,

Wilde, Serjt., last term obtained a rule *nisi* for setting aside so much of the payment as related to increased costs,—for restoring the indorsement in the *postea*,—and for the prothonotary to be at liberty to review his taxation of costs. He relied on *Meers v. Greenaway*, 1 H. Bl. 291, and *Lockwood v. Stannard*, 5 T. R. 482.

Vaughan, and *Lawes*, Serjts., who showed cause, contended that the plea only mentioning the *assaults*, there was an admission of the battery and *laceravit*, and that, therefore, a judge's certificate was not necessary to entitle the plaintiff to his increased costs, though the damages were under 40*s.* *Vide* 22 & 23, *Car. 2, c. 9.*

*For the defendant it was observed, that the battery and *laceravit* [*136] must have formed parcel of the assault, even in the estimation of the plaintiff, as he had joined issue on the plea, and had made no award of enquiry of damages for the *laceravit*.

The court were of opinion, that the plea denying the assault had been made in manner and form as alleged by the plaintiff, contained in substance a denial of the battery and *laceravit*. And they made the rule

Absolute.

SPOONER v. BREWSTER.

Though the freehold of the church-yard is in the parson, trespass lies for the erector of a tombstone against a person who wrongfully removes it from the church-yard and erases the inscription.

TRESPASS for seizing, cutting, damaging, and destroying divers tombstones and gravestones of the plaintiff, and with chisels and other instruments cutting out and erasing therefrom divers inscriptions, letters, and figures of the plaintiff, and taking and carrying away the same stones, and converting them to defendant's own use.

Plea, general issue.

At the trial before *Best*, C. J., *Middlesex* sittings, after last *Easter* term, it appeared that one *Gravenor*, had in 1815, married the daughter of the plaintiff, who having been convicted of purchasing government stores, was then undergoing sentence of transportation in *New South Wales*. Mrs. *Gravenor*, died in 1816, when the plaintiff being still abroad and under sentence, his wife erected and paid for a tombstone to her daughter in *Bethnal Green* church-yard, and some little time after caused to be inscribed upon the stone, [137] the words "The family grave of John and Sarah Spooner." In January, 1825, the defendant (by direction of *Gravenor*, who had paid for the grave) took up the tombstone, and immediately conveyed it to his workshop. While he was in the act of removing the stone he received a prohibition from the plaintiff, whose consent had been asked and refused; and after the stone had been removed from the church-yard, notice was given him by the plaintiff not to alter it; this notice he promised to observe, but subsequently said he was indemnified, and would alter it: he then obliterated the words "The family grave of John and Sarah Spooner," and added the record of the death of *Gravenor's* two children.

It was objected on the part of the defendant that the freehold of the church-yard being in the parson, the plaintiff could not maintain trespass for what the defendant had done.

A verdict, however, was found for the plaintiff, with leave for the defendant to move to enter a nonsuit instead.

Wilde, Serjt., who moved accordingly, cited in support of the objection urged on the trial *Com. Dig. Esglise*, G. 1, 2 Roll. Abr. 337, *Corven's case*, 12 Rep. 105, *Frances v. Ley*, Cro. Jack. 367, and *Com. Dig. action on the case for misfeasance*, A. 8, to show that the remedy was by case and not by trespass, even where the parson had improperly removed ornaments placed in the church in honor of persons interred there. In *Godbolt*, 200, where it was said trespass would lie against the parson under such circumstances, a reference was made to the year book, which did not warrant the position. [Best, C. J. In *Dawtric v. Dee*, 2 Roll. Rep. 140. Palm. 46, it was holden that the owner of a pew might maintain trespass for breaking it. But in the present case the erasure seems to have been a distinct act of trespass *after the removal of the stone:] That will not assist the plaintiff, for the taking up, the removal, and the erasure constituted one continued act, and the property and possession of the tombstone never reverted to the plaintiff. In the severance by a thief of things fixed to the freehold, the thing severed is not deemed a chattel so as to render the taking of it felonious, unless an interval elapse between the severance and removal.

The court took time to consider, and now

Best, C. J., said,† There is no doubt that *some* action may be maintained for the injury of which the plaintiff complains. Lord *Coke*, says, the parson

† The reporter was absent when this judgment was delivered, and is indebted for it to a gentleman at the bar.

in such a case "is subject to an action to the heir;" Co. Litt. 18 b. but this passage does not state what form of action is to be adopted. The observance of forms is indeed material for the purposes of justice, but upon consideration we are all of opinion that the form which has been chosen in the present instance is right. There are many authorities which show that the heir may maintain an action in cases of this kind: so also the owner of a pew for violations of the right to enjoy it. In general that right is conferred by the ordinary, and case is the remedy for a mere obstruction; but in *Davotrie v. Dee*, it is said, if the pew itself which the party has put up, be broken, trespass lies. That case has, I understand, been somewhere doubted, but I think it consistent with law and good sense, and it agrees with the decisions in 9 Ed. 4, 14, 8. In *Moore*, 878, Lady *Grey's* case is cited, and trespass said to be the proper form.

In a case like the present, where it is clear some action is maintainable, one instance is sufficient to decide the form. As to the cases of felony the distinctions *in favorem vitæ* are exceedingly nice, but even in those *cases [**139] a slight interval between severance and removal, will make the thing removed a chattel. The defendant here subsequently to the removal of the stone, was cautioned not to obliterate the inscription, and he promised to abstain from doing so; but afterwards, saying he was indemnified, effected the erasure complained of. It has been urged that the freehold of the church-yard is in the parson; that is undoubtedly true, but even he has no right to remove the tombstones, the property of which remains in the persons who erected them.

The rest of the court concurring, the rule was

Refused.

(IN THE EXCHEQUER CHAMBER.)

WILLIAMS, et al., v. BARTON, et al.

A. and *B.* having, by their brokers, purchased cottons, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of *A.* Immediately after the purchase, *B.* paid *A.* one-half the value. When considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased, and upon directions from *A.* and *B.*, divided the goods held on their joint account, by appropriating specific warrants to each party; *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers; as a security for which, the whole of the warrants were deposited with *C.* by the brokers.

Before the bills became due, the brokers were directed by *A.* to get one-half renewed. *C.* having discounted fresh bills for this purpose, the brokers who had obtained the warrants from *C.* for the purpose of dividing them and returning him one-half, left in the hands of *C.* as a security, the warrants belonging to *B.*, *C.* not knowing that *B.* had any interest in them:

Held, that *B.* might recover from *C.* in respect of the goods thus pledged to him by *A.*

ERROR from K. B. The plaintiffs below had sued in *trotter* to recover from the defendants below the value of certain *East India* warrants for the delivery of "a quantity of cotton, and certain quantities of cotton stated in the declaration. At the trial before Abbott, C. J., at the London sit. [**140]

tinga, a verdict was found for the plaintiffs below, damages 7337*l.* subject to the opinion of the court in the following case :

In the year 1818, *John Moon*, who then carried on business at *Manchester*, as a cotton merchant, under the firm of *J. Moon & Son*, having agreed with the plaintiffs below (who also carry on business at *Manchester*), to make a purchase on joint account with them of cottons, gave directions to his brokers, *Hunt & Sharp*, of *London*, to purchase, at the *East India Company's* sales, cotton to a considerable amount, on the account of *J. Moon*. *Hunt & Sharp*, accordingly purchased, at several sales between the months of *January*, and *June*, in that year, cotton to the amount of 20,000*l.*, and obtained orders for the delivery of it, commonly called *East India warrants*, which were made out in the name of *Hunt*, as the broker employed at the sale, and were left in the possession of *Hunt & Sharp*, as the brokers of the said *John Moon*. The plaintiffs below, immediately after the purchases, paid *Moon & Co.*, one-half of the value of the cottons. *Hunt & Sharp*, knew that *Moon & Co.*, were occasionally in the habit of making purchases on joint account, but at the time of making the first purchases in question, had no knowledge that the plaintiffs below were in any way concerned. When half the purchases were completed, they were apprised that the plaintiffs below had some interest in the purchases in question. It was subsequently agreed between the plaintiffs below and *J. Moon*, that the cottons should be divided; and accordingly, in *February*, 1819, written directions were given by the plaintiffs below, to *Hunt & Sharp*, to make divisions of the cottons held by them on the joint account of *Moon*, and [the plaintiffs below; and they having received similar directions from *Moon & Co.*, proceeded to make the division, by specifying, in separate columns, the warrants which were respectively appropriated to the plaintiffs below, and *Moon & Co.*; and on the 20th of *February*, 1819, they communicated such division to both parties, and received their approbation of the same. At the latter end of *November*, 1818, *Moon*, directed *Hunt & Sharp*, to procure him a loan of from 20,000*l.* to 25,000*l.* on the security of the *East India warrants*, then in their possession: they informed the defendants below, of the request of *John Moon*, and applied to them to discount acceptances of them, *Hunt & Sharp*, on bills drawn by *Moon & Co.* upon the security of the whole of the warrants: this the defendants below agreed to do; and, accordingly, eight bills, payable at three months after date, were drawn by *J. Moon & Son*, upon, and accepted by *Hunt & Sharp*, falling due respectively, 27th of *February*, 1st of *March*, 3d of *March*, and 4th and 5th of *March*, all of which were duly paid at maturity. These bills were discounted by the defendants below, in the beginning of *December*, 1818; and at the time of receiving the money from the defendants below, and as a security for the payment of the bills, *Hunt & Sharp*, deposited with the defendants below, the whole of the warrants.

On the 23d of *February*, *Hunt & Sharp* received from *Moon & Co.* the following directions, contained in a letter, dated the 15th of *February*, 1819: "Half the amount from *Williams's* is all I would wish, or even nothing, if you can force off every bale of cotton I have in *London*. Cash in time. If half should be done by *Williams* and *Co.* Mr. *B.'s* warrants might remain." An application was, in consequence, made by *Hunt & Sharp* to the defendants below to renew 10,000*l.* of the amount of the original bills, which the defendants below agreed to do, by "discounting other bills, similar to the former [142] on a sufficient number of the warrants to cover them to that amount being left as a security for such renewal. *Hunt & Sharp* did not at any time previous to such renewal communicate to the defendants below that any alteration had taken place in the property, or that the plaintiffs below had any concern in it. On the 2d of *March*, *Sharp*, of the firm of *Hunt & Sharp*, received the warrants from the defendants below, for the express purpose of dividing them, so as to take 10,000*l.* worth of them away, and to return 10,000*l.* worth to the

defendants below, to remain as a security for the renewed bills : he took them to his counting-house for the purpose of making such separation ; and having made it, returned to the defendants below the warrants belonging to the plaintiffs below, retaining those which had been appropriated to *Moon & Son* : in so doing he acted by the direction of *Moon & Son*, but without any communication with or authority from the plaintiffs below. The defendants below discounted two bills of 2490*l.* 8*s.* and 2569*l.* 12*s.* respectively, drawn as before, by *Moon & Son*, upon, and accepted by *Hunt & Sharp*, on the 2d of *March* ; and two other bills of 2496*l.* 15*s.* and 2564*l.* 15*s.* on the 11th of *March* ; which four bills amounted to 10,121*l.*, and which were dishonored when they became due. The defendants below sold the cottons in question for 7337*l.*

The question for the opinion of the court below was, whether the plaintiffs below were, under the circumstances, entitled to maintain the action of trover. Upon this question they gave judgment for the plaintiffs below, 5 B. & A. 395, in *Hilary* term, 1822, when the special case having been turned into a special verdict, a writ of error was brought into this court.

**Tindal*, for the plaintiffs in error. First, the plaintiffs in error had a lien upon the whole of the warrants, or, at all events, upon an undivided moiety of them to the extent of the bills last accepted ; secondly, they were tenants in common with the defendants in error of the whole of the warrants, and therefore were not liable to be sued in trover. The question is a question of strict law, neither of the present parties being to blame. [*143]

The defendants in error were either sub-contractors with *Moon* or partners with him in this transaction ; and, in either case, the pledge made by *Moon* is binding on them. If they were sub-contractors, the property of the cottons was in *Moon*, and he had a right to dispose of them, as in *Savile v. Robertson*, 4 T. R. 720, where, although goods were purchased for a specific purpose, yet the supercargo, who alone appeared in the transaction, was considered solely interested. And in *Young v. Hunter*, 4 Taunt. 582, where one person purchased goods, and another was afterwards permitted to share in the adventure, it was helden the vendor could not recover the price of the goods against the person so subsequently taking a share. *Gibbs*, J., said, "If parties agree amongst themselves that one house shall purchase goods, and let another into an interest in them, that other being unknown to the vendor, in such a case the vendor could not recover against him, although such other person would have the benefit of the goods." If, however, the defendants in error had a joint interest with *Moon*, his authority to pledge the whole was indisputable, and no distinction can be made in this respect between general partners, and partners for an individual transaction. *Raba v. Ryland*, Gow's N. P. C. 132, *Ex parte Gellar*, 1 Rose, 297.

But, secondly, after the pledge by *Moon*, the plaintiffs *in error became tenants in common of the warrants with the defendants in error, [*144] at all events as to a moiety, and therefore were not liable to be sued in trover by their co tenants, unless there had been a destruction of the property. *Co. Lit.* 200, *Heath v. Hubbard*, 4 East, 110.

The division of the warrants made by *Sharp* occasions no alteration in the case, for in effecting that division he acted as the agent of the plaintiffs in error, who having a lien on the whole of the warrants, might, if they pleased, have made the division in their own counting-house.

Pollock, for the defendants in error.

The original purchase was made on the joint account of the defendants in error and *Moon*. The defendants in error, therefore, were not sub-contractors with *Moon*, and the cases of *Young v. Hunter* and *Savile v. Robertson* do not apply. Then, after the division of the warrants by *Sharp*, there was no longer any community of interest between the defendants in error and *Moon*, but the defendants in error were separately entitled to their moiety, which *Moon* had no authority to pledge, and in which, therefore, under his pledge

the plaintiffs in error could not acquire any property. The defendants in error might, therefore, maintain trover against the plaintiffs in error; for even supposing the division by *Sharp* did not effect a separation of the property of the defendants in error from the property of *Moon*, still the pawnee of a pledge does not become tenant in common with others who have an interest in the pledge as well as the pawnier. A tenant in common would have the rights of an absolute owner, whereas a pawnee has only a lien on the property and cannot sell. It is laid down in *Conyn's Digest* (*tit. Action on the Case upon Trover, E*) that if a bailee sells the goods of another, the very act of sale is such a conversion as to enable the owner to maintain trover.

BEST, C. J. The counsel for the plaintiff in error has reminded us that we are called on to decide a question of strict law. I feel that this is our situation, and on this account *only*, I give the judgment that *I shall* give in this case.

Had I authority to alter the law, as the mode of carrying on commerce has altered, I would say that, when the owner of property conceals himself, whoever can prove a good title under the person whom the concealed owner permits to hold it, should retain that property against the owner:—but this is not yet the law of *England*. Possession is not proof of property. Our ancestors kept their goods in their own possession. If agents were employed by them to deal with their property, they did not keep themselves out of view, and the extent of the authority of the agent was so well known, that no one dealing with these agents could be imposed upon. But as little credit was given, and as men could not trade beyond their capital, they were seldom reduced to the necessity of pledging their stock in trade. The sales of merchandise were made in market overt, and if the buyers conducted themselves honestly, the law protected them from suffering by purchasing in market overt property that did not belong to the person of whom they bought. This exception in our law proves that if a person acquires the possession of property in any mode, other than that of sale in market overt, he cannot keep it against the owner; it proves at the same time, that, as commerce is now carried on, the purchaser or pawnee should have the same protection against him who permits another to deal with his property, as if it were his own. But a small proportion of the merchandise that is now brought to sale, is sold in market overt. The law relative to sales in market overt, affords, therefore, but little protection to those who are engaged in commerce.

The owners of goods for many reasons keep themselves concealed, and put forward brokers to act for unknown principals. If such brokers abuse their trust, those who have trusted them should suffer: but it is for the legislature, and not the courts of justice, to adapt the law to this new state of things. As the law now stands, if the pawnier of goods has no authority to make the pledge, the pawnee cannot hold them against the owner. What then is the present case? The goods had been originally purchased by *Hunt & Sharp* on the joint account of *Moon & Barton's*; whilst *Moon* and the *Bartons* were tenants in common of those goods, they were pledged by *Hunt & Sharp* to the plaintiffs in error for 20,000*l.* for *Moon* only, unknown to the *Bartons*. If the *Bartons* had brought their action to recover their share of the goods, whilst they remained under this first pledge, they might probably have been told they were only tenants in common, and could not support the action against persons who held under their co-tenants. It would also have been necessary to consider the effect of the cases to which we have been referred, and which seem to show that one part owner of a joint adventure may bind the property of the others concerned. But 10,000*l.* of the original debt was paid off, and it was agreed between *Hunt* and the defendants below that they should renew those acceptances for the 10,000*l.* remaining unpaid; that they should give back the whole of the warrants to *Hunt*, and allow him to select

from them such as he thought proper to pledge for the 10,000*l.* The defendants below parted with their lien on the whole of the warrants, and gave *Hunt* leave to say which he would select to repledge for this reduced debt. Before this happened the goods had been divided, and one moiety was the sole property of *Moon*, and the other moiety the sole property [^{*147} of *Moon*. When *Hunt* got back these warrants, he held those that related to the *Bartons*, share for them, and those which related to *Moon's* share for him. Neither *Moon* nor *Hunt* could then pledge the *Bartons'* warrants without their assent. *Hunt* was then bound to use the right of selection, which the defendants below had given him, as honesty required; that is, by carrying back *Moon's* warrants to the defendants below, and keeping the *Bartons'* for them. The defendants below having parted with the lien on the whole, could only require such part to be brought back as *Moon* had a right to pledge. Instead of which, under the authority of *Moon*, and of *Moon* only, *Hunt* pledged those warrants with which *Moon* had now no more to do, than one who never had any interest in them.

It has been contended at the bar that none of the warrants were out of the possession of the defendants below, for the possession of *Hunt* was the possession of the defendants below, and that he was to sort the warrants for them. We cannot consider *Hunt* as the agent of the defendants below, but of *Moon*; and, therefore, when they were in *Hunt's* hands, they were, in law as well as in fact, out of the possession of the defendants below. *Moon* had certainly contracted to repledge, not the whole, but enough to serve the new loan of 10,000*l.*, and he is answerable to the defendants below in damages for the non-performance of that contract; but after the defendants below had given the possession of the warrants to *Hunt*, with authority to *Hunt* to return such as he pleased, they had no legal means of getting any of these warrants in specie. They were then in *Hunt's* hands as agent of the *Bartons*, and he could not part with them again without their assent. We consider that the first pledge was given up entirely, and a new contract [^{*148} made by the second transaction. We are all, therefore, of opinion that the Judgment of the King's Bench must be affirmed.

Judgment affirmed.



RATCLIFFE v. BLEASBY.

The defendant, after settling a draft of articles of partnership with the plaintiff, having engrossed and executed a deed, differing in some respects from the draft of the articles, the plaintiff refused to execute the deed; but having afterwards commenced an action for breach of agreement to take him into partnership, he moved to be at liberty to inspect and copy the deed. The court refused to order such inspection.

An affidavit of the plaintiff's attorney stated, that this action was brought to recover a compensation in damages, for breach of an agreement to take the plaintiff into partnership; that a draft of the articles of co-partnership was prepared by the defendant's attorneys, perused and settled by the plaintiff, and returned by him to the defendant's attorneys; that an engrossment of a deed of co-partnership between the plaintiff and defendant was made, signed, and executed by the defendant, and retained in his possession; that the plaintiff had no copy of the draft or deed, and that the defendant had refused to furnish copies at the plaintiff's expense.

Cross, Serjt., upon this affidavit, and upon an opinion pronounced by him at the requisition of the court, that a copy of these instruments was necessary

to enable the plaintiff to declare safely, obtained in the last term a rule *nisi* for the plaintiff to be at liberty to inspect and take a copy of the above mentioned draft and deed.

Wilde, Serjt., (upon an affidavit which stated that the deed executed by the defendant differed in some respects from the draft settled by the plaintiff *149] and that the plaintiff had, therefore, refused to execute the deed) *now showed cause against the rule. He urged, that in all the decisions the principle on which the indulgence now asked by the plaintiff had been granted, was, that the party holding the instrument was a trustee for the party requiring a copy; that this could not be the case with a party holding instruments, neither of which had been signed by the plaintiff; and upon which, therefore, he could have no cause of action.

Cross. The draft assented to by both parties is their agreement, though not signed. *Murrow v. Saunders*, 1 B. & B. 318, is a decision expressly in favor of the present application, the only difference between the two cases being, that in that case the plaintiff retained a deed which had been signed and was called for by the defendant; in the present the defendant has signed and retained a deed called for by the plaintiff. In *Clifford v. Taylor*, 1 Taunt. 167, *Blakey v. Porter*, Id. 386, *Bateman v. Phillips* 4 Taunt. 157, and *King v. King* 4 Taunt 686, the court has recognised the convenience of this practice, and its own jurisdiction to pursue it. That jurisdiction enables them to compel parties to a suit to do justice. How far the engrossed instrument may be binding on the Defendant is a matter to be ascertained at the trial of the cause, and not summarily upon motion; but if he be refused a sight of it, he may be nonsuited, and prevented from entering into the merits of his case.

Best, C. J., I agree with the observations which were made from time to time by *Mansfield, C. J.*, that it is fit for the courts of law, as far as possible, to save its suitors from the expense of resorting to a court of equity, in order to establish a common law right. If, however, the law compels them to *150] proceed in that course, "we have not authority to alter it; and the only question for us to decide at present, is, whether we are warranted, by any rule of practice established in this court, to do what is now required of us." But as to the *deed*, we should go farther than the court has ever yet gone, if we acceded to the present application; for though the deed has been signed by the defendant, the plaintiff has refused to sign it, and thereby has repudiated all interest in the instrument: having done this, he cannot call on the court to order an inspection; for the principle established by all the cases is, that a party can only be compelled to produce a deed where he holds it as a trustee for another. In *Bateman v. Phillips*, indeed, the party applying was not a party to the instrument, but it was given to the party who held it, to allay the apprehensions, and afford a kind of security to the creditors of a bank on which there had been a run. By that instrument the holder, *Bowling*, was authorised to assure the inhabitants of *Pembroke* that the subscribers to it would be accountable for the payment of notes issued by the *Milford* bank to the extent of 30,000*l.* The authority in writing, therefore, given to *Bowling*, was for the advantage of the plaintiff who was a creditor, as well as the other creditors; and *Mansfield, C. J.*, says, "This rule is called for on the ground that the plaintiffs are interested in the paper, and that is the only ground on which they can support their application. On the declaration the plaintiffs state, that, at the time of giving the guarantee, they held some notes, and in consequence of it became possessed of others." He, therefore, puts it upon the ground that the party who held it held it as trustee for the others: he then goes on, "This paper is certainly not of a public nature, like corporation books or records, but it is a paper in which the plaintiffs are interested. In the case of *Osborne v. Taylor*, in the court

of King's Bench, it seems "admitted, that if the party had been interested he might have had the production of the instrument." [*151]

So in the present case, if the plaintiff had any interest the defendant would not be permitted to withhold the deed. *Morrow v. Saunders* is clearly distinguishable from the present case, because the deed was required by the party who had executed it at the hands of the party who had not. It is just the converse of this case, in which, if the plaintiff had executed the deed instead of the defendant, there might have been some ground for the application. In *Blakey v. Porter, Mansfield*, C. J., puts his decision on the same footing as in *Bateman v. Phillips*. "Of what use would the defendant's covenant be, if the plaintiff could not get access to it? Parties, in order to save the expense of double stamps, are unwisely content to execute one part only of an indenture. Is it not, however, the necessary consequence of this practice that the party who has the custody undertakes to produce the deed when wanted for the use of both?"

He puts it on the principle of an implied undertaking that the party who has the deed holds it as a trustee for both. That case, however, has nothing in common with the present, but the opinion of *Gibbs*, C. J., in *Street v. Brown*, 6 Taunt. 302, is conclusive: there, two parts of a charter-party were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody, was lost at sea with the ship, but the court would not compel the charterer to grant an inspection and copy of the other part, for the purpose of the plaintiffs declaring with certainty; and the ground on which the Chief Justice decides is, "The one party executes a deed, by which he binds himself, and the other executes a deed by which he binds himself, and the one having lost his part, calls on the [152] other to produce his: it is like the case where a man having given a bond and kept a copy of it, the other losing the bond applies for a copy of the copy:—we should not grant that."

In the course of his judgment he has commented on all the cases, and has declared the principle on which inspection is ordered, to be, that the party holding the instrument is considered a trustee for the party applying. How can that be affirmed in the present case? It has been urged, indeed, that, by the production of the deed at the trial, the plaintiff may be nonsuited; but if we were to act on that consideration, we might on motion order something like a bill of discovery in every case. In ejectment, the lessor of the plaintiff is always liable to be nonsuited by the production of deeds which may disclose a title better than his own; but in order to obtain a sight of them, he must apply to a court of equity. In the present case, however, one of the instruments, the draft of the articles of co-partnership, appears to have been at one time agreed on by both parties; as to that, the defendant stands in the situation of a trustee for the plaintiff, and the rule for its production must be made absolute.

PARK, J., The principle on which these applications have been granted is, that the party holding the deed has been a trustee for the party requiring a sight of it; but the defendant in this case cannot be esteemed a trustee for the plaintiff, as to a deed which the plaintiff refused to execute. The principle laid down by the Court of King's Bench in *Taylor v. Osborne* is, that the application will not be attended to where the party applying is neither an instrumental party, nor has any interest in the deed; and that seems the more expedient rule; *Street v. Brown* seems to trench closely upon **Taylor v. Osborne*, and to be a case of some hardship; but our jurisdiction ought to be exercised consistently with the rule of law, and not to infringe upon the province of equity. *Morrow v. Saunders* is quite consistent with what we now decide, for in that case the deed was executed by the party who applied for its production. The draft of the articles in the

present case is, however, an instrument in which both parties have an interest, and as to that the rule must be made absolute.

BURROUGH, J. Upon the affidavits now before us, the deed required can be of no avail to the plaintiff, and inspection has only been allowed of what the party would probably give some evidence. This deed has been repudiated by the plaintiff, and amounts to nothing. Where both parties have an interest in the same deed, I hope we should come to the good sense of the thing, and order an inspection, without driving them into a court of equity; but even equity would not compel the production of a title deed, in which both parties litigant have not an interest.

GASELEE, J. I cannot accede to the position that this court has jurisdiction in all cases to compel parties to do what is requisite for the purposes of justice. But when a party has an interest in a deed he has a right to inspect it, as the creditors, in the case of *Bateman v. Phillips*; the plaintiff however has no interest in this deed of which he requires the inspection. In the draft of the articles he may have an interest, because that was settled by both parties, as the foundation of a mutual agreement. But the plaintiff having refused to execute the deed, it can neither be necessary to enable him to declare, nor can he have any right to call for its production. The rule, therefore, must be made

Absolute as to the draft of the articles only, and discharged as to
the deed.



[*154 *DAVIES, et al., v. ARNOTT, HASKINS, and SHEPPARD.

Obligors in a bastardy bond discharged under the insolvent debtor's act subsequently to a judgment on the bond, are liable for expenses incurred in respect of the bastard subsequently to their discharge.

SCIRE FACIAS on a judgment in an action on a bastardy bond, the condition of which was to indemnify the parish of *Christ Church*, against all charges and expenses which might be imposed on them for the birth, maintenance, clothing, educating, or bringing up a bastard child, of which *Arnott*, was the reputed father. The *scire facias* suggested that since the time of the plaintiff's recovery upon breaches of the condition of this bond formerly assigned, the defendants had again broken the condition, by allowing the parish to incur further expense in respect of *Arnott's* child.

The defendant *Haskins* pleaded, that since the recovery of the said judgment, and after the occurring of the subsequent breach of condition, and before suing out the *scire facias*, by an order of the court for the relief of insolvent debtors, *Haskins*, was discharged from the said further breach, and the damages thereby sustained by the parish since the said judgment.

Defendant *Sheppard*, pleaded that he was in custody in the *Fleet*, in *July*, 1824; that the causes of action, if any, accrued against him before he was so in custody; that afterwards, by an order of the court of insolvent debtors, he was duly discharged according to the act of Parliament, and thereby discharged from the said causes of action, if any.

The plaintiffs replied, as to *Haskins*, that the further breach suggested in the *scire facias* was committed after the making of the order of the insolvent debtor's court, and that by such order *Haskins*, was not discharged from [*155] *the said further breach, and the damages thereby sustained by the parish.

And as to *Sheppard*, that the further breach was committed, and the damages thereby occasioned were sustained by the parish, after the making of the order of the insolvent debtor's court, and that by such order *Sheppard*, was not discharged from the said further breach, and the damages thereby sustained by the parish.

These replications concluded to the country, and the defendants having joined issue, the cause was tried before *Best*, C. J., at the London sittings, after *Easter* term last, when it was proved that the parish had paid sums on account of *Arnott's* child, from April, 1824, to March, 1825, but that *Haskins* and *Sheppard*, having included in their respective schedules the bond and judgment on which the present *scire facias* was brought, were discharged by the court for the relief of insolvent debtors, in October, 1824, and a verdict was taken for the plaintiffs for such damages only as had accrued since that period, with leave for *Haskins* and *Sheppard*, to move to set aside the verdict, and enter it in favor of themselves.

Onslow, Serjt., for the defendant *Sheppard*, and *Wilde*, Serjt., for the defendant *Haskins*, having obtained rules *nisi* accordingly, on the ground that by the discharge under the insolvent debtor's act, they were released from all further claims in respect of the bond,

Taddy, and *Pell*, Serjts., showed cause.

By 1 G. 4, c. 119, s. 10, the bond creditors of an insolvent are to be entitled to receive a dividend of the estate of the prisoner in such manner and upon such terms and conditions as if the prisoner had become bankrupt. Now in bankruptcy the just and true debt alone can be proved, and not the penalty of a bond, *21 Jac. 1, c. 16, s. 9.; and the bankrupt is only discharged from such debts as are capable of proof under the commission. But the future expenses which may be incurred by a parish in maintaining a bastard are altogether contingent, cannot be the subject of valuation or proof; nor can the bankrupt be discharged from them by his certificate. *Overseers of St. Martin's v. Warren*, 1 B. & A. 491. A bond given by the putative father and his sureties, or even a promissory note, *Cole v. Gower*, 6 East, 111, are no more than a security or indemnity against future debt, and every expense incurred after certificate is a new debt, and a new cause of action. Previously to the 49 G. 3, an annuity could not be proved unless it were secured by a bond with a penalty; and, even in that case, the penalty was not the subject of proof, but only the value of the annuity, provided it did not exceed the penalty. But a mere engagement for indemnity, where no damnification had been incurred, could never be proved. *Millen v. Whittenborough*, 1 Camp. 428, *Goddard v. Vanderheyden*, 3 Wils. 270. And even if the contingency on a bastardy bond could be valued like the future payments of an annuity, it is contrary to the policy of the law to allow any proof or anticipative payment in respect of it, lest the parish-officers, having received such payment in advance, should thereby have an interest to neglect the child. *Cole v. Gower*. The judgment which has been obtained in this case is only for damages up to the time of the action, and under the 8 & 9 W. 3, c. 11, does not constitute a debt, but, like the bond itself, stands only as a security against future expenses. Then by the 28th section of 1 G. 4, c. 119, the insolvent's discharge is not to apply to any judgment which cannot be put in force at the time of the discharge; and *in respect of half the expenses claimed under the present *scire facias*, the judgment on the bond could not have been put in force at the time of the insolvent's discharge.

Onslow, and *Wilde*, in support of the rule,

The causes of action upon this *scire facias* did not arise subsequently to the judgment; for the judgment is the cause of action, *Executors of Wright v. Nutt*, 1 T. R. 388, and the *scire facias* is no more than a continuation of the suit. With regard to proof of debts under a bankruptcy, although con-

tingent damages are not provable in respect of a covenant, yet a penalty may be the subject of proof, *Ex parte Mare*, 8 Ves. 335, and before the 49 G. 3, an annuity could only be proved in virtue of the penalty of the bond under which it was secured. In all the cases the forfeiture of the bond is the ground of proof. *Toussaint v. Martinant*, 2 T. R. 100. The future expenses attending the maintenance of the child are not more a matter of contingency than the future payments of an annuity, and are equally susceptible of valuation. There are many contingent claims, which may be the subject of proof under a bankruptcy, as in *Ex parte Rowlett*, 2 Rose, 416, where the engagement was to pay 200*l.* a year till the party obtained church preferment; and the proof may go to the whole, although the forfeiture has only been in respect of a part of the contingency. *Ex parte Winchester*, 1 Atk. 117, *Ex parte Cockshot*, Cooke's Bkpt. Laws, 163. [Best, C. J. In all those cases there was a debt, a saleable debt; can a mere bond of indemnity, in a case like this, be sold?] A bail bond is not a security for a debt, but for the defendant's appearance, and yet if it be forfeited before bankruptcy, it is discharged by the certificate. *Coulson v. Hammon*, 2 B. & C. 626. So where the forfeiture is before bankruptcy, proof may be admitted in respect of a payment to be made afterwards. *Hodson v. Bell*, 7 T. R. 97, *Ex parte King*, 8 Ves. 334. In the case of the overseers of *St. Martin's v. Warren*, no judgment had been obtained upon the bond, so that the cause of action was clearly new; and in *Cole v. Gower*, the overseers had stipulated to receive a particular sum instead of an indemnity, which stipulation the court held to be illegal; but it was, notwithstanding, holden allowable for them to receive such a sum on a motion to stay proceedings on a bastardy bond, on payment of the penalty. *Shuttle v. Proctor*, 2 Marsh. 226. As to the statute of 8 & 9 W. 3, c. 11., that does not prevent the judgment from being, like every other judgment, a fixed and proveable debt, but only regulates the time and mode of execution. In the 26th clause of the 1 G. 4, c. 119, the causes for which the insolvent may be imprisoned anew, are enumerated; a claim like that on the present bond is not among them, and in a decision on a similar act, was holden not to be sustainable. *Cotterel v. Hook*, 1 Doug. 97.

Best, C. J. Even if we could have been satisfied that the defendants would have been discharged by bankruptcy and certificate, that would have fallen far short of proving that they were discharged under the provisions of the insolvent debtor's act, for in the present case we must look to that act only, and if that does not exonerate the defendants from every claim in respect of their bond, the bankrupt laws cannot avail them. But it is not clear that they could have been discharged, *even by bankruptcy and certificate. According to the principle established, in *Cole v. Gower*, the claim for future contingent expenses in respect of such a bond, could not be proveable under the commission, and if it be not proveable, the bankrupt cannot be discharged from it by certificate. Lord *Ellenborough* says, public policy requires that the parish officers should not be allowed to take a specific sum in respect of such a claim, because they would thereby have an interest to neglect the child for whom it was paid. They have, therefore, no certain or saleable property in such a claim. But in all the cases in which an interest, though contingent, has been allowed to be proved under a commission of bankruptcy, that interest has been a saleable interest, which distinguishes it at once from the present claim. The case, therefore, of the overseers of *St. Martin's v. Warren*, is in point for the defendant. In that case, the obligee, in a bastardy bond, after the bond had been forfeited, became bankrupt and obtained his certificate; and it was holden that the parish officers were not thereby precluded from recovering on the bond further expenses incurred subsequently to the bankruptcy: the court said, "This was a debt upon a contingency, and one too in its nature wholly incapable of valuation, and therefore, not proveable under the commission. The case of an annuity is an

exception to the general rule: there, indeed, the courts have admitted the amount of the contingent debt to be valued and proved: but there you can only estimate the duration of life; here, the expenses for which the party is liable may vary in consequence of the sickness of the child; the contingency here is, not only the duration of life, but the continuance of health; it is subjected to every accident of human life, and is most precarious and uncertain; how then could its value be estimated so as to be proved under a commission?"

"If, therefore, the present had been a case of bankruptcy, that decision would not have been distinguishable. But independently of any principle of the bankrupt laws, the words of the insolvent debtor's act of themselves decide the case. This is a bond for the payment of uncertain damages; for the liquidation of a future account; and as such, is within the statute of 8 & 9 W. 3. c. 11. s. 8. Now what is the situation of the obligor under that statute, after judgment has been entered up on his bond for damages incurred by antecedent breaches of condition? Is there any debt created in respect of future contingent damages? No, but merely a security in case they accrue. The judgment has an effect with respect to such damages, but its only effect is that of being a lien on the obligor's real property from the time of signature. "In case the defendant after judgment and before execution shall pay into court the damages assessed and costs, a stay of execution shall be entered, or if by reason of an execution, the plaintiff should be fully paid, the defendant's body, lands, or goods shall be thereupon forthwith discharged, but the judgment shall, notwithstanding, remain as a further security to answer the plaintiff for such damages as he may sustain by any further breach contained in the same deed, upon which plaintiff may have a *scire facias* upon the said judgment against the defendant, suggesting other breaches." The plaintiff cannot sue for the penalty, even in the first instance, but only for the damages he has actually sustained, and when they have been satisfied, he can issue no execution till he suggests that fresh damages have subsequently occurred. How does the insolvent act 1 G. 4. c. 119. apply to this? by the 28th section it is "provided, that it shall be lawful to proceed against the prisoner discharged, upon any judgment, recognizance, or other security obtained or given, which could not have been put in force against such prisoner at the time of his obtaining such discharge, "anything in that act contained to the contrary notwithstanding." It is clear that at the time of the insolvents' discharge, the judgment could not have been put in force, for the expenses which have subsequently accrued. Therefore, coupling this proviso with the 8th section of the 8 & 9 W. 3. c. 11. the defendants are clearly liable on this *scire facias*.

The 28th section has no application to the present case, and the decision in *Douglass* to which we have been referred proceeded on a statute which did not contain any provision similar to that in the 28th section of 1 G. 4. c. 119.

That section overrides the whole act, and the prisoner can claim no exemption from a judgment, unless it is one that could have been put in force at the time of his discharge. My opinion proceeds on this provision of the statute; and without any reference to the bankrupt laws, the rule which has been obtained in behalf of the defendants must be discharged.

PARK, J. The only question is, whether coupling the statute 8 & 9 W. 3. with the insolvent debtor's act, the defendants are discharged. This case clearly falls within the statute of W. 3., and the provision in the 28th section of the insolvent debtor's act is conclusive. Could the judgment on which this *scire facias* proceeds have been put in force at the time of the prisoner's discharge? unquestionably not. The principle established in *Cole v. Gover* was recognised in *Staniforth v. Stagg* before *Lawrence*, J., at *Nisi Prius* on

the northern circuit, and his decision was afterwards confirmed upon a motion in the Court of King's Bench. *Shuttle v. Proctor* did not overrule *Cole v. Gower*, and is clearly distinguishable.

BURROUGH and GASELEE, Js., concurring, the rule was

Discharged.

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*COMBE et al v. CUTTILL.

In C. B., provided there be fifteen days between the *tests* of the first and the return of the second, a second writ of *scire facias* may be tested and issued before the *quarto die post* of the return of the first.

Sunday may be reckoned as a day in one of the four days which must elapse between the return of the second writ and signing judgment.

WILDE, Serjt., moved to set aside two writs of *scire facias* which had been issued against *Moate*, one of the bail in this cause, together with a *fieri facias* which succeeded them, upon the ground, among other objections, that though *Moate* was constantly resident, and might have been found within the bailiwick of the sheriff of *Middlesex*, from the time the first *scire facias* was sued out to the time when the second was returned, and could have rendered his principal, if called on to do so, he had received no notice whatever of the writs, to each of which the sheriff of *Middlesex* had returned *nihil* and *non est inventus*.

And also, that the second writ was tested on the same day as the return of the first.

The first was tested on the 6th of November, made returnable in eight days of St. Martin (the 18th,) and issued on the 17th, with a direction to be returned *non est inventus*.

The second was tested on the 18th, issued on the 19th, and made returnable in fifteen days of St. Martin (the 25th of November) with a direction to be returned *non est inventus*. He also objected, that the judgment which was signed on the 30th of November was premature, one of the days between the 25th and the 30th having been a *Sunday*; so that there were not four clear juridical days before the return of the writ and the signing judgment. Where bail was concerned the four day rule ought to exclude a *Sunday*, as the bail could not render on that day; *Watthen v. Beaumont*, 11 East, 71.

*The court having referred to the prothonotary to state what was
*163] the practice as to the *scire facias*,

He reported, that the practice had in some instances been, to give the order for and *teste* the second writ of *scire facias* on the return day of the first, or before the *quarto die post*, and in some instances on the *quarto die post*: and that he thought either course was right. The practice as to the signing judgment was usual and regular.

Wilde, now objected to this report, that in all the books of practice it was laid down that the second writ must be tested on the *quarto die post* of the return of the first; and that the first was generally returnable on a *Sunday*, on which day the second writ could not be tested or issued.

BEST, C. J. There are many parts of the practice of the court for which it might be difficult now to assign a reason; but that practice having been established and acted on, it is better to abide by it. Our officer has reported, that the course which has been pursued in the present instance is not irregular, and the only thing of importance is, that the bail should have fifteen days to render, which they have had here, between the *teste* of the first writ and the

return of the second. With respect to the signing of the judgment, the course in this court has always been to consider *Sunday* as one of the four days which are allowed before signing; and *Creswell v. Green*, 14 East, 537, is directly contrary to the case in 11 East.

PARK and BURROUGH, Js., concurred.

*GASELEE, J. I feel myself bound by the report of the officer; but it seems so contrary to common sense, that the party should have four days to appear after the return of the first writ, and yet that a second may issue before the four days have elapsed, that I hope the subject will be taken into consideration. [164]

As to the signing the judgment, I think the practice is clearly ascertained in this court, and reasonable.

Rule discharged.

TAPLIN v. ATTY.

Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it: Held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents.

TROVER against the sheriff of *Warwickshire*, for certain goods of the plaintiff which the sheriff had taken under an execution, issued by one *Reynolds* against the effects of one *Stanton*.

At the trial before Park, J., *London* sittings in *Easter* term last, in order to connect the sheriff with the transaction, the bailiff who conducted the execution was called, but without any *subpæna duces tecum*, to produce the sheriff's warrant for levying; he, however, stating that he had returned the warrant to the under-sheriff, the plaintiff, in order to entitle himself to give parol evidence of its contents, proved service on the defendant's attorney of a notice to produce the warrant at the trial, the defendant having been still in office at the time the warrant was returned to the under-sheriff. The learned judge, however, thought this was not sufficient, and that the plaintiff ought to have given such a notice to the under-sheriff or his attorney, which not having been done, the plaintiff was nonsuited.

*Vaughan, Serjt., obtained a rule *nisi* in the last term to set aside this nonsuit and have a new trial, on the ground that, under the circumstances of the case parol evidence of the contents of the warrant ought not to have been excluded. Against this rule,

Pell, Serjt., in this term showed cause. The bailiff ought to have been served with a *subpæna duces tecum*, and also the under-sheriff, before parol evidence could be received of the contents of the warrant. The constant practice is, that if a warrant be executed, the bailiff keeps it for his own justification, and merely returns to the sheriff a memorandum of what has been done. In *Martin v. Bell*, 1 Stark. 415, a notice had been given to the sheriff to produce the warrant, but that was helden not sufficient to let in parol proof of its contents.

Vaughan, and Wilde, Serjts., in support of the rule. The warrant was in the possession of the under-sheriff, and his possession is the possession of the sheriff. The sheriff and his officers are one; *Bro. Abr. Sheriff*. In *Drake v. Sykes*, 7 T. R. 117. Lawrence, J., said, the admissions of the under-sheriff would affect the sheriff; and a notice to a customer to produce a check is sufficient to let in parol evidence of its contents, although it is lodged at his banker's office, *Coates v. Partridge*, 1 Moody & Ryan, 156. So a notice to

a ship-owner to produce papers, although the captain has possession of them for his own protection, *Baldney v. Ritchie*, 1 Stark. 338.

BEST, C. J. This was an action of trover against the sheriffs of *Warwickshire*, for taking, under an execution *against one *Stanton*, goods which the plaintiff alleged to be his property. In order to connect the sheriff with the transaction it was necessary to prove his warrant to the bailiff who levied the execution. The bailiff was subpoenaed, but not under a *subpœna duces tecum*; had he been called under a *subpœna duces tecum* he would probably have procured the warrant, but his account was, that he had returned it to the under-sheriff. There has been some difficulty as to the time at which the warrant was so returned, but my Brother *Park*, thinks it was during the time when the sheriff remained in office; no notice was given to the under-sheriff to produce the warrant, and if it had been placed in his hand after the sheriff had gone out of office, our judgment might have been different, for it would be inconvenient, when the sheriff is no longer in office, to compel him to send perhaps across the whole county to apprise his under-sheriff of such a notice: but as he was still in office, and as his under-sheriff is in law identified with him, we think notice to the sheriff is equivalent to notice to the under-sheriff. When, therefore, the notice was served upon the sheriff's attorney, he ought to have sent to the under-sheriff for the warrant. The case of *Martin v. Bell*, is distinguishable, inasmuch, as the paper was not traced to the hand of the under-sheriff. The rule, therefore, for a new trial, which has been obtained in this case, must be made

Absolute.

*167] *BRAZIER v. BRYANT.

Corruption in the arbitrator is no answer to a motion for an attachment for non-performance of an award.

ONSLOW, Serjt., showed cause against a rule for an attachment against the defendant for not performing an award made under a rule of court, and he proposed to prove by affidavit corruption in the arbitrator; but

The court said, that such an objection was not any answer to a motion for an attachment, although it might have formed the ground of a specific motion for setting aside the award; for this they referred to *Holland v. Brooks*, 6 T. R. 161, and *Brudick v. Thompson*, 8 East, 344, and observing that the rule in *Holland v. Brooks*, was founded on good sense, they made the rule

Absolute.

CHATFIELD and Wife, Defendants; SOUTER, Tenant.

The court will not stay the proceedings in a writ of right till the costs of a prior ejectment are paid.

WILDE, Serjt., had obtained a rule calling on the defendants to show cause why all further proceedings on the above writ of right should not be stayed

until the tenant's costs of an ejectment brought for the same premises were satisfied, in which ejectment the lessors of the plaintiff, after entering the cause for trial in 1816, withdrew the record.

*Pell, Serjt., who was to have shown cause, was stopped by the [168] court, who called on

Wilde, to support his rule. He urged that the practice of the court was, not to allow the second proceeding to be pursued, till the costs of the first were paid, if the second was substantially the same as the first, and that the rule was not confined to any particular form of action. [*Gaselee*, J., referred to the note in *3 Bosanquet*, and *Puller*, 23.] That authority limited the rule to cases where the first proceeding had been decided on the merits. But if the defendants had had any merits, they would not have abandoned their ejectment in 1816, and have remained inactive till the present time.

BEST, C. J. The abandonment of the ejectment was no decision on the merits, and the court has no power to stay the proceedings in a writ of right till the costs of a prior ejectment are paid; it is a totally different proceeding: The rule often operates with hardship in ejectment, and it would be more liable to do so in a writ of right, by preventing a party who was poor from asserting his title.

The rest of the court concurring, the rule was

Discharged.



*DOE dem. MORGAN v. ROE.

[169]

Where, in ejectment, the tenants in possession,—having undertaken to appear, enter into the common consent rule, plead *instanter*, and take short notice of trial,—made no defence at the trial, but sued out a writ of error when judgment was signed, the court allowed the lessor of the plaintiff to take his judgment against the casual ejector.

A RULE in this cause for setting aside with costs a judgment against the casual ejector, and the subsequent execution, on account of some misnomer in the notice of declaration, had been discharged, and execution withdrawn, upon the tenants in possession undertaking to appear, enter into the common consent rule, plead *instanter*, and accept short notice of trial.

No defence was made at the trial, and it not appearing that the tenants had any merits, final judgment was signed and costs taxed, when the lessor of the plaintiff was served with a rule for the allowance of a writ of error. Whereupon

D'Oyly, Serjt., obtained a rule *nisi* for execution to issue against the tenants in possession, notwithstanding the allowance of the writ of error.

His affidavit stated the belief of the lessor of the plaintiff's attorney, that the writ was brought solely for delay, and that the lessor of the plaintiff had received notice, that unless the premises were forthwith pulled down, proceedings would be taken on the part of the city of *London*, to pull them down, which would put him to a great additional expense; he urged that the undertaking entered into by the tenants in possession amounted to an engagement to try the merits of the cause only, and to avoid delays of every kind.

Pell, Serjt., who showed cause, contended, that without an affidavit of a declaration from the mouth of the tenants in possession, or their attorney, that the error was *brought for delay, this rule could not be made absolute, [*170] as error would lie on a suit in ejectment, as well as in any other case, and he referred to *Evans v. Swete*, 2 Bingh. 326, *Harrison v. Grote*, 6 T. R. 400, *Rawlins v. Perry*, 1 N. R. 307.

But the court thought that this proceeding was not a compliance with the undertaking entered into by the tenants in possession, and without deciding any general question, they said the lessor of the plaintiff might sue out execution on his judgment against the casual ejector.

PETTY v. ANDERSON.

A wife having carried on business on her own account during the imprisonment of her husband, and he having returned to live with her after his discharge: Held, on motion for a new trial, after a verdict against him, that he was liable for articles furnished in this business, with his knowledge, after his return, though the invoices and receipts were in the name of the wife, and she was rated to and paid the poor's and paving rates.

ASSUMPTION for goods sold and delivered. At the trial of the cause before *Best, C. J., London* sittings, after *Easter* term last, the evidence on the part of the plaintiff was, that the goods, which were for the purpose of carrying on the confectionary business, had been delivered from the 9th of *August, 1823*, to *February, 1824*, at a baker's and confectioner's shop, over which was the name *Anderson*. That upon these occasions the defendant had been repeatedly seen in the shop, and when called on for payment, referred to his wife, saying she managed those things, and adding that he was a journeyman to his wife, that he received no wages, and that the plaintiff had better not go to law, or perhaps he would get *4s.* in the pound. The defendant's son often ordered [171] the "goods, and when his wife was applied to, she said she would tell Mr. *Anderson*.

The evidence on the part of the defendant disclosed, that previously to *August 1823*, he had carried on the business of a baker in the house in which the plaintiff's goods were delivered; had gone to prison, and had been discharged under the insolvent debtor's act, when he returned to live with his wife; that several tradesmen in the neighborhood had given credit to the wife, who during the defendant's imprisonment had set up and carried on the business of a confectioner and baker on her own account; the Christian name *Andrew*, which had formerly been inscribed over the shop when the defendant carried on in it the business of a baker, having been erased, and the name *Anderson* alone being left; the landlord received the rent of the house from the defendant's wife, and she was rated to and paid the poor's and paving rates; the plaintiff's invoices and receipts for the goods were also made out in her name; the defendant's daughter had ordered and had once paid for goods in her mother's name, and the defendant never interfered in the house in the way of paying and receiving money.

Best, C. J., summed up the whole of the evidence to the jury, but commented upon the fact of the defendant saying the plaintiff had better not go to law, or he might get *4s.* in the pound; this, he thought, identified him with the business, and proved his knowledge of his wife's transactions; connecting this with the circumstance of his being in the house where the business was carried on, assisting in the business, and subsisting on the profits (for he had declared he received no wages.) the learned Chief Justice put it to the jury whether any man could doubt that she was the agent of her husband, and directed them to find for the plaintiff.

*172] *The jury having found a verdict accordingly,
Wilde, Serjt., obtained a rule *nisi* for a new trial, which he moved

for on the ground, that the circumstances of the case showed the defendant's wife to be a sole trader, or that at all events it ought to have been left to the jury to say whether or not the credit was given to her alone. He cited *Bentley v. Griffin*, 5 Taunt. 356,

Vaughan Serjt., who showed cause, characterised the conduct of the defendant as a gross fraud, and insisted that the case though left to the jury with a strong expression of the opinion of the judge, was still correctly left to them upon a matter of fact which their verdict had determined; namely, the agency of the wife.

Wilde, in support of his rule, objected that no fact had been left to the jury, but that they had been directed to find for the plaintiff without considering whether or not credit had been given to the wife alone. Supposing the husband's conduct afforded a presumption in law that the wife acted as his agent, there were many facts in the case on which the jury ought to have been required to consider whether or not that presumption was rebutted.

PARK, J. There is always some difficulty as to the mode in which a presiding judge is to state his opinion to the jury. Now, though the Chief Justice expressed a strong opinion upon the present occasion, he summed up the whole of the evidence to the jury, and thereby left it in their power to form a judgment of their own.

In *Cox v. Kitchin*, 1 B. & P. 339, *Buller*, J., states very clearly, the limits within which rules for new trials are to be confined, and he lays it down, that the court will not merely examine whether the defendant be strictly liable in point of law, if the verdict is consistent with the justice and conscience of the case. The present verdict is so correct that no new trial ought to alter it. The only fault in the learned Chief Justice was, that he did not describe the whole transaction to the jury as a gross fraud. As justice has been fairly attained, it would be unwise to disturb the verdict upon any supposed nicety as to the way in which the case might have been put to the jury. When a judge is clearly wrong in point of law, or nonsuits improperly, that may be a ground for a new trial, but a strong expression of opinion, where the case calls for it, cannot be a ground of objection. In *Lungfort v. Tilor*, 1 Salk. 113, the husband was held liable on no other ground than the fact of his cohabiting with his wife.

BURROUGH, J. I should have charged the jury in the same way as the Chief Justice has done, and we shall not send a case down for new trial when we see the verdict must go a second time the same way. The husband was present and assisting in the business, and therefore clearly liable to the plaintiff's claim.

GASELEE, J., expressed the same opinion.

BEST, C. J. The husband took advantage of the trade that was carried on, by living on the profits, and a legal presumption arises from that circumstance, that the wife conducted the trade as his agent. In the present case he might have exonerated himself if he chose, by discontinuing the trade his wife carried on. Undoubtedly the presumption arising from his presence might have been rebutted, but there were no facts in the present case to repel the presumption. The bills of parcels, indeed, were made out to the wife, but the husband was at home, and assented to the delivery of the goods, which is a stronger case than that in *Comyns' Digest*, where the wife went out and ordered apparel by herself. The case of *Bentley v. Griffin* is not like the present. The clothes, it is true, were in that case furnished to the wife while living with her husband, but the contract was made privately and the salesman was told not to bring them home while the husband was within. In the present instance there is nothing to repel the evidence of the husband's assent.

Rule discharged.

BODY v. ESDAILE.

Where there were three verdicts ; the first in favor of the plaintiff, the second in favor of the defendant by reason of a mis-direction, and the third in favor of the defendant upon the merits, and the rule for the first new trial reserved the consideration of costs, the court allowed the defendant to take the costs of the first or second, at his option, and the costs of the third.

In this case there were three trials. The plaintiff succeeded in the first ; the defendant succeeded in the second, by reason of a mis-direction of the Judge, and in the third, upon the merits.

By the rule for the first new trial, the consideration of the costs of the first trial was to be reserved ; in the rule for the second, nothing was said about costs.

*The prothonotary having allowed the defendant the costs of the two last trials,

Vaughan, Serjt., obtained a rule *nisi* for reviewing the taxation, on the ground that costs were never allowed where a verdict was obtained through the mis-direction of a Judge.

The prothonotary referred to *Shulbred v. Nutt*, Hullock on Costs, 391 and

Pell, and *Wilde*, Serjts., who showed cause, argued, that if the court would not allow the plaintiff his costs upon the result of the first trial, but then reserved the consideration of them for the event, still less would they allow them when the event showed that the merits were with the defendant.

The court took time to consider, desiring to assimilate the practice of the two courts in these matters ; and now

BEST, C. J., said, it was not necessary upon this occasion to interfere with the practice, inasmuch as the court had a discretion left in them by the terms of the first rule. They, therefore, allowed the defendant his option to take the costs of the first or second trial, but not of both, and also the costs of the third.



*176] *HOLMES, defendant; SETON, Tenant; FOREMAN, Vouchee.

Recovery. Affidavit of presentation necessary to admit the word "advowson" in an amendment.

ROUGH, Serjt., moved to amend a recovery, by inserting the word *advowson*, the deed to lead to uses, conveying all the *hereditaments* of the party, and all *tithes* in the parish named in the deed, and in the county of *Kent*.

The recovery was suffered in 1796, and an affidavit stated that possession had gone conformably to it ever since ; but there was no allegation of any presentation having been made.

The court said there was no doubt they had a right to include *advowson* under the word *hereditaments*, but they required an affidavit, stating by whom the last presentation was made, whether that presentation had taken place before or after the recovery.

The court intimated that, after this term, they would take no recovery at chambers.

*HENRY v. TAYLOR.

The court set aside an annuity where 910*l.*, the consideration money, was paid to the grantor, who immediately returned it all but 1*l.* to pay off preceding annuities, and 165*l.* which the attorney, who negotiated the affair, retained for his trouble.

VAUGHAN, Serjt., obtained a rule *nisi* to set aside a judgment, together with a grant executed by the defendant for securing an annuity, and for delivering up and cancelling the securities, upon the ground that part of the consideration money was returned, and part retained.

The defendant's affidavit stated, among other things, that for the purpose of redeeming certain annuities already granted, the consideration for which had been 630*l.*, for the purpose also of discharging arrears, and charges for insurance, the consideration was, upon the proposal of Messrs. Howard & Gibbs, increased to 910*l.*, and the annuities from 105*l.* to 130*l.*

That upon payment of the last-mentioned consideration, Gibbs, handed to the defendant a parcel of bank-notes, which he stated to be of the value of 910*l.*, and the defendant immediately, without Gibbs's leaving the room, returned them to Gibbs, at his desire:

That Gibbs, then handed him 1*l.* and a few shillings, as the balance of the account between them, from which account it appeared that Howard & Gibbs, had obtained, in the manner above stated, about 165*l.* for themselves on this one transaction, though they had delivered no bill or statement of their charges for negotiating the business.

Wilde, Serjt., who showed cause against the rule, endeavored to distinguish this from the preceding cases, by the circumstance that the money was returned to pay off a just debt, and he argued that the act of Parliament was only directed against transactions in which the returning was the result of a previous agreement to enable the broker to retain more than his lawful commission.

*Vaughan, in support of his rule, referred to *Calton v. Porter*, 2 Bingh. 370, *Gorton v. Champneys*, 1 Bingh. 287, and *Williamson v. Goold*, Id. 316. [*178]

BEST, C. J. I am clearly of opinion that this annuity must be set aside. The ground alleged is, that a part of the consideration has been retained or returned; and either of those expressions may be properly applied to this transaction. But it is unnecessary to give any opinion on that part of the case, because there is an attorney's bill of 165*l.* for negotiating a loan of 910*l.*, and no explanation given of the items of which the charge is composed. Without explanation, it must be taken to be an unfair charge; and the attorney of the attorney having been called to it by the rule which objects to the retainer, he was, therefore, bound to show that the charge was fair and reasonable. I fully concur with the cases which have been decided in this court; but, without adverting to the authority of any case, this is clearly a retainer within the terms of the act of Parliament.

PARK, J. I am of the same opinion; and if we were to give the act the construction required on the part of the plaintiff, we should, in effect repeal it.

The act has been repeatedly and most deliberately considered, and it is impossible to entertain any doubt, unless at one sweep we say that all we have decided on the subject is wrong. It is indifferent whether the transaction be styled a returning or a retainer. The whole is a juggle and a mummery, contrived to elude the salutary provisions of the act.

The rest of the court concurring, the rule was made

Absolute.

*WYNNE v. GRIFFITH.

By deed of 1750, lands were limited to the use of such person as *H.*, *D.*, *M.*, and *C.* should by their joint deed, in the presence of two witnesses, appoint: And for default of such appointment, to the use of such person as *H.*, *D.*, and *M.*, in case they should all survive *C.*, by their joint deed, in the presence of two witnesses, should appoint: And in default of, and until such appointment Part of the premises to *C.* for life, without impeachment of waste; And that part after her decease, and the rest of the premises, to the use of such person as *H.* by deed, in the presence of two witnesses, should appoint; And for default of, and until such appointment, to *H.* and his heirs forever. By a settlement made in 1751, on the marriage of *M.* with *R.*, and attested by three witnesses, *H.*, *D.*, *M.*, and *C.* granted, bargained, sold, released, confirmed, directed, limited, and appointed the premises to *L.* and his heirs, to the uses, trusts, intents, and purposes hereinafter expressed, concerning the same; among which was a term of five hundred years to the use of *L.*, in trust to raise portions for younger children by sale or mortgage of the premises thereby granted and released, so as that thereby none of the prior estates in the premises should be impeached and incumbered; and *H.*, *D.*, *M.*, and *C.* covenanted that they (or one of them) were seised of the premises by them thereby granted and released for an absolute estate of inheritance, and that they would make such farther assurance of the premises thereby released, settled, or assured, as should be required: Yield, that the legal fee of the premises did not become vested in *L.*

THE following case was sent for the opinion of this court by the Master of the Rolls.

By indentures of lease and release, bearing date respectively the 1st and 2d of June, 1750, the release being tripartite, and made between *Humphrey Roberts*, and *Dorothy* his wife, *Mary Roberts*, spinster, daughter and heir apparent of the said *Humphrey Roberts*, and *Dorothy* his wife, and *Catherine Roberts*, widow, of the first part; *John Salusbury*, and *John Ellis*, of the second part; and *Robert Wynne*, and *Owen Holland*, of the third part; and by a common recovery suffered in pursuance thereof, at the great session for the county of *Caernarvon*, on the 8th of September, 1750, certain messuages, lands, and hereditaments, the estate and inheritance of the said *Humphrey Roberts*, and certain other messuages, *lands, and hereditaments, the estate and inheritance of the said *Catherine Roberts*, and certain other messuages, lands, and hereditaments and premises, therein described to have been theretofore purchased by the said *Humphrey Roberts*, and all other the messuages, lands, tenements, and hereditaments whatsoever of them the said *Humphrey Roberts*, and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, or any of them, in the parishes therein mentioned, and elsewhere in the county of *Caernarvon*, with their appurtenances, were limited to the use and behoof of such person and persons, and for such estate and estates, and subject to such provisoos, powers, limitations, trusts, conditions, and agreements, as the said *Humphrey Roberts*, and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, at any time or times thereafter during the term of their natural lives, by any their joint deed or deeds, writing or writings, to be by them duly executed in the presence of two or more credible witnesses, should direct, limit, and appoint; and in default of such direction, limitation, and appointment, to the use and behoof of such person or persons, for such estate and estates, and subject to such provisoos, powers, limitations, and agreements, as the said *Humphrey Roberts*, and *Dorothy* his wife, and *Mary Roberts*, (in case they should all of them survive the said *Catherine Roberts*) should at any time or times after the decease of the said *Catherine Roberts*, by any their joint deed or deeds, writing or writings, to be by them executed in the presence of two or more credible witnesses, direct, limit, or appoint; and for default of and until such direction, limitation, and appointment respectively as aforesaid, as to certain parts of the said hereditaments, to the use of the said *Catherine Roberts*, and her assigns for her life, without impeach-

ment of waste; and as to as well the said last-mentioned messuages, lands, and hereditaments, so limited to the said *Catherine *Roberts*, for her life [*181 as aforesaid, from and after her decease, as also as to all the rest and residue of the said messuages, lands, hereditaments, and premises therein-before mentioned, whereof such common recovery should be had and suffered as aforesaid, and whereof no use was thereinbefore limited and declared, to the use and behoof of such person and persons, and for such estate and estates, and subject to such provisoos, powers, limitations, trusts, conditions, and agreements, as the said *Humphrey Roberts*, at any time or times thereafter, during the term of his natural life, by any his deed or deeds, writing or writings, to be by him duly executed, in the presence of two or more credible witnesses, or by his last will and testament in writing, to be by him the said *Humphrey Roberts*, also duly executed, in the presence of three or more credible witnesses, should direct, limit, or appoint; and for default of and until such direction, limitation, or appointment, to the use and behoof of the said *Humphrey Roberts*, his heirs and assigns forever.

By indentures, bearing date respectively the 1st and 2d days of *October*, 1751, the former being a lease for a year, and made between the said *Humphrey Roberts*, and *Dorothy* his wife, the said *Mary Roberts*, and *Catherine Roberts*, of the one part; and *William Mostyn*, *John Lloyd*, *Robert Wynne*, (of *Garthwin*.) and *Pearce Wynne*, of the other part; and the latter being tripartite, and made between *Robert Wynne*, the elder, and *Robert Wynne*, the younger, son and heir apparent of the said *Robert Wynne*, the elder, of the first part; the said *Humphrey Roberts*, and *Dorothy* his wife, and the said *Mary Roberts*, and *Catherine Roberts*, of the second part; and the said *William Mostyn*, *John Lloyd*, *Robert Wynne*, (of *Garthwin*.) and *Pearce Wynne*, of the third part; after settling divers messuages, lands, and hereditaments belonging to the said *Robert Wynne*, the elder, and *Robert *Wynne*, [*182 the younger, to the uses therein mentioned, it was witnessed, "that in consideration of a marriage then intended to be solemnized between the said *Robert Wynne*, the younger, and the said *Mary Roberts*, and of the provision thereinbefore made for her or her issue, and for the settling the messuages, lands, tenements, hereditaments, and premises thereinaster mentioned, to the uses therein expressed concerning the same, the said *Humphrey Roberts*, and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, did grant, bargain, sell, release, and confirm, direct, limit, and appoint, unto the said *William Mostyn*, *John Lloyd*, *Robert Wynne*, (of *Garthwin*.) and *Pearce Wynne*, in their actual possession, being by virtue of the said lease for a year made to them by the said *Humphrey Roberts*, and his wife, *Mary Roberts*, and *Catherine Roberts*, as therein mentioned, the several messuages, lands, tenements, and hereditaments therein particularly described (and which, in fact, included the messuages, lands, tenements, and hereditaments comprised in the said indentures of the 1st and 2d of *June*, 1750, and whereof such recovery was suffered as aforesaid,) with their and every of their appurtenances, and all other the messuages, lands, tenements, and hereditaments, situate, lying, and being in the said county of *Caernarvon*, whereof or wherein the said *Humphrey Roberts*, then was seised of any estate of inheritance, in possession, reversion, remainder, or use, and all the reversion and reversions, remainder and remainders, &c.; and all the estate, right, title, interest, use, trust, possession, property, claim, and demand whatsoever, of them the said *Humphrey Roberts*, and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, or any of them, of, in, and to the same hereditaments and premises, and every of them, and every part and parcel thereof, to have and to hold the same premises so granted and released unto the said *William Mostyn*, *John Lloyd*, **Robert Wynne*, (of *Garthwin*.) and *Pearce Wynne*, their heirs and [*183 assigns forever, to the several uses, intents, and purposes, and under the provisoos, powers, limitations, and agreements thereinaster mentioned,

expressed, limited, and declared, of and concerning the same respectively; that is to say, in the meantime and until the said then intended marriage should take effect, to the same uses and estates as the said hereditaments and premises then respectively stood limited; and from and immediately after the solemnization of the said then intended marriage, as to part of the lands, hereditaments and premises therein comprised, to the use and behoof of the said *Humphrey Roberts*, and *Dorothy* his wife, and their assigns, for and during the term of their natural lives, and the life of the longer liver of them, without impeachment of or for any manner of waste, during the life of the said *Humphrey Roberts* only, for and as the jointure of the said *Dorothy*, and in full satisfaction, lieu, and bar of her dower or thirds, out of any real estate, whereof the said *Humphrey Roberts*, then was or should at any time thereafter during her coverture be seised, and as for and concerning other part of the lands and hereditaments therein mentioned and described, to the use and behoof of the said *Humphrey Roberts*, and his assigns, for and during the term of his natural life, without impeachment of waste, and as, to, for, and touching certain other parts of the lands, hereditaments, and premises therein mentioned, to the use and behoof of the said *Catherine Roberts*, and her assigns, for and during the term of her natural life, without impeachment of waste; and as to, for, and concerning the several capital and other messuages, lands, tenements, hereditaments, and premises thereinbefore limited to the said *Humphrey Roberts*, and *Dorothy* his wife, and *Catherine Roberts*, for their lives respectively as aforesaid, from and after the respective determination of the several estates thereof, *to the use and behoof of the said *William Mostyn*, *John Lloyd*, *Robert Wynne*, (of *Garthwin*,) and *Pearce Wynne*, and their heirs, for and during the term of the natural lives of the said *Humphrey Roberts*, and *Dorothy* his wife, and *Catherine Roberts*, respectively, in trust only to preserve the contingent uses and estates therein-after limited and declared from being barred and destroyed; and to that end to make entries as often as occasion should require, but nevertheless to permit and suffer them the said *Humphrey Roberts*, and *Dorothy* his wife, and *Catherine Roberts*, respectively, to receive and take the rents, issues, and profits thereof, during their respective natural lives; and as to as well the said premises so limited to and to the use of the said *Humphrey Roberts*, and *Dorothy* his wife, and *Catherine Roberts*, respectively, for their lives as aforesaid, from and after the several deceases of them the said *Humphrey Roberts*, and *Dorothy* his wife, and *Catherine Roberts*, respectively, and as the said estates should end and respectively determine, as also the rest and residue of all and singular the said premises thereinbefore mentioned, and whereof no use was thereinbefore limited or declared, to the use and behoof of the said *Robert Wynne*, the younger, and the said *Mary*, his intended wife, for the term of their natural lives, and the life of the longest liver of them, without impeachment of waste; and from and after the determination of that estate, to the use and behoof of the said *William Mostyn*, *John Lloyd*, *Robert Wynne*, (of *Garthwin*,) and *Pearce Wynne*, and their heirs, during the lives of the said *Robert Wynne*, the younger, and the said *Mary*, his intended wife, respectively, in trust, to preserve contingent remainders; and from and immediately after the decease of the survivor or longest liver of them, the said *Robert Wynne*, the younger, and *Mary*, his intended wife, to the use and behoof of the said *William Mostyn*, *John Lloyd*, *Robert Wynne*, (*of *Garthwin*,) and *Pearce Wynne*, their executors, administrators, and assigns, for the term of five hundred years, from thence next ensuing; nevertheless upon the trusts, and for the intents and purposes thereafter mentioned; and from and after the determination of the said term and estate of and for five hundred years, to the use of the first son of the said *Robert Wynne*, the younger, by the said *Mary*, his intended wife, lawfully to be begotten, and the heirs of the body of such first son lawfully issuing, and for

default of such issue, to the use of the second and every other son of the said *Robert Wynne*, the younger, by the said *Mary*, his intended wife, lawfully to be begotten, severally and successively in tail, with remainder, to the use of the daughters of the said *Robert Wynne*, the younger, by the said *Mary*, his wife, in tail, with remainder to the use of the said *Humphrey Roberts*, his heirs and assigns forever."

The term was then declared to have been created, in trust, to raise by sale or mortgage £6,000*l.* for the younger children, if any, of *Robert Wynne*, the younger, and *Mary* his wife, or so much, not exceeding £6,000*l.* as *Robert Wynne* the younger should direct and appoint, so as thereby none of the prior estates in any part of the premises should be thereby impeached or incumbered during the continuance thereof, and for want of appointment of the whole £6,000*l.*, one moiety of the sum appointed was to be raised out of the premises granted and released by *R. Wynne* the elder, and *R. Wynne* the younger, the other moiety out of the premises granted and released by *Humphrey, Dorothy, Mary, and Catherine Roberts*, who covenanted that they were, or one of them was lawfully, rightfully, and absolutely seised of the premises by them thereof granted and released for an absolute and indefeasible estate of inheritance, and that they would make such further assurance of the premises by them thereby released, settled, or assured as by **W. Mostyn, J. Lloyd, R. Wynne, and P. Wynne* should be required. [186]

The said indenture of the 2d of October, 1751, was duly executed by the said *Robert Wynne* the elder, *Robert Wynne* the younger, *Humphrey Roberts*, *Dorothy Roberts*, *Mary Roberts*, and *Catherine Roberts*, in the presence of, and the same was as to the execution thereof by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, attested by three witnesses.

The marriage between the said *Robert Wynne*, the younger, and the said *Mary Roberts* was solemnised shortly after the execution of the said last-mentioned indenture.

There was issue of the said intended marriage, only one son, viz., *Robert Watkin Wynne*, and one daughter, viz., *Jane*, who afterwards became the wife of *John Wynne Griffith*.

The said *Catherine Roberts* died in the year 1763. The said *Humphrey Roberts*, in the year 1766, and the said *Dorothy Roberts* in the year 1767.

The said *Robert Wynne*, the younger, departed this life in the year 1782, leaving the said *Mary* his wife, and the said *Robert Watkin Wynne* his only son and heir at law, and the said *Jane* his daughter, and only other child him surviving, having by his will, dated the 24th of September, 1787, directed that the whole of the said portion of £6,000*l.* should be raised in favor of his said daughter *Jane*, and paid to her on her attaining the age of twenty-one, or marriage as therein mentioned.

By an indenture of settlement made on the marriage of the said *Jane* with the said *John Wynne Griffith*, and dated the 15th of February, 1785, the said *Jane* assigned the said portion of £6,000*l.* to the said *Robert Watkin Wynne* and *John Lloyd, Robert Wynne, and * Bennett Williams*, Esqrs., upon trust, to pay £1,000*l.* (part thereof) to the said *John Wynne Griffith*, [187] and on receipt of the sum of £5,000*l.* (the residue thereof) to invest the same in the purchase of lands of inheritance, and settle the same in strict settlement for the benefit of the said *John Wynne Griffith* and *Jane* his wife, and their issue as therein mentioned. But the settlement did not expressly authorise the said trustees to give discharges for the money.

By indentures of the 4th and 5th of October, 1805, the said *Robert Watkin Wynne* conveyed an estate called *Plasenpwydd* estate, being part of the settled estates to the use of the said *John Wynne Griffith, Robert Watkin Wynne, and Edward Lloyd*, upon trust to sell, and out of the moneys to arise thereby pay off the remaining portion of £6,000*l.*

By an indenture, dated the 24th of *December*, 1812, after reciting that the sum of 4,200*l.*, the then remainder of the said portion, had been paid to the said *John Lloyd* the surviving trustee of the said marriage settlement of the said *J. W. Griffith* and *Jane* his wife, they, the said *John Lloyd*, *John Wynne Griffith*, and *Jane*, his wife, released the said *John Wynne Griffith*, *Robert Watkin Wynne*, and *Edward Lloyd*, and the estates comprised in the said indenture of settlement of the 1st and 2d of *October*, 1751, of and from the same.

The said *Robert Watkin Wynne* died in the year 1808, in the lifetime of his said mother, *Mary Wynne*, and without having barred the entail, leaving *John Wynne*, his eldest son and heir at law, him surviving. The said *Mary Wynne* died in *Januairy*, 1814.

By indentures of lease and release bearing date respectively the 10th and 11th of *March*, 1814, and made and duly executed between the said *John Wynne*, who is therein described as the eldest son and heir at law of the said [188] *Robert Watkin Wynne*, who was the only son of **Robert Wynne* by *Mary* his late wife, deceased, of the first part, *John Oldfield* of the second part, and *Sir Thomas Mostyn*, Bart., of the third part, whereby, after reciting among other things, the said indentures of the 1st and 2d of *October*, 1751, and that the said *Robert Watkin Wynne* died in *March*, 1808, without having done any act to bar the estate tail which became vested in him in remainder under the said last-mentioned indenture,

It was witnessed that the said *John Wynne* for barring and destroying the estate tail then vested in him, of and in all the messuages, lands, and hereditaments therein mentioned, and for assuring the same to the uses limited and declared of and concerning the same, did grant, release, and confirm unto the said *John Oldfield*, and his heirs, the said settled estates in the said county of *Caernarvon*, to hold the same unto and to the use of the said *John Oldfield*, his heirs and assigns forever; to the intent that the said *John Oldfield* might be tenant of the *præcipe* to a common recovery to be suffered of the said premises, and which said recovery, when suffered, it was thereby declared should inure to the use of such person or persons and for such estate or estates as the said *John Wynne* should in manner therein mentioned appoint; and in default thereof, to the use of the said *John Wynne* and his assigns for his life, without impeachment of waste, with remainder to the use of the said *Sir Thomas Mostyn* and his heirs, during the life of the said *John Wynne*. In trust, nevertheless, for him the said *John Wynne*, with remainder to the use of the right heirs of the said *John Wynne* forever. And which said recovery was afterwards duly had and suffered at the *Caernarvonshire Great Sessions* on the 4th of *April*, 1814.

By a decretal order of the High Court of Chancery, made on the 5th of [189] *April*, 1822, in a cause in which *the said *John Wynne* was plaintiff, and the said *John Wynne Griffith* and others were defendants, it was declared that the said portion of 6,000*l.* had been fully paid and satisfied, and that the said term of five hundred years had ceased and determined.

The question was, whether under the said indentures of the 1st and 2d of *June*, 1750, and common recovery suffered in pursuance thereof, and the said indentures of the 1st and 2d of *October*, 1751, the legal fee of such of the estate and premises comprised in the said first-mentioned indentures as were settled and assured by the said last-mentioned indentures, became vested in the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*), and *Pierce Wynne*; and if so, whether a jury would be directed to presume a re-conveyance of the said legal estate?

Bosanquet, Serjt. The principal question is, whether the deed of 1751 operated as an independent conveyance, or as an appointment under the deed of 1750? for if it operated as a conveyance, *Mostyn*, *Lloyd*, *R. Wynne*, and *P. Wynne*, did not take the legal estate in the premises.

It operated as a conveyance, for the following reasons : First, it does not recite, or even allude to the power in the deed of 1750, but professes to be made for the settling of the premises to the *uses* therein expressed. Secondly, under the deed of 1750, of the four persons who are to concur in the joint appointment, two have an interest, as well as a power ; the appointment would have been no execution of the power without the concurrence of those two ; and it is certain, according to Sir *Edward Clere's* case, 6 Rep. 18, that where a party "conveying has an interest, as well as a power, he shall be taken to convey by virtue of his interest, and not by virtue of the power." [*190] In *Cox v. Chamberlain*, 4 Ves. 631, the Master of the Rolls considered himself as bound by this principle, even where the conveyance expressed itself as having been made "in pursuance of all powers," &c. And according to the language of the Lord Chancellor in *Maundrell v. Maundrell*, 10 Ves. 259, the appointment having been executed by those who had an interest, as well as by those who had only a power, the power is gone. In *Roach v. Wadham*, 6 East, 289, there were express words of appointment, as well as of conveyance ; it was for the benefit of all parties that the deed should operate as an appointment ; there was a clear intention to that effect ; and Lord *Ellenborough* laid it down as a question of intention. But, thirdly, it could never have been the intention of these parties, nor beneficial to them, that the deed of 1751 should operate as an appointment. If *Mostyn, Lloyd, R. Wynne*, and *P. Wynne* took the legal fee, it would have been unnecessary to make them trustees to preserve contingent remainders, *Fearne. Cont. Rem.* 230. And the term which they take for raising portions to younger children would have been useless, inasmuch as it would have merged in their fee. The covenants profess to be made by parties having an absolute estate of inheritance, and the premises are respectively described as having been *granted* and *released*. The word *appoint* is only used once at the beginning of the deed, and that redundantly, after *grant*, *bargain*, *sell*, *release*, and *confirm*. But if it were necessary, the court might distribute and marshal these words *reddendo singula singulis* ; the words *grant* and *release* to those who have an interest, and the word "appoint" to those who have only a power. *Butler's note* [*191] *Co. Lit.* 271. b. 3d part, 4th division.

Even if *Mostyn, Lloyd, R. Wynne*, and *P. Wynne* took the legal estate under a deed drawn in a blundering way, a re-conveyance may be presumed where they have never acted under the deed, though there may have been no adverse possession. The language of the court in favor of such a presumption, in many of the cases is exceedingly strong ; as in *Roe v. Reude*, 8 T. R. 122, *Hilary v. Waller*, 12 Ves. 250 ; of *Kenyon*, C. J., in *Doe d. Bowerman v. Sybourn*, 7 T. R. 2.; of *Abbott*, C. J., in *Doe d. Putland v. Hitler*, 2 B. & A. 791, and of *Le Blanc*, J., in *Keene v. Deardon*, 8 East, 266. According to all the cases, the question is, what was the predominant intention of the parties ? and if it cannot be effectuated in any other way, a re-conveyance may be presumed. It never could have been intended, in the present case, that all the estates should be converted into trusts in case the marriage should go off.

Taddy, Serjt., contra. The deed of 1751 operated only as an appointment, and *Mostyn, Lloyd, R. Wynne*, and *P. Wynne* took, as trustees, the legal estate in the premises.

If the deed had been intended as a conveyance of an interest, and not as an execution of a power, there would have been no reason for joining as grantors persons who had no interest, but who could only transfer by way of appointment ; at the very outset of the deed the parties are made to *limit* and *appoint* the premises ; the word *limit* is repeatedly employed, and the other words of conveyance are only added in the redundancy of "conveyancing language." [*192] As to marshalling and distributing these words, that could only have been done if there had been a re-lessee as well as an appointee. [Gaselee, J.]

There is not a word to show that the estates which before marriage were legal, should after marriage become equitable.] In *Tomlinson v. Dighton*, 10 Mod. 36, *Parker*, O. J., lays down the principle in Sir E. Clerc's case, as follows: "That where according to the way the parties intended, the conveyance would have no effect at all, then it should pass another way; but where, should the estate pass the way the parties intended, the conveyance would have some effect, though not all that was intended by the parties, there it should pass no other way than the parties designed." Now that the deed of 1751 was intended to operate, as an appointment, is apparent from the circumstance that the execution by all the parties is attested by three witnesses; and it is equally clear, that in such a way the deed would have some effect, though, perhaps, not all that the parties intended. In *Roach v. Wadham*, the deed which was worded like the present, was held to operate as an appointment. And the case of *Cox v. Chamberlain* does not apply, because the parties who were joint donees of a power, had both an interest also, which they declared their intention to convey. The question touching the destruction of a power by a conveyance from one who has an interest in the property to which the power applies, has never been determined in a court of law. With respect to the trust for supporting contingent remainders, and the term of five hundred years, admitting them to have been unnecessary, they will not alter the general operation of the deed.

As to the supposed re-conveyance, it cannot be presumed in the absence of any fact to support such a presumption. The enquiry as to this point in all the cases, is, what has been the conduct and beneficial interest of the parties? but there is nothing in the present case which can afford the court any grounds for forming a judgment.

Bosanquet, was heard in reply, and

The following certificate was afterwards sent.

We have heard this case argued by counsel, and having considered the same, are of opinion that under the said indentures of the 1st and 2d of June 1750, and common recovery suffered in pursuance thereof, and the said indentures of the 1st and 2d of October, 1751, the legal fee of such of the estate and premises, comprised in the first mentioned indentures, as were settled and assured by the last mentioned indenture, did not become vested in the said *William Mostyn, John Lloyd, Robert Wynne* (of Garthwin,) and *Pierce Wynne*.

W. D. BEST,
J. A. PARK,
J. BURROUGH,
S. GASELEE.

HOUSE OF LORDS.

The rate of interest for loans advanced within the dominions of native and independent Indian sovereigns, by British subjects domiciled and residing within such dominions, is not limited to 12 per cent.

Best, C. J. By an order of your Lordships of the 22d of June, the following question was submitted to the Judges, viz., Whether according to the true construction of the 30th section of an act passed in the 13th year of the reign of his late Majesty, entitled, "An act for the establishing certain regulations for the better management of the affairs of the East India Company," the same limits the rate of interest to be taken for loans of any monies to twelve pounds for one hundred pounds by the year, such loans

being made or advanced *within the dominions of a native independent Sovereign by British subjects domiciliated and residing within such dominions?* The Judges having maturely considered this question, have directed me to inform your Lordships that they are unanimously of opinion, that the act referred to, in the question submitted to them, does not limit the rate of interest on loans made within the dominions of a native independent Sovereign by British subjects domiciliated, and residing within such dominions, to twelve pounds for one hundred pounds *by the year*. In the absence of the Lord Chief Justice of the King's Bench, I will humbly submit to your Lordships the grounds on which my opinion is founded: Not expecting that it would be my duty to state to your Lordships the opinion of the Judges, I have had no opportunity of submitting to them the reasons that I should offer to your Lordships in support of their opinion; your Lordships will be pleased to consider me alone responsible for the observations that I am about to make.

The words of the statute on which you: Lordships' question is raised, are, "And be it further enacted, by the authority aforesaid, that no subject of his Majesty, his heirs and successors in the *East Indies*, shall upon any contract which shall be made from and after the 1st of *August*, 1774, take directly or indirectly for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of twelve pounds *for the forbearance of [195 one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever made after the time aforesaid, for payment of any principal or money to be lent, or covenanted to be performed, upon or for any usury whereupon or whereby there shall be reserved or taken above the rate of twelve pounds in the hundred as aforesaid, shall be utterly void; and all and every such person or persons whatsoever, who shall upon any contract to be made after the 1st of *August*, 1774, take, accept and receive by way or means of any corrupt bargain, loan, exchange, shift, or interest of any wares, merchandizes, or other thing or things whatsoever or by any deceitful way or mean or by any covin, engine, or deceitful conveyance for the forbearing or giving day of payment for one whole year of and for their money or other thing, above the sum of twelve pounds for the forbearance of one hundred pounds for a year, and so after that rate, and for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence treble the value of the money, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted, with costs of suit; one moiety whereof shall be to the said united company, and the other moiety to him or them who will sue for the same, in the said Supreme Court of Judicature, at *Fort William* in *Calcutta*, or in the Mayor's Court in any other of the said united company's settlements where such offence shall have been committed, by action of debt, bill, plaint, or information, on which no essoign, wager of law, or protection shall be allowed; and in case no such action, bill, plaint, or information shall have been brought and prosecuted with effect within three years, that then it shall and may be lawful to and for the party aggrieved to sue and prosecute for recovery of all sums of money *paid over and above such rate of interest." 13 Geo. 3. c. 63. s. 30. [196]

This is a penal statute, and must according to the rules by which acts of Parliament are construed, receive a strict interpretation. Our law will not allow of constructive offences; no man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute imposing such penalty. The meaning of the words of an act of Parliament is to be ascertained from the subject to which it refers, so that the same words receive a very different construction in different statutes. The intent of the legislature is not to be collected from any particular expression, but from a general

^tAbbott, C. J., was engaged in a trial at the Admiralty Sessions.

view of the whole of an act of Parliament. Your lordships will perceive that these are not merely technical rules established by lawyers for the determination of questions arising on statutes, but that they are maxims of common sense, the observance of which is necessary to conduct us to a right understanding of every kind of written instrument.

The statute on which this question arises is a law of usury. The supposed policy of the Usury Laws in modern times is to protect necessity against avarice, to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and increase national wealth, and to enable the State to borrow on better terms than could be made if speculators could meet the minister in the money market on equal terms. Laws framed on these principles are limited to the countries in which they are made. The foreign borrower wants not the protection of our laws, nor can it be extended to him. We may declare a contract void, but notwithstanding such declaration it may be enforced in the courts of the country in which it is made, if it be not repugnant to the laws of that country. We [197] leave the industry of other countries to the care of their respective governments. I will not say that it is impossible that our capitalists may be tempted by the high rate of interest in other countries to send money out of their own. I believe that our own government and commerce was inconvenienced by the large loans made by the servants of the *India Company* to the Nabob of *Arcot*. But the risk of loans to persons living out of the reach of British laws is so great, that, in general, much capital will not be drawn by them out of the country. Should any evil arise from them, it is not to be remedied by fixing a rate of interest, but by prohibiting them altogether, or allowing such only as are made under a license from government. This is the mode in which the Government in *India*, has proceeded in such cases.

In 1719, and repeatedly since, they have issued orders prohibiting British subjects from lending money to independent sovereigns without their authority. (Letter from the Court of Directors. Appendix. *Burke's Speech on the Nabob of Arcot's Debts*, No. 9.) and these orders have since been enforced by act of Parliament, (57 G. 3, c. 142, s. 28.) But if you allow loans to be made to persons resident in foreign states, it seems to me to be as absurd to fix the rate of interest as it would be to establish a maximum on the price of goods exported: I should observe that these regulations were made, more for the purpose of keeping under the constant control of Government, the intercourse between British subjects and the native princes, than of preventing the loan of money to those princes. An unrestrained intercourse between the subjects of one state, and Government of another can never be permitted, particularly between the subjects of a Government administered as that of our possessions in *India* was, and the native sovereigns of that country. The history of the *Carnatic* informs us of the dangerous intrigues [198] that such intercourse had occasioned: but whenever loans are allowed, either to native princes or their subjects, it must be to the advantage of the *British* empire, as well as of the individual lender, that the highest rate of interest should be obtained for them. I have been favored with the copies of two orders made by the Government of *Fort William*,—one on the cession of some territory of *Dowlat Rah Scindiah* to the *East India Company*, in 1793, and the other on the cession of certain provinces by the *Nabob Vizier* to the Company, in 1803. These orders show that interest, at the rate of 25 per cent. in some instances, and 30 per cent. in others, was taken by the orders of the Company. According to these orders, after the states were brought under *British* law, 12 per cent. only was to be allowed for the loan of money. These orders prove, from the highest authority, that the rate of interest fixed by our laws is not a just rate in countries where the lender has not the security which such laws afford him. The rate of interest must be

regulated according to the hazard attending the loan, and the value of the money in the country in which it is lent. In our own empire different rates of interest are established; there is one rate of interest in *Great Britain*, another in *Ireland*, another in the *West Indies*, and another in the *East Indies*. We must presume that whatever rate of interest is allowed in any country, is considered by the government of that country as a just compensation for the risk and use of the money lent; and it would be strange if our laws should prohibit a *British subject* from employing his capital to the same advantage, in any foreign country, as the subjects of any other state may employ their capital in such countries. Considering the spirit of this law, as the words *British subjects in the East Indies* are satisfied by *British subjects* residing and making loans in our own settlements in the *East Indies*, I think this clause of the act was not intended to include, nor can, consistently with any sound legal principle of construction, be made to [199-
include loans in foreign states to the subjects of such states. There are other acts of Parliament in which the words *British subjects in the East Indies*, include *British subjects* in any part of *India*, because the object which the legislature had in view in passing those acts could not be attained without putting this construction on those words; and therefore, it must be presumed that it was the intention of the legislature that such a construction should be put on them. Thus, the receiving presents by any *British subject*, holding any office under His Majesty, or the Company in the *East Indies*, (1 G. 3, c. 25, s. 45.) the lending money by a *British subject residing in India*, to a foreign company or merchant, to purchase goods in *India*, (21 G. 3, c. 65, s. 29.) the being in the *East Indies*, without proper authority, (9 G. 1, c. 26, s. 6.) are acts all equally injurious to *British interests*, whether they are done within the settlements of the Company, or the states of independent princes. The prevention of these offences, in every part of *India*, is clearly within the intent of the legislature: this intent is further proved by a provision in the statute of G. 1, that offenders under that act may be tried in any court of *Westminster*; by a provision in the 21 G. 3, that the penalties imposed by that act may be recovered in any court in the *East Indies*, or in the King's Bench at *Westminster*; and by a general clause in 24 G. 3, c. 25, s. 44, making all persons amenable to all courts of justice both in *India* and *Great Britain*, for offences committed in the territories of any native prince. If the legislature had intended that the 13 G. 3, should apply to loans made in foreign countries, the same provision would have been made for the recovery of the penalties in any court in *England* or *India*, as is to be found in the acts that I have referred to. Offences cannot, without an express provision of the legislature, be tried by any court but that which has jurisdiction in [200 the place where they were committed. All offences are said to be local: thus, before the 28 Hen. 8, c. 15, offences committed on the high seas, could not be tried on shore; and before the 24 G. 3, no offences in *India*, except such for which a trial in another country had been particularly provided, could be tried in any other settlement except that in which such offences were committed. If, therefore, the lending money at more than 12 per cent. interest, to the subject of a foreign prince, within the dominions of that prince, was made an offence by the 13 G. 3., the person who committed such offence could never be tried or punished for it.

But let me request your Lordships to apply the last rule to which I ventured to call your Lordships' attention to this act of Parliament. Let us look at the whole of the act, and form our opinion of its meaning from a due consideration of every part of it. The penalties imposed by the act are to be sued for in the Supreme Court of Judicature at *Fort William*, which your Lordships know has jurisdiction over the provinces of *Bengal*, *Bahar*, and *Orissa*, (13 Geo. 3, c. 3, s. 14.) "or in the Mayor's Court, in any other of the said united Company's Settlements where such offence shall have been

committed."—My Lords, to my humble judgment, these words clearly show that the legislature only intended to fix a rate of interest within these settlements. If the offenders against the act are tried in any other place than in the *British* settlement, where the offence was committed, they are tried without lawful authority for such trial, and against a positive provision of the statute creating the offence.—As the supposed policy on which usury laws are founded applies only to loans made within the realm;—as there is nothing to be found in the 13 *Geo. 3.*, which shows that the legislature was proceeding on any other principles than those on which *the ordinary usury laws stand;—nor any thing from which it appears that its provisions were to be extended beyond our own states;—as I cannot suppose the legislature meant to act so absurdly as to create offences and make it impossible to try the offenders;—I concur, in opinion, with the other Judges, that the 13 *Geo. 3.*, does not limit the rate of interest on loans made within the dominions of native independent sovereigns by *British* subjects domiciliated and residing within such dominions.

END OF TRINITY TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
MICHAELMAS TERM,
IN THE
SIXTH YEAR OF THE REIGN OF GEORGE IV., 1825.

DOE dem. CLARK, et al., v. SPENCER.

Under 1 G. 4, c. 119, the provisional assignee of the Insolvent Debtor's Court may, without application to that court, sue in ejectment for property assigned to him.

THE plaintiff recovered a verdict in this ejectment on the demise of the provisional assignee of the Insolvent Debtors' Court, although it was objected at the trial, that under the 1 G. 4, c. 119, such assignee had no title to sue. By section 4, of that act it is enacted, "That each petitioner to the court shall, at the time of subscribing his petition, duly execute a conveyance and assignment in such manner and form as the said court shall direct, of *all* the *estate*, right, title, interest, and trust of such prisoner, except the wearing apparel, bedding, and other necessaries of such prisoner and his or her family, not exceeding in the whole the value of 20*l.*, so as to vest *all* such real and personal estate and effects in the *provisional* assignee of the said court."

And by the 7th section of the act it is enacted, * "That when the [204] said court shall adjudge any prisoner to be entitled to his discharge, such court shall appoint a proper person or persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this act; and when such assignee or assignees shall have signified to the said court

their acceptance of the said appointment, every such prisoner's estate, effects, rights, and powers vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee to such assignee or assignees, in trust for the benefit of such assignee or assignees and the rest of the creditors of every such prisoner, in respect of or in proportion to their respective debts, according to the provisions of this act. And such assignee or assignees is, and are hereby fully empowered to sue from time to time as there may be occasion, in his or their own name or names, for the recovery, obtaining, and enforcing any estate, effects, or rights of any such prisoner."

By the 11th section of the act it is also enacted, "That no suit in law be proceeded in further than an arrest on *meane* process, or suit in equity be commenced by any assignee or assignees of any such prisoner's estate and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together, pursuant to a notice to be given at least fourteen days before such meeting, in the *London Gazette*, or other newspaper which shall be published in the neighborhood of the last residence of such prisoner, for that purpose, and without the approbation of one of the commissioners of the said court."

Wilde, Serjt., moved for a rule *nisi* to set aside the verdict and enter a non-suit instead. He argued, as it had been contended at the trial, that under this [205] act the provisional assignee had not authority to sue, or, at all events, not without the order of the Insolvent Debtors' Court, of which no proof had been adduced at the trial.

BEST, C. J. This was an action of ejectment brought on the demise of the provisional assignee of the Court of Insolvent Debtors. The objection made at the trial was, that the provisional assignee was only to take charge of the effects until the insolvent was adjudged entitled to relief, and an assignee was appointed by the court.

I was of opinion that until an assignee was appointed by the court, and the provisional assignee had assigned to the one so appointed, the legal estate in any lands belonging to the insolvent was vested in the provisional assignee, and that he might maintain an ejectment for such lands. We have now another objection presented to us, namely, that it was incumbent on the provisional assignee to prove at the trial that he had the authority of the Court of Insolvent Debtors, and of a majority of the creditors, for bringing the action, and that without such proof he could not recover. I do not think that there is any weight in either of the objections.

With respect to the first, it will appear from the 1 G. 4, c 119, and the 3 G. 4, c. 123, that the real estate is completely vested in the provisional assignee, by the assignment made to him, and remains so until it is divested by his assignment to the assignees named by the court, and these assignees have accepted such assignment. Unless there be something to control a provisional assignee in the exercise of this right, he may maintain any action that it may be necessary to bring for the purpose of getting possession of the real or personal property of the insolvent; and section 4, of the 1 G. 4, directs that the insolvent at the time that he subscribes the petition for his discharge, shall make an assignment to *vest all his real and personal estates in the provisional assignee*, with a proviso that in case the insolvent does [206] not obtain his discharge, the assignment shall be void. The object of this section was to prevent the estate of the insolvent from being wasted between the time of his applying for relief and the Court of Insolvent Debtors, declaring that he is entitled to it. This object would be defeated if the provisional assignee could not maintain actions for the recovery of the insolvent's property. The seventh section says, that when the court shall have adjudged that a prisoner is entitled to his discharge, it shall appoint proper persons to be assignees of the insolvent's effects; and that when such assignees shall have signified to the court their acceptance of the appointment, then the pro-

visional assignee is to assign the estate *vested in him* to the assignees appointed by the court. By the words of this section, the estate, by the assignment of the insolvent under the 4th section, remains in the provisional assignee, until he, by order of the court, conveys it to the assignee appointed after the court has adjudged that the insolvent is entitled to his discharge.

The next objection is, that although the estate is vested in the provisional assignee, the eleventh section of the 1 G. 4, and the second section of the 3 G. 4, make it necessary for him to prove at the trial that he was authorized by the court for the relief of insolvent debtors, and by the major part in value of the creditors of such insolvent to bring the action. By these sections the legislature did not intend to increase the expense of suits brought for the benefit of insolvent estates, or to give any advantage to those who endeavor to withhold from the assignees what belongs to such estates. If we put the constructions on those acts that the defendant contends for, both those consequences will follow. The legislature intended to prevent the insolvent's estate from being spent in useless litigation, and to protect a provisional assignee, from actions for what he had "done under the assignment, should it [**207 become void from the court for the relief of insolvent debtors refusing to discharge the insolvent.

If an action is brought without the proper authority, this court might perhaps stop it on motion, or the Insolvent Debtors' Court, might order their officer to suspend or discontinue it. I doubt, however, whether either court should interfere on the application of a defendant. He can in no way avail himself of this provision of the act, as it was not made for his benefit. I am convinced he can make no use of it at the trial of an ejectment brought against him.

Rule discharged.



CHOLMELEY v. PAXTON.

A trustee having a power to sell an estate of which the *cestui que trust* was tenant for life without impeachment of waste, sold and conveyed the land only, received the money for it, and applied it to the purposes of the trust; the *cestui que trust*, by the same conveyance, sold and conveyed the timber, and received the money for it: Held, that the power was not well executed.

THIS was a writ of *formedon*. The pleadings, which were of enormous length, may be stated in substance as follows: The defendant in his count set out so much of the will of Sir *Henry Englefield*, as showed that an estate was devised by him to Lord *Cadogan*, and Sir *Charles Buck*, in trust for the eldest son of Sir *H. Englefield*, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of his eldest son in tail male; remainder to his second son for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of his **208 second son, in succession in tail male; remainder to the defendant's mother for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in succession, in tail male. The count then showed the death of the testator and his wife (for whose benefit a term was created, which by her death was determined,) the death of the testator's two sons without issue, the death of the defendant's mother, and that the defendant was her eldest son, in which right he claimed the estate.

The tenants in their eighth plea, on which the question chiefly turned, stated that the trustees and the survivors of them were empowered by the will at the request of any person in possession as tenant for life to sell the estate for such price as they should think reasonable, and *for the purpose of such sale to revoke the uses expressed in the will*, and to declare other uses, and to lay out the proceeds in the purchase of other lands which they were to hold to the same uses as the land devised, and to receive and give a discharge for the purchase money which they were to lay out in real or government securities, until a proper estate could be purchased, and in the mean time to pay the interest and dividends to the tenant for life.

The plea then stated, that in pursuance of this power Lord Cadogan, after the decease of Sir C. Buck, at the request of Sir H. C. Englefield, the first tenant for life, sold the estate to *Byam Martin*, for 13,400*l.*, which Lord Cadogan, judged to be a reasonable price for the same, and then set out so much of the deed to *Byam Martin*, as revoked the former uses of the will, and conveyed the estate to a person in trust for *Byam Martin*, in fee, for the price of 13,400*l.*

The plea next deduced the title from *Byam Martin*, and his trustee to the tenant. *Proof* was made of the *deed of conveyance from Lord Cadogan, to *Byam Martin*. In the replication, oyer was demanded of that deed. The deed was then set out, from which it appeared that Lord Cadogan, sold the estate, *exclusive of the timber* growing upon it, for 13,400*l.*, and that such timber was sold by Sir H. C. Englefield, to *Byam Martin*, for 2448*l.*, which timber Sir H. C. Englefield, by the same deed conveyed to *Byam Martin*, and his heirs, and the *receipt of which* 2448*l.* Sir H. C. Englefield, acknowledged in the body of the deed, and also by a receipt on the back of it.

The replication also stated the will of Sir H. C. Englefield, and showed from that will that the power was what it was stated to be in the eighth plea, and brought under the view of the court the supposed imperfections, in the execution of the power by the trustees selling only the land and allowing the tenant for life to sell the timber on it, and to receive the price thereof. To this replication there was a general demurrer and joinder.

The case was argued in *Trinity term*.

Peake, Serjt., in support of the demurrer.

The power was well executed. The tenant for life having an estate without impeachment of waste, had a right to sell all the timber, and convert it to his own purposes. The estate itself could not be sold without his consent, and he was entitled to receive the produce of the timber. In *Lady Plymouth v. Lady Archer*, 1 Br. Ch. Rep. 159, *Burgess v. Lamb*, 16 Ves. 174, and *Woolf v. Hill*, 2 Swanst. 149, Lord Eldon held that the tenant for life was entitled to sell the timber upon an estate purchased in lieu of one in which he had been tenant for life without impeachment of waste. If, therefore, he might cut, either upon the first property, *or that which was received instead, it is difficult to say why he might not sell.

But, at all events, the conveyance by Lord Cadogan operated as a revocation of the uses of the will, and thereby destroyed the plaintiff's claim.

Cross, Serjt., contra. The tenant for life was not the owner of the timber, but had only the liberty to cut, without being subject to an action: *Lewis Bowles's case*, 11 Rep. 79.; and the trustee having conveyed the soil only, without the timber, has not executed the power; for under that power he was not only to exercise a judgment as to the price to be paid for the property, but to purchase another in exchange, and this would be less valuable than the property sold, by the amount of the price of the timber. It might happen that the timber might be worth more than the rest of the property. Even with regard to the right of cutting down, it is by no means clear that a tenant for

life, without impeachment of waste, can do more than cut in a husbandman-like manner *Bridges v. Stephens*, 2 Swanst. 150, n.

Cur. adv. vult.

BEST, C. J., after stating the pleadings (as in the beginning of the case) now delivered the following judgment:

From the deed set out in the replication it appears that Lord *Cadogan* had nothing to do with the sale of the timber, and that he formed no opinion as to the reasonableness of the price paid for it, nor ever received or had any control over it; although it is conveyed as real property to the heirs of the purchaser, the trustee does not join in that conveyance; he does not convey the woods, but only the land on which the woods stand.

*This is at least the effect of the deed, for although a conveyance of the land would convey the timber, if there were nothing to control the effect of such conveyance, here it is controlled by the conveyance of the wood in the same deed.

It seems to have been supposed that as Sir *H. C. Englefield* was not impeachable of waste, the woods whilst standing and forming part of the estate were his property, and he is by the deed the only party who conveys the woods.

The question, therefore is, whether Lord *Cadogan* having sold and conveyed the estate, without the timber standing on it, has executed the power so as to convey the estate or any part of it, or any interest in it.

A tenant who is not impeachable for waste, may cut down all the timber on the estate, and the moment it is severed from the ground he may convert it to his own use. But a tenant without impeachment of waste, has no interest in the woods while standing, nor can he convey any interest in them to another. A tenant in tail is unimpeachable of waste; but if standing woods are sold by him, and these are not cut down during his life, the property in them descends with the estate, and the vendee cannot cut them. The tenant in tail, or other tenant unimpeachable of waste, may give authority to cut down timber, but such authority conveys no interest, and is revoked by the death of the person by whom it is given.

It may be said, that if a tenant unimpeachable of waste might cut every tree on the estate, as the estate will sell better with the trees uncut than when quite denuded of timber, is it not for the advantage of the reversioner that the tenant for life should give up his right of cutting the timber, and be permitted to sell it with the estate? Whether this would be for the advantage of the reversioner must depend upon many circumstances, such as the quantity of timber and the means which the tenant for life may have of cutting it. He may die before he can cut the whole or a considerable part, or even a single tree. Although a tenant in tail may bar remainders by a recovery, yet the Court of Chancery will not allow a trustee who has lands in trust for one and the heirs of his body, with remainder over, to convey to such person in fee, because such a conveyance would prevent the reversioner from claiming the estate if the tenant in tail should die before he could suffer a recovery, 1 Eq. Ca. Abr. 395. It is not fit, therefore, that a tenant for life or trustees should be permitted to do what may prejudice the reversioner without his concurrence; besides, in the sale of growing timber, trees of the value of a shilling are included, and although a tenant unimpeachable of waste would not be liable to any action for cutting such small trees, a court of equity would prevent him from taking such as were not ripe for cutting.

The tenant unimpeachable of waste by selling the timber standing, gets an advantage over the reversioner which he otherwise could not be permitted to obtain, 2 Bro. P. C. 88. It does not appear that any of this timber was felled during the life of Sir *H. C. Englefield*. It was a part of the estate at the time of the sale, and may be a part of the estate at this moment. This part of the

estate has not been conveyed by the trustees, or by any other person that had authority to convey it : is then the sale of an undivided part of the estate (for the trees whilst standing are a part,) a good execution of the power as to the part sold ? The power of sale in the will, is in these words : " To make sale and dispose, or to convey in exchange of or for any other manors, all or any part or parts of the messuages aforesaid, with the appurtenances either ^{213]} together or in parcels, for such price or prices in *money or any other equivalent as to them the trustees should seem reasonable." The trustees must substantially comply with the authority given to them ; if they do not, the act done by them will not be a good execution of the power, and the conveyance will be altogether void. They might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold ; that is the extent of their authority. They cannot sell *part* of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows. The sale of the one without the other would be a cause of confusion and litigation, which could not fail to be injurious to both the vendor and vendee, and such a sale is a material departure from the power, injurious to the reversioner, and therefore altogether void.

When a tenant for life requires an estate to be sold under such a power as this, he places himself in the situation of the owner of an estate decreed to be sold by the Court of Chancery, and he must, like him, sell it with the timber : *Burgess v. Lamb*, 16 Ves. 174. As the estate to be purchased with the proceeds of the sale must be conveyed to the same uses as the old estate, the tenant for life will have a right to cut down the timber on the purchased estate, and that is a just equivalent for his not cutting the timber on the first estate. It was not attempted at the bar to prove that although the timber was not conveyed, the conveyance of the land on which such timber was standing, might be supported. We presume that such an argument was considered untenable. My brother *Peake* seemed to feel that the sale was not warranted by the power, and he argued, that although the sale might not be good, yet the trustees having a power to revoke the uses in the will, and the "surviving trustee having revoked the uses, the demandant had no title to support his formedon. But they are only to revoke the uses for *the purpose of a sale or exchange* ; that is, for purpose of such a sale or exchange as is consistent with the legal power. The legal estate is in the *cestui que* use, and nothing remained in the trustees but a conditional power. The will authorizes the trustees to sell on the request of the tenant for life in possession, and then it says, " and to that end, (that is, that they make a sale,) they may revoke and make void the uses on which this estate is devised to them." If they had revoked the uses by one deed, and conveyed the estate by another, the two deeds would be considered as parts of the same transaction, and if the conveyance had been void, the revocation of uses preparatory to the conveyance would have been void also. Although the case of *Doe d. Willis v. Martin*, 4 T. R. 39, is in many of its circumstances distinguishable from the present, all the judges who decided that case, lay down a principle which governs this. Lord *Kenyon* says, " I am most clearly of opinion, taking the whole of the power together, that the deed was no legal revocation : they had only a power to revoke on condition." *Ashhurst*, J., says, " Their interests (the interests of the *cestui que* use,) could only be divested by a due execution of the power of revocation : a bad execution has no operation whatever." *Buller*, J. " The power of revocation was *conditional* only, but that condition not having been complied with, the *deed of revocation is void*." *Grose*, J. " This was merely a conditional power which must be considered altogether, and no part of the execution can be good unless the whole be so." It is true, that in *Doe d. Willis v. Martin*, the trustee who made the conveyance was an infant, and it ^{214]} was thought the case was not within the **7 Ann. c. 19*, which gives validity in certain cases to the conveyances of infant trustees. But

this was not the reason given by any one judge for his judgment: they all rest their judgment on this, that although the revocation of the uses and subsequent conveyance of the property were by different instruments, yet all the acts done were in execution of the power, and that not being well executed, every deed made for the purpose of executing that power was void. In the present case the revocation of the uses and the conveyance of the estate are done at the same time and by the same deed. The remainder, which under the will vested in the defendant, could only be divested by a legal revocation of uses by the trustees, and as there was no good revocation of the uses, the defendant's estate remained undisturbed, and the trustee had no legal interest to convey.

We are therefore, of opinion, that the eighth plea is not supported by the deed which is set out on oyer, and that the defendant is entitled to our judgment on the demurrer to the replication to that plea.

Judgment for defendant.

FLIGHT v. BUCKERIDGE.

A memorial of an annuity deed, enrolled within thirty days after execution of the deed by the grantee, is good, though enrolled before execution by the grantor. If the witnesses to the deed are accurately described in the memorial, it is sufficient, though they did not see the parties execute.

Covenant on an annuity deed, between *Richard Buckeridge*, of the first part; *George Buckeridge*, of the second part; *Banister Flight*, the plaintiff, of the third part; *Alexander Wylie*, *Edward Greenhill*, and *William Roberts James*, of the fourth part; *Alexander Wylie*, and *Catherine*, [^{*216} his wife, and *Alexander Forrest*, of the fifth part; and *Thomas Flight*, of the sixth part.

Breach, non-payment of the annuity.

The defendant pleaded among other pleas the following, (which was the fourth.)—that although the plaintiff within thirty days after the execution of the indenture in the declaration mentioned, by *Richard Buckeridge*, by the said plaintiff, by *Alexander Wylie*, by *Edward Greenhill*, by *William Roberts James*, by *Catherine Wylie*, and by *Alexander Forrest*, caused a memorial thereof, and of certain other instruments and assurances for granting and securing the said annuity, to be enrolled in the High Court of Chancery as follows, that is to say,

"A memorial to be enrolled in his majesty's High Court of Chancery, pursuant to an act of Parliament, made and passed in the fifty-third year of the reign of his late majesty king *George* the third: Date of instrument; 2d of Nov. 1821: Nature of instrument; indenture of grant and demise: Names of parties: (they were here set out at length:) Names of witnesses and description: *Daniel Collins*, 28, *Cursitor Street, Chancery Lane*, and *William Wadley*, clerk to Mr. *Wilmott*, No. 1, *Tanfield Court, Temple*: Name or names of persons by whom annuity or rent charge to be beneficially received: *Banister Flight*: Person or persons for whose life or lives the annuity or rent charge is granted: for the term of one hundred years thenceforth, if the said *Richard Buckeridge*, shall so long live: Consideration and how paid: (it was here set forth in detail:) Amount of annuity or rent charge; 400*l.* a year: Enrolled in his majesty's High Court of Chancery, at six o'clock in the afternoon of the 1st day of *December*, in the year of our Lord 1821:."

*217] Yet the said defendant did not execute the said *indenture in the said declaration and memorial mentioned, until long after the enrolment of the above mentioned memorial, to wit, until three months after such enrolment, to wit, on the 30th of *March*, in the year of our Lord, 1822 : And the said defendant further saith, that no memorial whatsoever of the said indenture in the said declaration mentioned, was enrolled in the High Court of Chancery, within thirty days after the execution of the said indenture by the said defendant, according to the directions of the said act of Parliament, made and passed in the fifty-third year of the reign of his late majesty king *George* the third ; whereby the said indenture in the declaration mentioned, is null and void, as against the said defendant.

The fifth plea was,—that although the plaintiff within thirty days after the execution of the indenture in the declaration mentioned, caused a memorial thereof and of certain other instruments and assurances, for granting and securing the annuity to be enrolled in the High Court of Chancery, as follows, (setting out the memorial, as in the preceding plea)

Yet the defendant did not execute the indenture in the memorial and declaration mentioned, in the presence of *Daniel Collins*, and *William Wadley*, as in the said last mentioned memorial is mentioned, either at the time the said indenture bears date, or at any time before or since the enrolment thereof; whereby according to the said act of Parliament made and passed in the fifty-third year of the reign of his late majesty king *George* the third, the indenture in the declaration mentioned, is null and void as against the said defendant.

The plaintiff demurred to the fifth plea, and assigned the following causes of demurrer ;—that the averment in that plea, that the said defendant did not execute the *indenture in the presence of *Daniel Collins*, and *William Wadley*, and the issue tendered thereby, was immaterial and irrelevant to the matter in dispute between the plaintiff and the defendant; and that it did not appear, nor was it stated in the said plea, that the memorial in that plea mentioned did not contain the names of all the witnesses to the indenture.

To the fourth plea, the plaintiff replied, that a memorial of the indenture was within thirty days after the execution thereof, enrolled in the High Court of Chancery, pursuant to the statute. He then set out the memorial, and concluded,—that the said memorial did and does duly contain the date of the said indenture, the names of all the parties and of all the witnesses thereto ; of the person for whose life such annuity was granted ; of the person by whom the same was to be beneficially received ; the pecuniary considerations for the granting of the same ; and the annual sum to be paid ; in manner and form, as in and by the statute in that case made and provided, is required.

The defendant rejoined to the replication on the fourth plea, that the defendant did not execute the indenture until long after the enrolment of the above mentioned memorial, to wit, until three months after such enrolment, to wit, on the 30th of *March*, 1822.

And there was a joinder in demurrer on the demurrer to the fifth plea.

The plaintiff surrejoined to the rejoinder on the replication to the fourth plea,—that during the whole of the said thirty days next after the execution of the said indenture by the defendant, as in the rejoinder to the replication to the fourth plea mentioned, the memorial described in the replication to the fourth plea was, and remained, and continually thenceforth hitherto hath been *219] and remained, and still is, and remains *enrolled in the High Court of Chancery, to wit, at *Westminster*, aforesaid ; as by such memorial now being and remaining so enrolled in the same court fully appears.

The defendant demurred to this surrejoinder, and assigned the following causes of demurrer,—that the plaintiff had not, in or by his surrejoinder, confessed or traversed, or denied the said rejoinder of the defendant, but had tendered an issue upon a collateral, unissuable, and immaterial point.

Joinder in demurrer.

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Lawes, Serjt., in support of the memorial, argued, that provided the memorial contained a true description of the instrument, it was immaterial when the grantor executed it, and that if the law were otherwise, the greatest inconvenience and delay must be occasioned, where some of several parties to an annuity deed resided in foreign parts. With regard to the witnesses, he maintained on the authority of *Park v. Meers*, 2 B. & P. 217, and *Powell v. Bluckett*, 1 Esp. 97, that it was not necessary the witnesses should see the party execute, and that if they did not see, it was the same thing as if there had been none : *Grellier v. Neale*, Peake N. P. C. 148, that it was not alleged in the rejoinder that any were present besides those mentioned in the memorial ; and that the plaintiff had set forth in his replication a memorial which could not be impeached.

Tuddy, Serjt., contra, contended that a memorial *ex vi termini* implied a record of the past, and therefore, could not apply to a deed in part executed after the enrolment of the memorial. The memorial must contain the date, and the date is the delivery of the deed, (2 *Salk.* 463.) *which could not effectually take place till the defendant executed it. Then, with [*220] regard to the witnesses, the whole object of the statute requiring publicity of enrolment would be defeated, if those who attested the deed were not those who saw it executed. The witnesses mentioned in the statute must mean those who were actually present.

BEST, C. J. I should like to see the granting of annuities by individuals restrained or entirely prohibited. There is but one case in which, in my opinion, it is proper that an annuity should be allowed ; namely, where an aged person without dependants is desirous of sinking part of his capital for the purpose of obtaining an improved income for his life. The payment of annuities granted by individuals is generally obtained with so much difficulty, and so often never made at all, that such a purchaser as I have described ought not to think of purchasing an annuity but from government or some public body. I have heard the present Chancellor say from the seat in which I now sit, that the dealing in annuities generally ends in the ruin of all the parties concerned. In the beginning of such transactions, avarice attempts to take a cold-hearted advantage of distress ; in the end, distress cheats avarice : all the parties engaged, are actuated by the worst motives, and, as is usual in such cases, all suffer from the conflict.

I cannot however say, that my opinion of the policy of allowing individuals to grant annuities is supported by that of the legislature. The act of the 53 G. 3, c. 141, was rather intended to promote than restrain the granting of such annuities. It relieves the annuitants from the difficulties that 17 G. 3, c. 26, placed them under.

I must construe this act according to the intent of *the legislature, [*221] and not according to my own views of the subject to which it refers. The construction that we are desired to put on this statute, would render it impossible for any one to take an annuity granted or secured by a person living at a great distance from *England*. The deeds could not be got back to *England*, to be enrolled within thirty days from the time of their execution. Nor could the names of the witnesses, in whose presence such parties executed, be known here before that period had elapsed.

The only mode of complying with the act is to enrol the deeds before they are sent abroad for execution, and to desire the parties who are to execute to have no attesting witnesses. Let us see if the words of the act will allow of such an enrolment. The second section is in these words : "And be it further enacted, than within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge, shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or

other assurance,—of the names of all the parties, and of all the witnesses thereto,—and of the person or persons for whose life or lives such annuity or rent-charge shall be granted,—and of the person or persons by whom the same is to be beneficially received,—the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid—shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require; otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes.”

*Whatever may be the literal construction of these words, I think all [222] that the legislature has required by them, was, that the enrolments should not be delayed beyond thirty days from the execution of the deeds. There is no reason why the deeds should not be enrolled before they are executed. It is true that before the execution, the covenantors are not accurately described as parties: for although a covenantee is a party before he executes, a covenantor is only made one by execution. But the enrolment, although made before, only takes effect from the execution; and then the persons whose names are set out in the memorial being parties from that moment, the memorial gives to the grantors all the information that the legislature intended they should have. A writ of error may now be obtained before judgment, and it takes effect from the moment of the entering up of the judgment. With respect to the witnesses, it does not appear on this record that there are any witnesses besides those whose names are set out in the memorial. Probably the defendant's execution was not attested by any witness. The statute does not require that there should be any attesting witnesses, but only, if there are any, that their names should appear on the memorial. I therefore think that the memorial set out on this record is a sufficient compliance with the 53 G. 3., and that the Plaintiff is entitled to judgment.

Judgment for the plaintiff.

*THORPE v. GRAHAM.

UPON a rule for an attachment against a witness not obeying a *subpoena*, which rule this court discharged, because it did not appear that there had been a sufficient service of the *subpoena*; the court also said, a term having elapsed since the service, that for the future they would adopt the rule in the King's Bench, not to entertain such a motion after a term had elapsed. 2 Tidd. 857.—v. Sillery.

RENNELL v. Bishop of LINCOLN.

When a rectory falls vacant, the advowson of which belongs to a prebendary in right of his prebend, and the prebendary dies without having presented, the presentation does not belong to his personal representative.

LINCOLNSHIRE to wit.—George Bishop of Lincoln, Thomas Henry Mirehouse, clerk, and William Squire Mirehouse, clerk, were summoned to

answer *Frances Henrietta Rennell*, widow, relict and administratrix of all and singular the goods, chattels, and credits which were of *Thomas Rennell*, clerk, bachelor in divinity, deceased, at the time of his death, who died intestate, of a plea that they permit the said *Frances Henrietta* to present a fit person to the rectory of the parish church of *Welby*, in the county of *Lincoln*, which is vacant, and in her right as administratrix aforesaid, and whereupon the said *Frances Henrietta*, "by her attorney, complains; for that whereas one [^{*224} *William Dodwell*, clerk, doctor in divinity, late prebendary of the prebend or canonry of *South Grantham*, founded in the cathedral church of *Salisbury*, heretofore, to wit, on the 27th of October, in the year of our Lord 1775, to wit, at *Boston*, in the county of *Lincoln*, was seised of and in the said prebend or canonry, with its appurtenances,—to which said prebend or canonry the advowson of the said rectory of the said parish church of *Welby*, with its appurtenances, then belonged, and still belongs,—in his demesne as fee in right of the said prebend or canonry; and the said *William Dodwell*, doctor in divinity, so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry, with its appurtenances, to which, &c., afterwards, to wit, on the same day and year aforesaid, at *Boston* aforesaid, in the county aforesaid, presented to the said church of *Welby*, being then vacant, one *William Dodwell*, master of arts, his clerk, who, on the said presentation of the said *William Dodwell*, doctor in divinity, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our Sovereign Lord *George the Third*, late King of *Great Britain*; and the said *Frances Henrietta* further says, that the said *William Dodwell*, doctor in divinity, being so seised of the said prebend or canonry, with its appurtenances, to which, &c., in his demesne as of fee, in right of the said prebend or canonry, he, the said *William Dodwell*, doctor in divinity, afterwards, to wit, on the 1st of October, in the year of our Lord 1785, to wit, at *Boston* aforesaid, in the county aforesaid, died so seised; after whose death, to wit, on the 29th of October, in the year last aforesaid, to wit, at *Boston* aforesaid, in the county aforesaid, one *Robert Price*, clerk, was lawfully admitted, instituted, [^{*225} and inducted prebendary of the said prebend or canonry, with its appurtenances, to which, &c.; whereby the said *Robert Price* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c., in his demesne as of fee in the right of the said prebend or canonry; and the said *Frances Henrietta* further says, that the said *Robert Price* being so seised of and in the said prebend or canonry, with its appurtenances, to which, &c., in his demesne as of fee in right of the said prebend or canonry, he the said *Robert Price* afterwards, to wit, on the 1st of April, in the year of our Lord 1823, at *Boston* aforesaid, in the county aforesaid, died so seised; after whose death, to wit, on the 23d of April, in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, the said *Thomas Rennell* was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which, &c., whereby the said *Thomas Rennell* then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry; and the said *Thomas Rennell* being so seised, the said church afterwards, to wit, on the 1st of June, in the year of our Lord 1824, at *Boston* aforesaid, in the county aforesaid, became vacant by the death of the said Rev. *William Dodwell*, clerk, the late parson and incumbent thereof, and still is vacant, whereby it then and there belonged to the said *Thomas Rennell* to present a fit person to the said rectory of the said parish church so being vacant as aforesaid; and the said *Frances Henrietta* further saith, that afterwards, and whilst the said church was so vacant as aforesaid, to wit, on the 30th of June, in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, the said **Thomas Rennell* died intestate, so seised of and in the said prebend or canonry, [^{*226}

with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, without having presented any person to the said rectory of the said parish church; after whose death, and whilst the said church was so vacant as aforesaid, to wit, on the 22d of July, in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, administration of all and singular the goods, chattels, and credits which were of the said *Thomas Rennell*, deceased, at the time of his death, who died intestate, by the Right Rev. Father in God, *Charles*, by Divine Providence, Archbishop of *Canterbury*. Primate of all *England*, and Metropolitan, was in due form of law, granted to the said *Frances Henrietta*, whereupon and whereby it then and there belonged, and now belongs, to the said *Frances Henrietta*, as administratrix aforesaid, to present a fit person to the said rectory of the said parish church so being vacant as aforesaid, and which is still vacant; but the said Bishop of *Lincoln*, and the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* unjustly hinder her from presenting a fit person to the said rectory of the said parish church, whereupon the said *Frances Henrietta*, administratrix as aforesaid, saith, that she is injured, and hath sustained damage to the value of 1000*l.*, and, therefore, she brings her suit, &c. And the said *Frances Henrietta* brings into court here the letters of administration of the said Archbishop, which give sufficient evidence to the court here of the grant of administration to the said *Frances Henrietta* as aforesaid, the date whereof is a certain day and year, to wit, the day and year above in that behalf mentioned, &c.

Plea. And the said defendant, *George Bishop of Lincoln*, by *William Gillmore Ballon* his attorney, *comes and defends the wrong and injury when, &c., and saith that the said rectory of the parish church of *Welby* is within his diocese, and that he hath nothing, nor doth he claim to have any thing in the said rectory of the church aforesaid, or in the advowson of the same, except only the admission, institution, and induction of the person to the rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place: and this he is ready to verify, wherefore he prays judgment, if the said *Frances Henrietta* without assigning some special disturbance in the person of him the said bishop ought to have or maintain her said action against him, &c.

And the said defendant *Thomas Henry Mirehouse*, clerk, and *William Squire Mirehouse*, clerk, by their attorney, come and defend the wrong and injury, when, &c., and say that the said *Frances Henrietta* ought not to have or maintain her action against them, because they say, that after the said *Thomas Rennell* had so died without having presented any person to the said rectory of the said parish church, and whilst the said church was so vacant as aforesaid, to wit, on the 19th of July in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, he the said defendant *Thomas Henry Mirehouse*, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which said prebend or canonry the said advowson with its appurtenances then belonged and still belongs, whereby he the said *Thomas Henry Mirehouse* then and there became and was seised of and in the said prebend or canonry with its appurtenances, to which, &c., in his demesne as of fee in right of the said prebend or canonry, and whereby it then and there belonged to him to present a fit person to the said rectory, so being vacant *as aforesaid; and the said *Thomas Henry Mirehouse*, and the said *William Squire Mirehouse* further say, that he the said *Thomas Henry Mirehouse* being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry with its appurtenances, to which, &c., afterwards, to wit, on the 26th of September in the year last aforesaid, at *Boston* aforesaid, in the county aforesaid, presented to the said church of *Welby*, being then vacant, the said defendant *William Squire Mirehouse*, his clerk, for the purpose of his being

admitted, instituted, and inducted into the same, but which said admission, institution, and induction have been hindered and prevented by his majesty's writ of *ne admittas* to the said defendant Lord Bishop of Lincoln, in that behalf directed; for which reason the said *Thomas Henry Mirehouse* hath prevented the said *Frances Henrietta* from presenting a fit person to the said church; and this they the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* are ready to verify; wherefore they pray judgment if the said *Frances Henrietta* ought to have or maintain her aforesaid action thereof against them, &c., and they also thereupon pray a writ to the said bishop, &c. And the said *Frances Henrietta*, as to the plea of the said bishop, (inasmuch as he hath not nor claimeth to have any thing in the church aforesaid, or in the advowson of the same, except only the admission, institution, and induction of the rectors to the same rectory and parish church, and all such other things as belong to the ordinary as ordinary of that place,) prays judgment against the said bishop, and a writ to the said bishop, &c. Therefore it is considered that the said *Frances Henrietta* recover against the said bishop her presentation to the said church, and that she have a writ to the said bishop, that notwithstanding his disclaimer he admit a fit person to the said church on the presentation of the said *Frances Henrietta*, and the *said bishop [^{*229}is not amerced because he hath excused himself of any particular disturbance, but let execution thereof be stayed until the said plea between the said *Frances Henrietta* and the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* be determined, &c. And the said *Frances Henrietta* as to the plea of the said *Thomas Henry Mirehouse* and *William Squire Mirehouse* by them above pleaded says, that the said plea and the matters and things therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude her the said *Frances Henrietta* from having and maintaining her aforesaid action thereof against them the said *Thomas Henry Mirehouse* and *William Squire Mirehouse*, and that she the said *Frances Henrietta* is not bound by the law of the land to answer the same; wherefore for want of a sufficient plea in this behalf, the said *Frances Henrietta* prays judgment and her damages by reason of the hindrance aforesaid, together with a writ to the said bishop to be adjudged to her, &c.

This case was argued twice. First, in *Hilary* term 1825, by *Wilde Serjt.*, for the plaintiff, and *Taddy Serjt.*, for the defendant: and again in *Trinity* term, by *Vaughan Serjt.*, for the plaintiff, *D'Oyly Serjt.*, for the defendant, and *Bosanquet Serjt.*, for the crown. There was a difference of opinion among the members of the court, and they delivered their several judgments at such length as to render superfluous, especially in a case of so rare occurrence, a detailed report of the arguments of counsel.

On the part of the plaintiff it was contended, that where a church falls vacant, the next presentation is a chattel interest, and, as such, must be disposed of according to the unvarying rule of law by which all such interests are regulated.

That the character or situation of the party, into whose hands a chattel falls, cannot alter the nature of the interest, or the common law [^{*230}mode of disposing of it.

That such an interest cannot be in abeyance, or go in succession, but must, for the foregoing reasons, belong to that party in whose time the vacancy takes place, or his personal representative; and that this was admitted to be the law with respect to archbishops' options, which could not be distinguished from any other spiritual chattel.

For the defendants it was argued that the incidents of ecclesiastical patronage in spiritual hands were different from the incidents of the same patronage in lay hands, the lay patron having an interest both of profit and of trust, the

spiritual patron only a trust; and a trust to be exercised for the benefit of the public:

That in the pleadings the plaintiff's intestate was alleged to be seised in right of his prebend, and the presentation, therefore, ought to be in the same right; yet it was impossible for the administratrix to present in right of the prebend. Again, a lay patron might grant an advowson, or next presentation, but there was no instance of a spiritual patron having exercised such a power. The temporalities of a bishop were also mentioned as a proof that the incidents of a chattel in trust might depend in some degree upon the character of the owner. If a bishop have an advowson, and the church become void, and the bishop die, neither his executors nor successor shall present, but the king.

On the part of the crown, the case was likened to that of the temporalities of bishops, priors, and abbots, the practice with regard to which it was contended ought to be pursued in the present instance.

Cur. adv. vult.

GASELKE, J. This is a *quare impedit* brought by the administratrix of the late prebendary of *South Grantham** in the cathedral church of *Silvbury*, against the three defendants, to recover the presentation to the rectory of the parish church of *Welby* in the county and diocese of *Lincoln*, the advowson of which belongs to the prebend of *South Grantham*, and which became vacant in the lifetime of the intestate, the late prebendary.

The declaration states the seizin of one *William Dodwell* of the prebend, to which the advowson belongs in his demesne as of fee in right of the said prebend; his presentation of a clerk who was admitted, instituted, and inducted; the death of the prebendary, and the admission, institution, and induction of *Robert Price* to the prebend; the death of *Price*, and the admission, institution, and induction of the intestate; the death of the incumbent, whereby it belonged to the intestate to present; the death of the intestate pending the vacancy, and administration granted to the plaintiff, whereby she is entitled to present, but that the defendants hinder her.

The defendant the bishop pleads the usual plea, that he claims nothing but as ordinary, and there is judgment against him with a stay of execution in the usual form.

The other defendants plead that after the death of the intestate, and while the church continued vacant, one of them was duly admitted, instituted, and inducted, to the prebend, whereby it belonged to him to present to the rectory; that he accordingly presented the other, whose admittance has been prevented by a writ of *ne admissas* directed to the bishop.

To this replication the plaintiff has demurred generally, and the defendants have joined in demurmer.

The case was first argued in *Hilary* term last, when it appearing to the court, that a question might be made, whether, under the circumstances, the crown was not *entitled to present to the vacant living, it was directed* that the case should be argued a second time, and notice was given to the attorney-general that he might intervene, if he thought fit, for the interest of the crown. The case was accordingly argued a second time in the last term, not only by the counsel for the respective parties to the record, but also by my brother *Bosanquet* on the part of the crown, and now stands for the judgment of the court.

The material question which it is necessary for the court to decide *upon this record* is, whether the plaintiff has made out her title to present? for if she has not, it is immaterial as to this action, who is entitled, as any decision of the court upon the title of any other party would not be binding.

The question is a new one, for notwithstanding all the industry which has been exerted by the several counsel by whom the case has been argued, and by those by whom it is to be decided, no case similar to it has been found in

the books; and although one would think that the case must have happened in many instances, none have been discovered.

In support of the affirmative of the question, the plaintiff must make out that the right of presentation to a presentative living, the patron of which is entitled to the advowson in right of an ecclesiastical prebendarcy, and the vacancy in which happens in the life-time of the patron, is a chattel severed from the inheritance, and in the event of the death of the patron before the vacancy is filled up, belongs to his personal representative in the same manner as it would have done, had he been seized of the advowson in respect of any temporal property.

I use the term presentative living, because it has been decided in this court in the case of *Repton v. The Governors of Tamworth School*, in 2 Wils. 150, after two arguments, that in the case of a donative, the right "of donation descends to the heir, and that the executor has no title, which [*233- he would have had, had it been a presentative benefice.

I could have much wished for a fuller report of that case than is to be found in the very short statement of it in *Wilson*, in which neither the argument of counsel, nor the grounds of the decision are mentioned; nor do I find any other authority upon the point.

I have seen the declaration, which stated that one *Sebright*, was seised of the advowson and donation of the vicarage, as of fee and right, which said vicarage had been immemorially a donative; and a prescription in *Sebright*, and all those whose estate, &c., upon a vacancy to give such vicarage to such person as they should think proper, to be held during his life.

It then deduced the title to the plaintiff's testator, showing the vacancy to have happened in his lifetime, and to have continued to, and at his death, whereby it belonged to plaintiff to present. I do not find what the plea was, but whatever it was, the argument appears to have been in arrest of judgment.

It seems that originally the right of presentation to all churches was in the bishops, and perhaps it is not easy to ascertain precisely to what period any alteration happened in that respect. It appears, however, to have taken place at a very considerable time back, and the origin of it is thus accounted for by Lord Coke.

"The right of advowsons, or of presenting a clerk to the bishop as often as a church becomes vacant, was first gained by such as were founders, benefactors, or maintainers of the church, either by reason of the foundation, as where the ancestor was founder of the church; or by donation, where he endowed the church; or by reason of the ground, as where he gave the soil whereupon the church was built;" 1 Inst. 119.

* And Gibson says, "although the nomination of fit persons to officiate throughout the diocese was originally in the bishop, and no other, [*234 yet when lords of manors were willing to build churches, and to endow them with manse and glebe for the accommodation of fixed and resident ministers, the bishops, on their parts for the encouragement of such pious undertakings, were content to let these lords have the nomination of persons to the churches so built and endowed by them, with reservation to themselves of an entire right to judge of the fitness of the persons so nominated; and what was the practice, became in process of time the law of the church." Gibson, 2d Ed. 7. 57.

The general rule is admitted, that if one be seised of an advowson in fee, and the church becomes void, the void turn is a chattel, and if the patron die before he presents, the avoidance doth not go to his heir, but to his executor. And to such an extent is the doctrine of the void turn being considered as a chattel and severed from the inheritance, carried, that it is held, that where a wife is seised of the advowson, and the church being void, dies with-

out having had issue, so that the husband is not tenant by the courtesy, still the husband shall present to the void turn : 21 H. 6, 56 b.

And where the husband is tenant by the courtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir shall not have the turn, but the husband's executors. And so is the law in most cases where the interest determines after the church is void and before presentation, *per Finch.* 38 E. 3, 36. *Bro. Presentation al Eglise,* 18, 21 H. 6, 56.

Other authorities in which the void turn is stated to be a chattel, are,—
Fitz. Nat. B. 34, n. “If a vicarage happen void and before the parson presents, he is *made a bishop, &c.; yet he shall present to this vicarage [235] because it is a *chattel vested.*” 4 *Leon.* 109, this interest is a *chattel*, for if the church void, and before presentation the patron dieth, his executors shall have the presentation, for that it was a *chattel vested* in their testator.

It is said, there are some exceptions to the general rule of the executor being entitled to present. One is, where the patron is also the incumbent. As in the case of *Hall v. The Bishop of Winton*, 3 *Lev.* 47., where the same person being parson of the church and seised in fee of the advowson, although it was objected that the advowson did not descend to the heir until after the death of the ancestor, and by the death of the ancestor the church was void, and the avoidance, by that, severed and vested in the executor, the court on the first argument held and adjudged that the heir should have it; “for all is done in an instant; the descent to the heir and the falling of the avoidance to the executor; and where two titles accrue in the same instant, the elder, shall be preferred; as in the case of joint tenancy where one devises his part, the title of the devisee and of the survivor happen in the same instant, and the title of the survivor being the elder, shall be preferred.”

Another is, where the patron is a bishop and entitled to the living in right of his see. There if the bishop dies after the vacancy and before it is filled up, the king and not the executors shall present. And this is urged by the counsel for the defendant, if not as an authority in favor of the new prebendary, yet against the right of the plaintiff, which will equally answer their purpose in this action. Various reasons are assigned in the books for this. In *Co. Lit.* 388, a. it is said, “that if a church become void in the life of a [236] bishop, and so remain until after his decease, the king shall *present thereto and not the executors, for nothing can be taken for the presentation, and therefore, it is not assets.”

This, however, cannot be the reason, for if it were, it would apply to every case, even the admitted one of a lay patron, in which, therefore, it might be said, the executor is not entitled to the presentation: for nothing can be taken for it, consequently, it is worth nothing: and therefore, no assets. The dicta respecting value are, however, contradictory: *Hob.* 304. Advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor. In 38 H. 6, the king granted the monks should have all their possessions of the abbey in the vacation for their sustentation: ruled, that they should not have the advowsons, because no sustentation arose out of them.

It has also been argued, that the presentation is a spiritual trust, and consequently on the vacancy of the see vested in the king as the supreme patron and head of the church. If this were so, would not the guardian of the spiritualities of the vacant see be the proper person to present, or if the see should be filled up before the presentation, would not the new bishop be entitled to it? But on the contrary, the authorities show that it is considered as part of the temporalities; that the king takes it as such; that it passes to a third person by a grant of the temporalities; and that, although the church remains void, not only till after consecration of the new bishop, but after the restitution of the temporalities of the see, the vacancy is still to be supplied by the king

or his grantee, and not by the new bishop. Surely nothing can be more conclusive to show it to be a temporal chattel, and completely severed from the advowson. There is a passage in *Watson*, chap. 9, p. 48., in the edition of 1701, which shows very clearly the rights of the crown on this subject.

*It is thus: "But in the case of a bishop, the void turn of a church, [*237] of the advowson whereof he is seised in right of his bishopric, by his death doth not go to his executor. But when the temporalities of the bishopric are seised into the king's hand, the king doth not only present such benefices as became void during the seizure, (18 Ed. 3, 5 a., 29 a., 30 a. 24 Ed. 3, 26. 5 E. 2, *Fitz. quare Impedit*, 165, 19. E. 2, *quare Impedit*, 178.) and as were void after the death of the bishop and before the seizure, (12 Ed. 3, *Fitz. quare Impedit*, 58.; but also of all such as were void when the bishop died; (50 Ed. 3. 9 H. 6, 16 b. *admitt*: 24 Ed. 3, 26. *Lib. Parl.* 21 Ed. 1. *Prior de Bermonsey's case*, 24 Ed. 3, 30. 1 *Inst.* 90, 388 e.;) yea, and to such to which the bishop had at any time presented or collated, if his clerks had not taken as well induction as institution, or collation before the bishop's death, because nothing but induction fills the church as against the king; (*Liber Parliamentorum*, 21 Ed. 1. *The Prior of Bermonsey's case*, 24 Ed. 3, 30. 11 H. 4, 9 e, *Fitz. Nat. br.* 34, k. 36 k. 38 Ed. 3, 3 & 4. *Hob.* 208.) much more to such to which the bishop had only presented, and to which his clerk was not instituted; (44 Ed. 3, 33.) and if the bishop doth die the same day after induction, the king is not barred; yea, and whether the king doth of grace grant the temporalities before consecration, or livery of them be sued out of the king's hands by the successor, the king, though he hath not then presented to such benefice, the right of presenting to which came to him by reason thereof, may at any time afterwards present to the same: (18 Ed. 3, 1 e. 24 Ed. 3, 26 b.*)"

Fitz. Nat. brev. 33 n. "But if the king have his advowson by reason of the temporalities of a bishop, and during the avoidance the king restore the temporalities "to the bishop, yet he shall present to the advowson, and [*238] not the bishop, for this avoidance."

Fitz. Nat. brev. 33 n, "If the king grant unto an abbot and his successors, that the monks shall have the temporalities during the vacation, now if the advowson happen to void during the vacation, the monks shall present the same:" (30 Ed. 3. 17 Ed. 3, 51.)

2 Roll. Abr. 345. "If the king has an advowson by reason of a wardship, and he grants to another during the minority of the ward, and after the church becomes void, and continues so until the ward attains his full age, whereby the interest of the grantee determines, yet the grantee shall have the presentation, and not the king:" (*Contra* 29 Ed. 3, 8 b. *Admit per Issue.*)

In *Co. Lit.* 17, it is said, on the other hand, that guardian in socage shall not present to an advowson, because he can take nothing for it; and by consequence he cannot account for it; and by the law he can meddle with nothing that he cannot account for.

In the case of *The Dean and Chapter of Hereford v. The Bishop of Hereford and Ballard*, Cro. Eliz. 440., the court held the next avoidance of a church not to be a thing whereof profit could be made, nor any rent reserved.

It is difficult to reconcile this doctrine of advowsons and grants of next avoidances not being worth any thing, with the practice of the present day; for it is quite clear that not only at this day, but for a considerable period, advowsons and grants of next presentations are, and have been matters of merchandize; as, indeed, Bishop *Gibson*, admits to be the case, though he complains very much of it, as contrary, not only to the nature of advowsons, which are, he says, merely a trust vested in the hands of patrons, by consent of the bishop, for the good of the church and religion; but also to the express letter of the canon law; the rule of which is that the *right of patron- [*239] age being annexed to the spirituality, cannot be bought or sold.

At what period advowsons and next presentations began to be considered saleable, it is not easy to ascertain, but it seems that presentations were considered valuable in the time of *Ed. I.*, for in the 13th year of his reign damages are given in *quare impedit* to the amount of two years, or a half year's value of the church, according to the length of time of the disturbance, and to the circumstance of the patron having thereby lost his presentation for that time or not. And before the *12 Ann.* the practice of selling them was quite common, insomuch that it was thought necessary to restrain it by act of parliament, not generally, but only in the case of the clergy purchasing for their own benefit. Dr. *Burn* says, "This act being only restrictive upon clergymen, all other persons continue to purchase next avoidances as they did before, and present thereto as they think proper." Another observation is, that the act only attaches if the purchaser is himself presented.

It is said that in case of a lay patronage, the church is secure from an improper person being presented, by the bishop's right to refuse the party presented.

The same protection is afforded in this case; the administratrix here only claims to present. The Bishop of *Lincoln* is to judge of the fitness of the person presented. So it is in all cases of ecclesiastical patronage, except in the case of a bishop collating to preferment within his own diocese. It is so with the options of an archbishop: with respect to which, it is to be observed, that they are to all purposes considered as chattels, and his personal property. He may devise them by his will; and if he does not devise them, they pass to his executor or administrator. They are not considered as belonging to the see, and seizable by the *king, amongst the other temporalities belonging to it. The case of options, also, is an answer to a distinction which has been attempted to be made between ecclesiastical and lay patronage, that the former is never sold or even granted away, or disposed of, until the avoidance actually happens. For the subject of the option is granted the very instant of the bishop's appointment to the see; and although it is not to be supposed that the archbishop would make it an object of sale, yet if it should happen that he should die intestate, and a creditor take out administration, what is there to restrain the administrator from selling the options before the vacancies happen; or, indeed, in a common case, to prevent a residuary legatee, or one of the next of kin, from calling upon the executor or administrator to do so? This inconvenience cannot arise here, for the vacancy having happened, the void term cannot be sold.

I mention the case of options to show that amongst the highest dignitaries of the church, there does not appear to be any apprehension of danger in permitting a presentation to fall into the hands of an executor. I do not mention it as a case which has hitherto received any express judicial sanction. It is certainly not conformable to the ancient custom, as set out in the grant of an option, in the Appendix to *2 Gibson*, 1329, where it is stated to have been the ancient and immemorial usage for the archbishop to name a fit clerk, for whom the new bishop was to provide *quam primum facultas se obtulerit*,—as soon as he could,—and to assign him a pension in the meantime.

Cranmer appears to have been the first who adopted the present course. That the law has no apprehension of any danger from the presentation falling into the hands of an executor, is clear from the daily sanction it gives to the grants of next presentation,—in all which, if the grantee dies before the church avoids, the *presentation falls to the executor or administrator,—and by allowing an executor or administrator to maintain a *quare impedit* in his own name.

In one of the cases I have met with, the name of which I do not remember, if my recollection is accurate, a question was made whether the executor could complain of the disturbance in the testator's time as well as his own, which was determined in the affirmative.

I am not aware of any instance, in modern times at least, of any ecclesiastical patron having sold the next presentation of any living to which he was entitled in respect of his ecclesiastical preferment. In addition to the improbability of their doing so, the uncertainty of the grant's taking effect by the vacancy happening in the life-time of the grantor, would, of course, render it not frequent. But were it to be done, and the avoidance happen in his life-time, I am not aware of any authority which has said he would not be bound by his own grant, although he cannot bind his successor. On the contrary it is stated, (*Watson*, page 53,) that the grant by a bishop of the advowson of an archdeaconry for twenty-one years, though void against his successors, and the king, is good against himself, so that he cannot void it during the time he continues bishop; so also grants by deans and chapters become void when the dean dies, but bind both dean and chapter during the life of the dean. For this he cites 3 Co. 60. *Richman v. Garth*, 2 Cro. 173.

That such grants have been made in earlier times, appears from many precedents to be found in the book of entries.

Pet. Int. 110. The King v. The Abbott of _____ and another. The declaration states the seizen of a former abbot of the vicarage of the church of *K.*, who presented *T.*: the death of that abbot, and the election of a successor: the abbot and convent granted the next presentation to *T. B.* A writ against *T. B.*, who was *outlawed. The death of the incumbent, during the [**242 outlawry, whereby it belonged to the king to present.

Winch. 825. Stanhope v. Bishop of London, Williams and Anderson, reported in Hob. 237. The declaration states, that the prior of *Thetford* was seized of the moiety of the advowson of the church of *Rippingell*, and one Sir *John Denham* of the other moiety, to present by turns: that the church being full of one *Birely*, the prior, with consent, &c., did grant the next avoidance unto *Bryan Higden*: the dissolution of monasteries, &c., and grant of priory and the moiety of the advowson by *Hen. 8.* to Sir *Michael Stanhope* and wife, and heirs male of his body: the death of the incumbent, and presentation by grantee of next avoidance: upon the death of the second incumbent, the party claiming under *Denham* presented, and upon the next vacancy plaintiff, as heir male of Sir *M. Stanhope*, presented, and defendants disturbed.

Co. Ent. 507. Webster v. Archbishop of York and Woodroffe. Archbishop seized of prebend of *Stillington* in cathedral church of *St. Peter*, collated *Boxal*: archbishop deprived: temporalities came to the queen: incumbent deprived: queen presented *Atkinson*: *Young* became archbishop, and in First *Mary* granted to *George Webster* and *John* his son, the first and next presentation to the prebend: confirmed by dean and chapter: death of *Atkinson*: belongs to plaintiff to present: *imparkance*.

Co. Ent. 508. Hill v. Bishop of London and others. Prior of *Shene*, seized and presented: 29 *H. 8.*, granted next presentation to *Arthur*.

Rastall, 522. Bishop of Bath and Wells seized of prebend: collated: bishop granted next presentation to plaintiff: bishop pleads he does not hinder; and because he does not deny the grant, judgment, with stay of execution. *Venire to try issue*.

**2 Brown, 233. Adamson v. Bishop of Lincoln and others.* Prior seized: presented: grant of next presentation: vacancy: grantee presented: grant of next presentation: assigned over: grant of second presentation to another: lease for ninety-nine years: vacancy: assignee presented: vacancy: second grantee presented: death of lessee: vacancy: executor presented: death of executor: his widow, being his executrix, married: vacancy: husband presented: wife assigned: assignee granted next presentation to plaintiff: vacancy: defendant hinders: bishop demurs: clerk pleads much at all length and traverses the vacancy as alleged: demurrer to that plea.

Overton v. Syddal. Co. Ent. 122. Debt on lease. Henry *Syddal*, pre-

boundary of the prebend of *Terwyn* in cathedral church of *Lichfield*, demised to *Henry Syddal* all the prebend, with lands, except *donatione vicariz apud T. ac nominatione et presentatione vicariz chordalis in cathedrali*: confirmed by bishop and dean and chapter: action by successor for rent. Plea, assignment.

Winch, 853. Byng v. Bishop of Lincoln. *Connam* prebendary of *Grantham*, seised of the advowson of *D.* presented *Bally*: *Connam* d.ed: *Still* made prebendary: 6th July, Jac. I., grant of next presentation to *Cotton*: assignment to plaintiff: death of *Bally*: defendants hindered plaintiff. Plea: before *Connam*, *Jacob Proctor*, prebendary: presented *Whitehead*, and granted next presentation to *Powell* and *Blacher*: confirmed by bishop, and dean and chapter: death of *Powell*: *Blacher* died, leaving his son executor: assignment by executor to *Richard Halsey*: death of *Proctor*: *Connam*, prebendary: death of *Whitehead*: *Connam* presented *Bally*: *Richard Halsey* died: *John*, his executor: death of *Bally*: *John Halsey* presented *Frisett*. Demurrer.

These cases show clearly the fact that such grants have been made by bishops, abbots, priors, and *prebendaries, although there does not appear to have been any express decisions upon them; yet, as said by *Ashurst, J.*, in 2 *Term Reports*, 636, forms of legal proceedings are evidence of what the law is.

But the case of *London v. Southwell*, (reported in *Hob.* 304, and the pleadings of which are in *Winch's Entries*, 810,) where the prebendary of *Normanton*, who in right of his prebend, was seised of the advowson of a vicarage, demised divers parts of the prebend with all commodities, emoluments, profits, and advantages with the appurtenances to the said prebend appertaining, or in any manner belonging, was discussed, and the court decided that the advowson did not pass by the lease. Why? not because the grant of the advowson by a spiritual person was illegal, but because the words were not sufficient to pass it. The court said the words are four, commodities, emoluments, profits, and advantages to the prebend belonging, all which four words are of one sense and nature, implying things gainful, which is contrary to the nature of an advowson regularly. Yet an advowson may be yielded in value upon a *voucher*, and may be assets in the hands of an executor.

Surely if the grant of an advowson by a spiritual person had been wholly void, that would have been a shorter mode of deciding the case. The exception in the case of *Overton v. Syddall*, which is referred to in some of the cases, may afford an inference that but for the exception it would have passed.

In the case cited from the old book of entries, it appears the king claimed the presentation on account of the outlawry of the grantee. There is another case of a similar nature, but stronger, inasmuch as it shows the next presentation to be so much a chattel, as to pass under a grant of the goods and chattels of felons, persons outlawed, &c. The case is *Holland v. The Bishop of Chichester, Shelly, and Gibson*: reported in *Hob.* 302, and *the pleadings in *Winch, 692*. *Edward 4*, granted to *Mowbray*, Duke of *Norfolk*, the goods and chattels of felons outlawed, &c. in the *Rape of Bramber*: title brought down to the plaintiff: *Sir John Shelly* seised of the advowson, grants next avoidance to *Thomas Shirley*, who was outlawed for debt: church void, and so belongs to plaintiff to present.

The case turned upon the question, whether the goods and chattels of persons outlawed for any thing except felony, passed: the court held that they did.

It has been already admitted, that if the right of presentation on this occasion is not in the plaintiff, it is not material what other person has the right; but in determining whether the plaintiff is entitled, it may be of use to endeavor to ascertain if there be any other person to whom the court can see clearly that the right of presentation belongs.

At present the claims of two persons only have been put forward, viz., of the new prebendary and the king. In favor of the first of these, I can find no authority either direct or by analogy. If the void term is a chattel, the authorities are clear that the successor of a sole corporation cannot take a chattel by succession. And it is as a sole corporation only, that the prebendary appears upon this record.

The claim of the latter I have already stated to be in my judgment insupportable.

But supposing the plaintiff not to have the right, it may, perhaps, be contended that the patron of the prebend is entitled; and there is an authority which, if rightly stated in *Rolle's Abridgment*, might have afforded some color for such a claim. In 2 *Roll. Ab.* 346, it is said, if the parson ought to present to a vicarage, yet if the vicarage became void during the vacancy of the parsonage, the patron of the parsonage shall present. But upon referring to the authority cited in **Rolle, M. 19 E. 2, quare impedit*, 178., it [*246] appears the claim by the crown is on the ground of this vacancy happening during the seizure of the temporalities of the priory. In the present case, indeed, if such claim were valid, we should probably have heard it made by the learned counsel who argued for the crown: for in the event which has happened since the church has been vacant, the crown might set up another title, as part of the temporalities of the Bishop of *Salisbury*, who, according to the general law in 3 *Rep.* 75, is patron of the prebend, though to that I believe there are some exceptions.

Another claimant may, by possibility, be found in the person of the first defendant upon the record; the Bishop of *Lincoln*; who, although upon this occasion, he has claimed as ordinary only, which he may have done, considering the plaintiff entitled, may, if the plaintiff's claim is overruled, contend that under the circumstances the presentation in this instance ought to revert to its original channel, and be made by the bishop of the diocese, or, to use the proper ecclesiastical phrase, he ought to be collated to it.

Are we prepared to decide in favor of any of these claims? Upon the whole, therefore, there being no authority to take this case out of the general practice with respect to presentative livings; and it appearing that, in fact, grants of next presentations of ecclesiastical patronage, have been made and acted upon by the executors of the grantees, I think the safest course is to decide according to that practice; and therefore, upon the best judgment I can form upon this record, I am of opinion, that the administratrix of the deceased prebendarian is entitled to present, and consequently, that there must be judgment for the plaintiff.

I very sincerely lament that I feel myself compelled to come to this opinion, not only because I have the misfortune to differ from the rest of the court, in which *case my opinion is always to be distrusted, but also because adverting to the original institution of prebendal churches which is [*247] treated of at some length in 1 *Burn's Ecc. Law* title *Appropriation*, it is not impossible, but that upon looking to the original foundation of the cathedral church of *Salisbury*, which as matter of history may be stated to have been before the time of legal memory, and the various statutes made from time to time by the members of this cathedral, matter may be found which might have warranted a different judgment from that which upon the present frame of the record I have felt myself called upon to pronounce.

BURROUGH, J. It frequently happens that different persons come to different conclusions from the same premises; this is the case with me in drawing a different conclusion from that of my Brother *Gaselee*. I am of opinion, that judgment must be given for the defendants, *Thomas Henry Mirehouse* and *William Squire Mirehouse*.

I ground myself on the allegations in the declaration, that the *late prebendary*, in his life-time and at his death, was seized of the prebend or canonry

sounded in the cathedral church of *Sarum*, with its appurtenances, to which the advowson of the rectory in question is annexed, in his demesne, as of fee and right, *in right of the said prebend or canonry*. These are the premises on which I ground my opinion.

These allegations stand admitted on the record. This naturally leads to an investigation of the character, in law, of the prebendary or canon; of the nature of his prebend, or in other words, of his right as prebendary or canon; and of what must be taken to be meant by the seisin in his demesne as of fee, in right of his prebend or canonry.

*248] *By our known law a prebendary or canon is an ecclesiastical sole corporation: as such, he can have no heir, he can have no personal representative: as such his prebendal rights or property cannot go, either to his natural heir or his personal representative. Where must those things go? to his successor. In their corporate capacities, in estimation of law, the predecessor and successor, being one, it is a continuance of the same corporate body. This is more visible in an aggregate corporation: when one of the body dies the body corporate remains. A prebendary or canon is a corporator, in two respects: in one respect, as member of the corporation of dean and canons. He is one of chapter, having *sedem in ecclesia at rocem in capitulo*: he is a corporator sole, as prebendary. In every relation in which he stands to the church he is a corporator.

That I might thoroughly understand the question we have to decide, I have looked into the origin of the rights of this particular prebend or canonry. Before the removal of the church of *Salisbury*, to the place where it now stands, *Osmond*, Bishop of *Salisbury*, nephew of *William the Conqueror*, by his charter, granted to the church of *Salisbury*, forever (amongst other things) the church of *Grantham*, with the tithes and other things there adjoining.

Whilst in this state the church of *Salisbury*, and that church only, could have the duties of the church of *Grantham*, under its care. A copy of this charter is to be found in the evidence book at the church of *Salisbury*, in the registry of that church, and in 3 *Dugdale Mon. Angl.* 371.

It must have been the intention of the founder that this property should be in the disposition of the church only.

*249] In process of time the property so given by the *Osmona*, *was appropriated in different ways. New prebends were founded in the church, and this and other property apportioned to them and other members of the church. Whether to the bishop, to the dean, to the dean and chapter, or to the prebendaries or canons, is wholly immaterial; they were all corporations of different descriptions, and could only take and hold in their corporate capacities. These corporate capacities excluded the idea of any of the rights going otherwise than in succession.

Therefore, I presume it is, that we find no instance of an heir or personal representative of a sole corporation presenting or claiming to present to any church, to which the right of presentation had vested in the corporate character.

If one adverted to a lay advowson in fee, appendant or in gross, a manifest distinction is to be perceived; the party claiming a right to present would allege a seisin in demesne as of fee, or in gross as of fee and right.

What is the legal explanation of the word fee in such cases? It is to him and his heirs. The property is in him in his natural character; the party seized of it may dispose of it as he pleases; if he dies without doing so it goes to his heir. If a vacancy happens in the ancestor's time, and he dies without disposing of it, it is wholly immaterial, in my mode of considering the question, whether it belongs to the heir, or to the executor or administrator to present.

There is no qualification of the seisin in such a case.

But the prebendary of the prebend of *Grantham*, (as appears in the decla-

ration) is seized in his demesne as of fee, in right of his prebend or canonry. It is said, "in his demesne as of fee." By this it cannot be intended to mean a seisin to him and his heirs; the heir ^{*}can in no case have it; it must mean to him and *his successors*. [*250]

There being so plain a distinction between the case of an ordinary lay patron seized of a lay advowson, and a prebendary seized in his corporate capacity in right of his prebend, it appears that no case of a lay patronage applies to the subject in question; such a case can only apply by way of analogy; on examination it is clear the analogy does not hold, and therefore, it has no application to this subject.

By looking to the fountain head, to the original grant to the church of *Sarum*, and then tracing the creation of the prebendary with the prebend appropriated, and the annexation of the advowson to the prebend, I feel myself obliged to say that the right to present in the present instance has not been disunited from the prebend.

The only case that bears materially on the subject, is *Repington v. The Governors of the Free School of Tamworth*, 2 Wils. 150. I have a copy of the declaration in my possession. It is there stated, that *Sebright Repington*, Esq., was seized of the advowson and donation of the vicarage of *Tamworth*, as of fee and right. The title to the advowson is then derived to *E. Repington*, as tenant in tail male. It is then stated that a vacancy happened, that *E. Repington* died without having given it, and his executor claimed to give it. There were pleas and a verdict for the plaintiff. This court arrested the judgment, saying, that the right belonged to the heir, and not to the plaintiff, the executor.

The court said, the executor would have had a title, if it had been a representative benefice. The declaration is, I admit, a confirmation of the law as it is said to exist, and as it respects lay property. But it is also a confirmation of what I hold to be the law in the present case. You must look back to the origin of the present ^{*}right, and see what it is. If the founder [*251] has placed it in a state to be enjoyed only in one particular form, that must be adhered to. In the present case, I think the right is annexed to the prebend, and one who is not clothed with the character of prebendary cannot exercise it. The plaintiff claims as the executrix of a natural person. She does not connect herself with the prebendary in his corporate capacity to the exclusion of the successor, and therefore, there must be judgment for the defendants.

PARK, J. I am of the same opinion (as I indeed always have been since I heard the argument) with my brother *Burrough*, that judgment must be for the defendants.

In this case, as my brother *Gaselee* has said, it is not absolutely necessary to decide who has the right of presentation to the living in question, though upon that I have a clear opinion, as will appear by the result. The point is, has the plaintiff established her claim, as administratrix to the late prebendary of *South Grantham*, in the cathedral church of *Sarum*? I am of opinion she has not.

One thing has been much pressed at the bar, which I think wholly unnecessary, because upon that we are, as I at present believe, all agreed; namely, that in the case of *lay* patronage, in the events which have happened, the executor or administratrix would have been entitled to this presentation, and not the heir; because in *lay* patronage the church having become vacant in the lifetime of the last possessor, the presentation became a chattel, went to the executor as personal property, and did not any longer remain with the advowson as a part of the possessions of the heir of the person seized of the advowson; and in that case it is a ^{*}mere question between the representatives of the same patron. [*252]

But in my view of this case, that leaves the point still open, and which, as

far as my research and reading go, has never yet in specie been decided in the law of *England*.

The real question is, whether lay and spiritual patronage are not to be considered as standing upon a very different footing? And if I should have formed a wrong opinion upon this subject, the silence of our books (and even the diligence excited at the bar having furnished us with no case bearing upon the point) will form no small excuse for those who think the claim of the plaintiff to be ill-founded. That the fact has existed many hundred of times no man can doubt; and that the ecclesiastics, and those who have had to act upon it, must have thought it clear one way or the other cannot be questioned, and, therefore, we find no decision upon it.

How they have thought I do not enquire, for we must act for ourselves; though I am induced to say, that till this claim was set up, no one ever imagined that those rights which a man held *merely jure ecclesie* could be exercised by others after he was departed, otherwise one cannot but think such a claim would have been ascertained by some decision in the course of five or six hundred years, the circumstance having necessarily so often happened.

Throughout the whole law of *England* a distinction prevails between the lay and spiritual character: even the cases and statutes just alluded to on the bench so luminously, by my brother *Gaselee*, prove the distinction.

Personal rights belong to one of these characters, which do not belong to the other.

*The transmission of their property stands under different considera-
•253] tions. A person seised of a freehold right is said to be seised in his demesne as of fee: a clergyman, as in this declaration, is said to be seised in his demesne as of fee, *in right of his said prebend or canonry*. It is very true that many of the evils and absurdities which I contemplate by giving effect to the plaintiff's claim, will also arise in *lay* patronage; because I must admit that by giving the presentation to the administratrix of a lay patron it may fall to a very inferior person to present, where the administrator may be such; that arises out of the unfortunate situation of *lay* patronage; but which I contend ought not to be carried one single point further.

What was the origin of *lay* patronage? It arose in the infancy of society. It arose from this, that though the nomination of fit persons to officiate throughout the diocese was originally in the bishop, yet when lords of manors of old were willing to build churches, and to endow them with glebes and manses for the accommodation of fixed and resident ministers, the bishops, on their part, for the encouragement of such pious undertakings, were content that those lords should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated; and thus arose that constitution of the church, "Si quis ecclesiam cum assensu dioecesis construxit, ex eo jus patronatus acquiritur;" and hence followed all the consequences of a mere *lay* possession. Chattels, where chattels, going to the executor; the rights of the heir, to the heir, where by the common law those rights would prevail. But still do those rules apply to the spiritual patron, and can his rights and properties be dealt with as if he were a private person? Of this there is no doubt, that in our
•254] *law,—and I hope they ever will,—*lay* and spiritual patronage stand upon a very different footing.

The doctrine of the book which has been so often referred to at the bar, I fully adopt, as making a clear distinction between *lay* and spiritual property. In *Gibson's Codex*, p. 757, it is decisively marked: for he says, "The right or property which the patron has in an advowson will not warrant a plea (as it is in *temporal* property, and of course *Gibson* is speaking of spiritual property,) that he is seised in *dominico suo ut de feodo*, but only *ut de feodo*." The reason of which is given by *Lord Coke* (in 1st *Institute*, 17, a.) because an inheritance which savoreth not *de domo* cannot serve either for the sus-

tentation of himself or his household; nor can anything be received of the same for defraying of charges. And in the case of *John London* and the church of *Southwell*, where the words of the lease were, *commodities, emolumen-
tum, profits, and advantages* to the prebend belonging, it was adjudged that the advowson did not pass by the said words. Why? because all of them implied things *gainful*, which, as was added, is *contrary to the nature of an advowson, regularly.* Hob. 304.

Why is all this? It is because, as I say, an advowson in the hands of a churchman is not a matter of *profit*, but of naked trust merely, and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust in *jure ecclesie*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only, as a member of the church, could he have a right to dispose. Only as a member of the church of *Salisbury* had Mr. *Rennell* any right; and the moment he expired, all his rights as a member of that church ceased.

*Am I right in stating it to be a matter of *trust* only? for upon that [*255 much of the argument has turned. Hear Bishop *Gibson* again on this subject, in the same pages, 757 and 758.

"Guardian in *Socage* shall not present to an advowson. Why? because he can take nothing for it, and, by consequence, he cannot account for it, and by the law he can meddle with nothing he cannot account for. Which said doctrine, and the plain tendency thereof, are exactly agreeable, not only to the nature of advowsons, which are merely a *trust*, vested in the hands of the patrons, by consent of the bishop, *for the good of the church and of religion*, but also to the express letter of the canon law, the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest*. But the notion and practice of making merchandize of advowsons, and next avoidances, is not so easily reconciled, either to the laws of the church, or to the ancient laws of the land, or to the nature of advowsons, considered (as they certainly ought in reason and good conscience to be considered) in the nature of *mere trusts* for the benefit of men's souls. Nor does it follow either from the patrons being now vested with that right by the common law, or from its being annexed to a *temporal inheritance*, or ought (legally speaking) to be considered otherwise, than as a *spiritual trust*, since it is certain that the foundation of the right was the consent of the bishop."

Am I not right then in contending that there is a great difference between lay and spiritual patronage, and that however the exercise of the right in the former case may have so grown up, that it is now difficult, perhaps impossible, to shake it, in the latter it has ever been considered as a *mere trust* to be exercised by the patron for the benefit of the church, for the due discharge of the duties of which he alone is to look, which "he only can consider in his life-time, and upon which his executors or administrators may be absolutely unable to form a judgment?" It may appear an unfit argument, but I think it a deep one, and of vital importance to the interests of that church which every good man must love and revere,—suppose a prebendary died insolvent, as well as intestate, and that all his next of kin renounced administration, and that his butcher, or baker, or other inferior tradesman, had taken out administration: was this person to present? and yet the consequence must follow. I have admitted that in case of *lay* patronage the same consequence would follow; but I lament it; and I am quite sure, that unless I am compelled by decisive legal authority, I ought not, sitting as a judge, to carry such lamentable consequences one point further; at least, not to introduce them into the church. That the next presentation (in the event that has happened) could not be assets (in the common and legal acceptation of that word) is quite clear, and, therefore, I cannot conceive that it ought to go to the executor or administrator of the deceased prebendary. It may be a chattel, but in the hands of an ecclesiastic it is a chattel of mere trust.

The total silence of our books during the whole period of our ascertained law of *England*, when the thing must have existed in *fact*, many hundreds of times, is, as I hear said to me, a strong proof that no such idea was ever entertained till *now* upon this question; and I verily believe that no man now living in the church of *England*, and interested in such questions, ever heard before of such a claim.

The court has been much pressed by the statute of 28 Hen. 8, ch. 21. But that statute, upon a full consideration of it, I think has no bearing upon the present question. It appears, at that time, that the heads of the *church following the example of the pope, who, till the Reformation, had exercised a most tyrannical sway over all churches under his dominion, had been desirous of keeping in their hands the temporalities of the church, which belonged to them in their corporate character, whether aggregate or sole, to an unreasonable time for their private benefit: the statute deprived them of that right, and gave the benefits to the incoming possessor from the death of the last incumbent, and to the executors of such successor, if he should die, before he realized those interests; and, therefore, though I was at first taken with that argument as bearing upon the question now at the bar, when it comes to be sifted, it does not appear to me to bear upon the point in the present case. Bishops' grants and several entries have been stated, and cases were quoted in reply from *Cro. Eliz.*, upon which I would observe that when they were decided, the church had hardly got into a state of regularity, so soon after the time of the Reformation; and we all know, both from history and law, that till that time the scandalous use made by the popish clergy of their revenues, and the rapacious and grasping manner in which they invaded the rights of the church, was matter of universal complaint. Even in this very reign of Queen *Elizabeth*, and at a later period in it, we find the legislature declaring, that although "by the intent of founders of colleges, churches, collegiate churches, cathedrals, &c., elections, presentations, nominations, &c., should be made of the *fittest and most meet persons* freely, without any reward, gift, or thing given or taken for the same; yet, notwithstanding, it is seen and found by experience, that the said presentations be many times wrought and brought to pass with money, &c., and whereby the fittest persons to be elected, wanting *money or friends*, are seldom, or not at all preferred."

*The legislature of the country, therefore, has sanctioned me in the reprobation I have used as to the shameful venality of the churchmen of that day.

It does not appear from any of the cases in *Cro. Eliz.*, that the bishops took any profits for their grants in these cases. If they did, it was a most disgraceful abuse of their sacred trust; and I do not believe that such cases would be supported if brought into discussion at the present day. But there will be no opportunity for that discussion: for I verily believe, there is not a bishop of the church of *England*, who would not think himself insulted by such a proposition.

The court has been much pressed also by the options of the archbishops; to which I answer, that they also are anomalies in the law. They were originally, as far as we can trace them, an usurpation in favor of the legatine power, annexed by the Pope to the archbishopric of *Canterbury*, over those who were appointed bishops under him; and that claim, which as *Blackstone* says, was originally an encroachment like most others of the papal see, has been continued to the archbishops in their respective provinces, even after the power of the popes has ceased in this country. But all these anomalies I desire to use in support of my argument, to show that the rights of *lay* and *ecclesiastical* persons stand upon a totally different foundation; and that the common law of the country as attaching upon property of this description in

the hands of a *lay* person, does not attach upon a person who merely holds *Jure Ecclesiae*.

We have been also pressed with the case from 2 *Wils.*, 150, that of *Repington v. The Governors of Tumworth School*, which has been fully explained by my brother *Burrough*, to whose argument I refer, as not wishing to trespass longer than is necessary.

*The ground of my opinion is, that this, in the case of a *spiritual* patron, is a mere personal trust, to be exercised by him in his spiritual character, which he cannot consistently with his high duty, either devolve upon another during his life, or leave behind him to be exercised by his heir, executor, or administrator after his death. He holds it *jure Ecclesiae*, and in that right only: if he had it not in right of his church, he could not have it at all; and as soon as he dies, all his rights, powers, and privileges as to the church, absolutely cease, as if he had never existed. This is not a new notion, for Dr. *Burn*, who is now no more, and may be now considered perhaps as an authority, as much as Bishop *Gibson*, and was a very considerable man, shows clearly what was the common understanding of men, and particularly ecclesiastics.

Dr. *Burn* is drawing a distinction between what is to be done with the possessions of a prebendary *after his death*, which he had in common with the rest of the chapter, and what he had in his separate capacity as a sole corporation of himself. (*Burn's Ecclesiastical Law*, vol. ii., p. 92, 7th edition, title *Deans and Chapters*:) "The issues of those possessions, which he hath in common with the rest of the chapter, shall after his death be divided amongst the surviving members of the chapter, but the profits of those possessions which he hath in his separate capacity as a sole corporation of himself shall be and inure to his successor."

Therefore, if a member of a chapter, as an aggregate corporation, should die after a living had become vacant, as well it might be contended that his executor or administrator might have a voice in the chapter how it was to be filled up, as that such executor or administrator might have it to himself exclusively, where a living belonged to him as a *sole corporator* merely; although Dr. *Burn*, as I think, more justly, says in the one case, it would go to the surviving members of the chapter; in the other, it would be, and inure to the successor. When *Gibson* says, that advowsons may be granted by deed or will, either for the inheritance, or for the rights of one or more turns, or for as many as shall happen within a time limited, he is speaking of lay patronage only, for he says, "This general rule is to be understood with two limitations, that it extends not to *ecclesiastical persons* of any kind or degree, who are seized of *advowson in right of their churches*; all these being restrained as to bishops by stat. 1 *Eliz.*, and the rest by 13 *Eliz.*, from making any grants but of things corporeal, of which a *rent or annual profit may be reserved*; and of that sort, advowsons, and next avoidances which are incorporeal, and lie in grant, cannot be. And therefore such grants, however confirmed, are void against the successors: and though they have been adjudged to be good against the grantors, (alluding, no doubt, to the cases from *Cro. Eliz.*, &c., upon which I have already given my opinion,) yet have such grants been generally disused by bishops, and I believe by all other ecclesiastical corporations since the following canon of 1571: *Episcoporum prebendarum et beneficiorum suorum, proximas, secundas aut tertias advocationes, quum vacant, nulli dabit; sunt enim et a bonis moribus, et a Christiana charitate alienae.*" In the teeth of this very canon, and within a few years after it was made, we find the two grants made in the cases cited from *Cro. Eliz.*

It will have been observed, that hitherto I have treated this question upon principle only, upon the distinction uniformly observed in the laws, and by the constitution of *England*, between the *lay* and *clerical* character. They

have (and formerly had much larger) exemptions on the one hand ; they have disabilities on the other. This distinction between laymen and the ^{*261]} clergy pervades every page of our constitutional history. But I have said, that there is no case in specie to be found applicable to that now in discussion. Those, however, who are at all well versed in the Ecclesiastical history of our venerable church will immediately recognise the justice of those principles which I have been endeavoring to establish.

It is well known, that in the early periods of the church in this country, the *parochia* or parish was the episcopal district. The bishop and his clergy living together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund, for the support of the bishop, and his college of presbyters and deacons ; for the repair and ornament of the church ; and for other works of piety and charity.

While this state of things continued, in the infancy of society, the stated forms of religion were performed only in these single choirs to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But to supply the inconvenience of distant and difficult access, the bishop was wont to send forth some of his presbyters into the remotest parts as a kind of *missionaries*, to be preachers and dispensers of the word and sacraments ; and these missionaries returned from their circuits to their homes, that is, to the episcopal college, to give the bishop a due account of their labors and success. But as the wants of society for spiritual instruction increased, and when the members of the episcopal college, or the deans and chapters found it inconvenient themselves to go forth as above-mentioned, certain churches were allotted, some by lay patrons, (where they had the patronage given them as a compensation for having built and endowed churches, which, as I before mentioned, was the foundation of lay patronage,) some by the bishops, to the prebendal body at large, some to one particular member ^{*262]} of the body ; or the individual member sent out priests to do the duty, paying them certain sums for doing so, and retaining the remainder to himself, or allowing them to receive the profits, reserving a certain rent to themselves ; as may be seen by those who will take the trouble to look into old church records ; and thus these churches becomes *prebendal*, and the supply of the duty was left to the aggregate corporation, if the perpetual advowson was in the whole community of the dean and chapter, or to that sole corporation, or single canon or prebendarian who was to have his prebend or exhibition from it.

In process of time these representative curates, who were to account for their profits, and only to receive a small pecuniary stipend for their services, were so ill paid, that the bishops obliged the members of his churches who had such advowsons to retain fit and able *capellans*, *vicars*, or *curates* (for these titles all meant the same office) with a competent salary ; and this plan failing in its effect, the bishop again interfered, and obliged the clergy (that is the chapters, or the single canon or prebendarian, in whom the perpetual advowson in right of the chapter, or in right of his prebend of which he was seized *jure ecclesiae*, was vested,) to make the presentation to perpetual vicars to be endowed and instituted, who should have no other dependance upon their spiritual patron than rectors had upon their lay patrons, with a competent maintenance to be taxed and assigned by the bishop ; and this matter became the subject of legislative consideration by the 4 H., 4 c., 12.

In giving this historical detail, I have not thought it necessary to refer to authorities, but what I have said will be found, as the early history of our church, in various books well worthy the attention of the curious, such as *Spelman de non temerandis Ecclesiis*, who says the *proprietores* of the advowsons are still said to be *parsons of their churches, and are as the incumbents thereof, and by reason of this, their incumbency is full, and

not void. See also Bishop *Kennel* on *Impropriations* and *Burn's Ecclesiastical Law*, tit. "Appropriations."

This short history of the church in general, I think decidedly proves that what is thus vested in the church for spiritual purposes, vests in them as a corporate body, and can never be allowed to fall into the private common stock of the body at large, or of the individual sole spiritual corporator.

What I have said of the church at large, I have no doubt is true of the church of *Salisbury*, and whoever will consult the history of the foundation of that church in *3 Dugdale*, (as quoted by my brother *Burrough*,) by *Osmond*, Bishop of *Salisbury*, Earl of *Dorset*, and nephew of *William the Conqueror*, will probably find that this history of the foundation of these prebendal presentations in the church at large which I have been giving, is no other than the history of the church of *Salisbury* too.

I am afraid I have fatigued the court, but as we are not unanimous, I thought it necessary, in case of research and novelty, to show that I acted upon a deep conviction, I had formed a right opinion. The sum and substance of my opinion then is this: Wherever a person has anything attached to a spiritual office only, it sinks with the death or resignation of the party who possesses that right.

Thus, then, an ecclesiastical person during his incumbency is entitled to all the *profits* which may fall of a chattel nature. But when a living falls vacant to which an ecclesiastical person has, in *right of his church*, a right to present, he can derive no *profit* from it, but merely presents *quasi* incumbent.

The living in the present case may, as I have shown, be assumed to have been endowed out of the prebend, *or the advowson of it to have been given or attached to the prebend; in either case the *prebendary* for the time being, has the right of presentation, and when the avoidance happens he may present, but he presents in right, and only in *right of his church*; he presents as a *trustee*; the *trust* is *personal*, it is a trust only, and without profit; and, I contend, cannot be transmitted.

How, then, can the executor or administrator of a deceased ecclesiastic, who dies after avoidance, but before presentation, claim the presentation? Is it that he may make it a chose in action to pay the debts of the testator or intestate? That cannot be, for it is not assets. Does he claim to present because this *trust* had devolved upon, or as it were, become vested in the testator? The trust has indeed devolved upon the testator or intestate, but not in *his own right*; but, as the declaration states, in *right of his prebend*; and the moment he ceased to be prebendary, the trust was no longer in him, nor in his representatives, for it was by bare naked personal trust in him; and the presentation is in him while he is prebendary, but not for his own use or benefit, but for the use and benefit of the church. It is a trust *confided to him*, for the dignity and ornament of the church, that he may appoint a proper incumbent upon his own personal responsibility, to have the cure of souls, and for the advancement of the interests of religion; a duty which his executor or administrators cannot in law be deemed qualified to discharge. For these reasons, I think the defendants are entitled to judgment.

BEST, C. J. It appears from the pleadings in this case that the prebendary of *Grantham* is patron of the rectory of *Welby*, and that the incumbent of that rectory died in the lifetime of the late prebendary, who died without having presented any clerk to the vacant rectory.

*The plaintiff is the administratrix of the late prebendary, and the question raised for our decision is, whether under these circumstances [265] the plaintiff is entitled to present for this turn to the rectory of *Welby*? I confessed that my mind has fluctuated exceedingly; but I am at length satisfied that the law gives the patronage in this case to the person who, according to sound policy, ought to have it. Great industry has been bestowed on the subject, both by the bench and bar; but neither the judgment of any court

nor the opinion of any writer, to guide us in making our decision, has been found. I have also enquired whether any instances of presentation, made under circumstances like those of the present case, are to be found in the registries of the bishop, but without success.

As neither the records of *Westminster Hall* nor of the church furnish any rule or practice to assist me in coming to a decision, I endeavored to find other cases from which I could safely reason by analogy to that now to be decided.

In all sciences analogical reasoning must be pursued with great caution. Minute differences in the circumstances of two cases will prevent any argument from being deduced from the one to the other.

I was at first struck with the appearances of similarity between the patronage of tenants for life, and of husbands in right of their wives, and that of dignitaries of the church in right of their churches.

I am, after the most attentive consideration of these cases, now convinced that the resemblance between the last and the two first fails in the very circumstance which, in my judgment, decides to whom the presentation belongs in the present case.

I shall, presently, particularly advert to this circumstance. I would, however, first observe, that in the absence of authority, the only course that can lead us to ^{*268]} a just and legal conclusion, is to consider the origin of church patronage, and the intent of its founders. If the intent of the founders can be ascertained, it must, if not opposed to some rule of law, or the undoubted policy of the law, govern us in deciding this case.

If he who creates a right has directed by whom and how it shall be enjoyed, those who are to decide any question on that right must consider how he has disposed of it, and follow that disposition.

This is evidently consistent with reason and justice, and is sanctioned by legal authority.

In disputes between members of corporations, the courts of law decide according to the will of the founder, as expressed in the instrument of incorporation, or ascertained by usage.

This principle is distinctly stated by Lord Kenyon in *The King v. Beltringer*, 4 T. Rep. 822, and by Buller, J., in *Blankly v. Winstandy*, 3 T. Rep. 288. In *Gape v. Handley*, 3 T. Rep. 288, in *notis*, this principle is applied by Lord Mansfield and the Court of King's Bench to determine whether the right of presentation to a living was in all the members of a corporation or in the mayor and aldermen only. So where two claim under the same grant, the court which has to decide on their claims must be governed in its decision by the intent of the grantor, and by that only.

The administratrix of the last prebendary and his successor must both found their claims on the grant of the donor of the property, out of which the prebend was founded, and the act of appropriation by which it was founded. From these are derived all the rights and privileges that belong to the prebend. To these we must look to see in what course of succession that prebend is to go; what fruits of it are ripe, and to be enjoyed by the person in possession, and those who represent him; and what are reserved for the successor.

^{*267]} Unfortunately historians have been too much occupied in exhibiting the human character as it has displayed itself in the wars and intrigues that have engaged the attentions of mankind, to bestow much of their time in giving any account of civil or ecclesiastical institutions. Whoever wants information as to the establishment of these institutions must submit to the labor of collecting it for himself, from the records of the public offices. We have ourselves done so in this case, and I think that by connecting some unpublished documents with what is to be found in our law books, we ascertain that the more pious founders of churches, who not only divided portions of their lands, and the tithes of what they retained for their own use, for the maintenance of the ministers of the Gospel, but also gave the advowsons of

the churches they founded, to the church, intended that such advowsons should be pure ecclesiastical trusts, which, after the dedication of them at the altar, were never to be disposed of by any layman. The church would have considered it as sacrilege in any layman to presume, under any pretence, to touch this sacred property.

The Roman Catholic Church, from which ours is derived, did not regard the personal representatives of its members. The policy of that church was to separate churchmen from their families, to prevent their acknowledging any connection but with the church.

In the infancy of that church, and before these laws were made by which the separation of priests from the world was completely effected, we find *Clement* declaring, in one of his constitutions, (36) "*Omnium rerum ecclesiasticarum curam episcopus gerito et eas dispensato quasi instante Deo: non licitum ei esto quipiam ex iis sibi tanquam proprium assumere aut cognatis suis elargire quae Deo dedicata sunt.*" Here the law for preserving the property of the church, and preventing "it from passing into the families [268] of its members, was first declared. The principle laid down in that constitution has never been departed from, but repeatedly confirmed.

Several of the documents which we have obtained relate to the prebend of *South Grantham*. As these documents are not set out on this record, I shall not use them as evidence of any facts peculiar to this case, but as historical proof of the origin and nature of church patronage in general, and of the manner in which churches became possessed of their patronage, and how it has been dealt with. This patronage was first given to the whole body of the clergy of a diocese. The general body afterwards appropriated part of what they had in common, to the exclusive use of the bishops; other part to the deans and chapters; and with other part prebends were founded by the bishops, with the assent of the deans and chapters. This is stated by Dr. *Burn*, in his *Ecclesiastical Law*, tit. "Appropriation," and he is confirmed as to the first grant being to the body of the clergy of each diocese, by a grant which we found in the chapter house of *Salisbury*, and which is also printed in 3 *Dugdale*, 371, by which *Osmond*, Bishop of *Salisbury*, Earl of *Dorset*, and nephew of *William the Conqueror*, and the founder of the church of *Old Sarum*, for the sake of his soul, and the souls of his ancestors, granted as follows:

Ego Osmundus Saresbur: Episcopus notifico omnibus: Christi Fidelibus: ad honorem Dei, et ecclesiam Saresbur: me contruxisse, et in perpetuum concessis huius villas preter militum terras; Elminster, Willtonia, Cernminster, &c. &c. Ecclesias de Grantham cum decimis ceterisque ibidem adjacentibus:—scripta est autem Hæc Carta et confirmata anno Incarnationis Domini 1091, Inductionis 14. Willo Rege Monarchiam totius Angliae strenue gubernante anno 4. regni ejus apud Hastings Hiis subscriptis Testibus, &c. [269]

Lord *Coke*, is mistaken when he says, in 3 *Rep.* 75 b., "that at first all the possessions were to the bishop." These possessions belonged to the whole body; and the whole body only could dispose of them: and accordingly we find, that these possessions, amongst which will be observed the *Ecclesia de Grantham cum decimiis ceteris que ibidem adjacentibus* were afterwards appropriated by the church to different members. This is proved by the evidence book in the same chapter house, which states, that a general chapter of the members of the church was holden, (at what date is not known,) but it was previous to the removal of the church from *Old Sarum*, to *Salisbury*, which took place in 1220, at which time the churches, with the tithes and other rights belonging to the body, were appropriated; some to the bishops, some to the deans, and some to the canons or prebendaries to whom the cure of the different churches was assigned. Dr. *Burn*, in the chapter to which I have already referred, tells us, that the prebendaries who, by means

of such appropriations, became possessed of what were called prebendal livings, at first appointed curates to the duties of those churches, but they were afterwards required to make a better and more permanent provision for the officiating ministers. He gives us the form of the constitution of a vicarage, which he found in the church of *Carlisle*.

This form of Dr. *Burn*, is like one which we have obtained from the church of *Lincoln*; namely, the constitution of a vicarage in one of the parishes belonging to the prebend of *Grantham*. By these ordinations of vicarages, as they are called, either portions of the tithes or an annual rent, and the advowsons of the vicarage, are reserved to the prebendary, and the residue is, [270] given to the vicars, on the condition of their performing the "duties of the churches. One of the ordinations is in these words :

" Ric de Newere capellanus p̄sent p Galfirid de Boclond Canonic P̄bende ausflis de Grāham ad ppetuam ejusdē P̄bende vicariam consensu dñi Sar̄ capitali sui Sar̄ ad id accendentī ad eandē admissus est † in ea vicarius ppetuus instituū. Consistit antidē vicaria in medietate alijii tam de Grāham q'm de Gunwardeby † in omnibus pventibus altariā de Morton † de Bresceby † solvet vicarius dōc G. † successoribus suis ejusdē p̄bende canonice centū solid annuos noīe pensionis † in officio sacerdotali psonalit ibidi ministerib sustinendo om̄ia onlā pochialia dēam p̄bendam contingencia Et mandat dōc Archid ut," &c.†

There are also in the cathedral of *Salisbury*, several grants of churches to the bishop : according to these grants, he and his successors are to take and dispose of these churches as he does of his other churches or prebends. All of these grants are of this form. As the churches were given to the whole body of the clergy of the diocese, the donor must have intended, that they should be disposed of only by the members of that body. The donors could not know that these churches would ever be appropriated to particular members of the body, and could not, therefore, intend that the lay representatives of any of the members could ever have the disposition of them. For if they had still remained in the aggregate corporation of the clergy of the diocese, personal representatives never could have any right.

They might have thought that the property given by them was forever vested in the church, and that it could not under any circumstances ever be touched by "lay hands." When the churches afterwards appropriated [271] portions of this property to different members, the only thing intended was, to give the exclusive possessions of the portions assigned to those members, to hold in right of the church by those members and their successors. The prebends thus constituted were made corporations sole, subordinate to the church, so that they and their successors were from time to time to represent the church, and to enjoy the rights which were derived from the church in return for the duties which they were to perform. Neither the donors nor the appropriators could intend that the personal representatives of deceased prebendaries should ever interfere with any thing that belonged to the church. The intent of both donors and appropriators is opposed to the plaintiff's claim, and their intent must give the rule for our judgment. The ecclesiastical law in a case like the present, follows what, I trust, I have shown must have been the intent of the donors of property to the church, and where the ecclesiastical law does not contravene the law of *England*, it is adopted into

† In an ancient roll of endowments of vicarages in the time of *Hugh Wills*, bishop of *Lincoln*, who began to preside over the diocese in 1209, and now remaining in the registry of the bishop of *Lincoln*.

that law, and is to be followed by the temporal courts in the decisions of such cases as are within its influence.

Lord Cok², in his *1st Institute*, 344, says, the ecclesiastical law is to prevail where it is not against the common law or any custom.

Linwood, in his *Treatise de Consuetudine*, fol. 19 a, has this passage. "Si beneficiatus decedat intestatus, et non desparat de fructibus, de Jure communis Ecclesia in eis succedit. De consuetudine tamen posset esse quod per episcopum vel alium ad quem pertineret bona testatorum tueri, deberet distribui, ad decedentis debita solvenda."

The ecclesiastical law or common law of Christendom, is here meant by *Jure communis*. By the words "*de consuetudine*," the custom of particular kingdoms is intended; for this writer in the same page says, "quæ est consuetudo per Angliam quodammodo generalis." [272]

According to the general law the church succeeds to fruits not disposed of by an incumbent previous to his death, and Linwood explains afterwards what he means by the church succeeding to fruits by saying, "*Pertinet ad successorem.*" I admit that the custom of *England*, will prevent the operation of the Ecclesiastical law in all cases embraced by such custom. But this custom does not apply to the presentations to benefices, but only to such things as can be sold for the payment of the debts of the deceased. These are the very words of Linwood, "No profit can be made of a presentation to a vacant benefice, it can therefore, be in no way used for the payment of debts." It was decided in *Hobart*, 304., that a right of presentation was not conveyed by the words "*profits, commodities, and advantages* of a prebend;" that these words included only such profits, commodities, and advantages as became due to the incumbent, and which he having earned had a right to apply to his own use. To such as these the custom applies, and not to trusts. Upon the same principle, that a guardian in socage cannot take a presentation, namely, because he can make no profit of it, (1 Inst. 89 a.) the personal representative of a deceased incumbent cannot take it under this custom. If a right of presentation is not within the custom, then it is governed by the general law, and that general law, as I have proved by the writings of a canonist of the highest authority, who is often quoted with approbation by Bishop Gibson, and Dr. Burn, gives it to the successor.

If it be said, what have the Judges of the common law, when giving judgment in an action of *quare impedit*, to do with the canon law, I answer, that where the right of presentation is derived from the church, it can only be decided by the canon law. Lay advowsons were attached to manors, [273] and the right of presentation to these could only be decided by the common law, as they followed the rights of the manors to which they were annexed, and which manors were the creatures of the common law. But ecclesiastical presentations having no connection with lay property, but existing only as rights of the church, are governed only by the laws of the church. The ecclesiastical law is for the decision of such questions and must be taken notice of by the judges of the courts of common law in deciding them. *Eldes v. The Bishop of Oxford*, Vaughan's Reports, 21 & 24. Tythes are a spiritual right, and as such they were originally recoverable only in the ecclesiastical courts. Actions may now be brought for subtraction of tythes in the courts of common law, and tythe may now be recovered in a court of equity, but these courts in deciding what tythes are due, and how they ought to be set out, consult the ecclesiastical law.

There are now indeed so many decisions of the courts of *Westminster*, on the subject of tythes, that it is seldom necessary to have recourse to the canonist; but if a case occurred for the decision of which our reports contain no precedents, the common law or equity judges must look to the canons and customs of the church, and must be governed by them in the decision of such a case. If tythe cases are within the legal operation of the canon law, the

present question must be so likewise, for I have shown that the original grant to the church was a grant of tythes, and that the patronage of livings belonging to the church was derived from grants of tythes by the appropriations that were made of them.

I hope I have shown, that the donors of churches and tythes to the clergy of dioceses, and the appropriators of such churches, intended that they should be for ever vested in the church, devoted to sacred uses, and "disposed [274] of only by sacred hands; that the ecclesiastical law in deciding between the last incumbent and the successor proceeds according to the intent of the donors and appropriators; that the custom of *Englund*, spoken of by *Linswood*, does not apply to a right of presentation to a vacant living; and further, that the ecclesiastical law must determine to whom such presentation belongs.

This intent of the donors prevents any analogy between ecclesiastical and lay patronage. The former is inseparably attached to the church, and to be disposed of only by churchmen; the latter is attached to the temporal estates of the founders of churches, and to be disposed of by those who happen to be the owners of the estates. Lay patronage being, from the conditions which its founders made, annexed to temporal estates, must sometimes pass, with the estates to which it is annexed, to infants and others incapable of exercising the right of presentation. This condition has occasioned a great defect in the law relative to this species of patronage; but as it must be disposed of by some one connected with the estate, it does not concern the public whether it belongs, in such a case as the present, to the heir or executor of the person last seized of the advowson; one of them is as likely to present a proper clerk as the other.

Ecclesiastical patronage is subject to no such condition.

The founders of ecclesiastical patronage looked to the advancement of religion; the founders of lay patronage to the maintenance of the influence of their families.

Courts of justice should not, unless compelled by some clear rule of law take church patronage from the churchmen, whose situations and characters are security for the due exercise of it. By assigning it to the personal representatives of deceased patrons, they subject it to what it is from its original [275] constitution exempt, namely, "the chance of falling into the hands of incapable persons, such as infants and creditors.

I have said, that I think the difference between the object of the founders of ecclesiastical and lay patronage renders it impossible to reason analogically from the former to the latter; if there be any analogy between them, it raises an inference unfavorable to the plaintiff.

The successor of a corporation stands in the same relation to his predecessor, that the heir to an estate does to his ancestor.

Now it was determined by the Court of Common Pleas, after two arguments in the case of *Repington v. The Governors of Tamworth School*, 2 Wilson, 150, that where a donative became vacant in the life-time of the owner of the advowson who died before it was filled up, the donative belonged to his heir, and not to his executor. This decision was pronounced on a motion in arrest of judgment. If the executor, when the judgment was arrested, had thought proper, that judgment might have been examined in a court of error; but it was never disputed.

Selden, in his *History of Tythes*, c. 12, fol. 380, vol. 3, p. 88, tells us, that until the time of King John, there was no institution; all livings were donatives. The judges, in the case above stated, confirm the account of this learned writer.

The heir must have had the donation in every such case as the present; and if the heir would have had it in lay patronage,—if analogy is to be referred to,—the successor must have it in ecclesiastical patronage.

If a person, in right of his estate, or any public functions, has the appointment to any office that becomes vacant, and is not filled up during the life of the patron, the person who succeeds to the office or estate to which the patronage is annexed, has the right of appointment. This is strictly analogous to the present case.

The office of exigenter became vacant during the life of *Brooke*, Chief Justice of the Common Pleas; Queen *Mary*, during the vacancy of the office of Chief Justice, appointed *Coleshall* exigenter. *Brown* was afterwards appointed Chief Justice, who removed *Coleshall* from his office, and admitted *Spragg*. The Judges of the King's Bench, the Chief Baron, Attorney-General, and the attorney of the duchy, held, that this office was only at the disposal of the chief justice for the time being, as an inseparable incident to the person of the chief justice. *Spragg v. Coleshall*, Dyer, 175.

I will now shortly consider the arguments urged in favor of the plaintiff. It has been contended that the right of presentation to a vacant living, is by the vacancy severed from the advowson to which it belonged, and become a chattel, and that a chattel could not pass to the successor of a corporation sole, except under the statute of *Hen. 8*, which conveyed only such fruits as fell during the vacancy.

Our law would be most absurd, if the determination of rights depended on names only. Either the right of presentation to a vacant benefice is not severed from the advowson, until such right has been fully exercised, and is not a chattel, or its being classed among chattels does not prevent it from passing to the successor. If this be not so, the donative in the case in *Wilson*, could not have belonged to the heir, for the right of donation was as completely severed from the advowson in that case, as the right of presentation in this.

The reference to the statute of *Hen. 8*, is unfavorable to the plaintiff's argument; for *Gibson* says, it was only an affirmance of the common law, by which the fruits enumerated in it belonged to the successors; and the object of it was to put an end to the usurpations of "the bishops, who, in defiance of the common law, took fruits from those who succeeded to benefits."

Fallen fruits, or chattels severed from the living, did, therefore, pass to the successor by the common law.

It has been also insisted, that if the rights to such presentations were perpetually annexed to the church, and could in no case be exercised by laymen, the king could not take them as parts of the temporalities of bishops, abbots, and priors. The king takes these by his prerogative; his rights, although determined by law, are often different from those of a subject under similar circumstances. Bishoprics, abbeys, and priories were founded by the crown. The king is "*persona sacra*." He is supreme ordinary (*Com. Dig. Ecclesiastical Persons*); and was by the statutes of the 16 Rich. 2, and 25 Hen. 8, declared to have always been justly and rightly supreme head of the church. It cannot, therefore, be considered that the objection to a layman's interference with church patronage applies to the king. I would observe, that in the different abridgments of the law it is said that, in these cases, the right of presentation belongs to the king, and not to the bishop's executors.

It might have been inferred from the words "*and not to the bishop's executors*," that but for the intervention of the prerogative, the presentation would have belonged to the bishop's executors.

I have looked into the year books, and can find in the case referred to, nothing said about executors, nor was an executor a party in the cause. There is, therefore, no authority for the introduction of the words, "and not to the bishop's executors."

It has been said that as the estate which an ecclesiastic has in his church is of the same quality as that which a lay tenant for life has, the

right of the personal representative of the former to present to a church,
[278] must be the same as that of the personal representative of the latter.

These estates are only alike in this, that each must determine with the life of its holder. The estate of the ecclesiastic may, indeed, determine before, by resignation, deprivation, or the acceptance of another benefice. But the estate of the tenant for life is held by him in his own right, and solely for his own benefit. The estate of the ecclesiastic is held in right of the church, and for the service of the church. On the death of a tenant for life, there is some person in existence who represents the estate. But on the death of a beneficed clergyman, his estate in the benefice is in abeyance until the appointment of a successor. (*Co. Lit.* 342 b.) The moment that successor is appointed, his estates relates back to the death of his predecessor, so that there is no time for the right of a personal representative of the latter to intervene.

The law, with respect to the exercise of the right of presentation, is different in the case of an ecclesiastical estate from what it is in the case of a lay estate. An ecclesiastical patron can only present one clerk, and if that clerk be rejected for insufficiency, the patron is not entitled to notice of his clerk being rejected. All ecclesiastical presentations state, that the person presenting is either bishop, or prebendary, or other person having church patronage, and that he collates or presents in right of his bishopric, or prebend, or other dignity.

"To the right reverend father in God, *John*, by divine permission, Lord Bishop of *Lincoln*, to his vicar-general in *spirituals*, or to any other person or persons having or to have sufficient authority in this behalf; *William Dodwell*, doctor in divinity, prebendary of the prebend of *South Grantham*, anciently founded in the cathedral church of *Sarum*, and in right of that prebend, [279] the true and undoubted patron of the rectory of *Welby*, in the county of *Lincoln*, and your lordship's diocese of *Lincoln*, greeting:

"I present to your Lordship, and to the rectory and parish church of *Welby* aforesaid, now void by the resignation of *Basil Cave*, clerk, the last incumbent there, and to my presentation in full right belonging, my beloved in Christ, *William Dodwell*, clerk, master of arts, humbly praying that your Lordship would be graciously pleased to admit, and canonically to institute him, the said *William Dodwell*, to the rectory and parish church of *Welby* aforesaid, to invest him with all and singular the rights, members, and appurtenances thereto belonging, to cause him to be inducted into the real, actual, and corporal possession thereof, and to do all other things which to your pastoral office may in this case appertain or belong. In witness whereof, I have hereunto set my hand and seal this 27th of *October*, in the year of our Lord 1775.

William Dodwell, (L. s.)"

"*John*, by divine permission, Bishop of *Salisbury*, to our well beloved in Christ, *Thomas Rennell*, clerk, B.D. Health, grace, and benediction. We do hereby freely, and out of mere good will, give and confer upon you the prebend or canonry of *South Grantham*, founded in our cathedral church of *Salisbury*, vacant by the death of *Robert Price*, clerk, L.L.D., the last prebendary thereof, and belonging in full right to our donation or collation by virtue of our bishopric:

"And we do duly and canonically institute you in and to the said prebendary or canonry, and invest you with all and singular the rights, members, privileges, and appurtenances thereunto belonging (you having first before us made such subscriptions, and taken such oaths as are in this case by law required to be subscribed and taken): And we do by these presents assign and [280] appoint to you the stall in the choir of our said cathedral church belonging to the said prebend or canonry, and to the same hitherto usually assigned, saving always to ourselves our episcopal rights, and the dignity and

honor of our cathedral church of *Salisbury*. In testimony whereof, we have caused our episcopal seal to be hereunto affixed, dated this 17th of April, in the year of our Lord 1823, and of our translation the sixteenth.

J. (L. s.) Sarum."

"*John, by divine permission, Bishop of Salisbury, to our well beloved in Christ, Thomas Henry Mirehouse, clerk, M.A. Health, grace and benediction. We do hereby freely and, of mere good will, give and confer upon you the prebend or canonry of South Grantham, founded in our cathedral church of Salisbury, vacant by the death of Thomas Rennell, clerk, B.D., the late prebendary thereof, and belonging to our donation or collation in full right by virtue of our bishopric; and we do duly and canonically institute you in and to the said prebend or canonry, and invest you with all and singular the rights, members, privileges, appurtenances thereunto belonging, you having first before us made such subscriptions, and taken such oaths as are in this case by law required to be subscribed and taken; and we do by these presents assign and appoint unto you the stall in the choir, and place and voice in the chapter of our said cathedral church belonging to the said prebendary or canonry, and to the same hitherto usually assigned; saving always to ourselves and our successors, bishops of Salisbury, our episcopal rights, and the dignity and honor of our said cathedral church of Salisbury.* In testimony whereof, we have caused our episcopal seal to be hereunto annexed, dated this 13th of July, in the year of our Lord 1824, and of our translation the eighteenth."

"These forms of presentation show the connection of the party presenting with the church. An administratrix could not use such words [281] in her presentation. It behoves those who support her claim, to show some law that would authorise a bishop to institute on a presentation that did not contain them.

A lay patron may present two persons and allow the bishop to take one of them. He may revoke his presentation and present another clerk; he is entitled to have notice of the rejection of his clerk for incompetency, and he does not name in his presentation the estate in right of which he presents.

If these patrons are subject to different laws whilst living, why must their patronage be subject to the same law when they are dead?

In 2 *Roll. Abr.* 346, it is laid down, "*Si le parson doit presenter al vicarage, uncore si le vicarage devient void durant le vacancy del parsonage, le patron del parsonage preservera.*" *Rolle* refers to 19 *Ed. 2, quare impedit*, 178. It may be said, if the successor is the representative of the church, he should have presented. In this case it does not appear that there was any successor at the time of the presentation. Formerly patrons kept churches vacant for many years, and in the mean time took the fruits. It does not appear whether the patron was a layman or ecclesiastic. But I have looked through the 19 of *Edw. 2.*, and find only two cases of "*quare impedit*." In the first, the plaintiff claimed to present as the heir of the person last seised of the advowson, and the question was, whether she was the heir or not: no point was made in favor of an executor: the second, which I think is the case alluded to by *Rolle*, was a case in which the king claimed to present to a living in the patronage of a prior during the vacancy of the priory. The case of a priory is like that of a bishop, and the king's claim is founded on his *prerogative, by which he is entitled to the patronage of vacant [282] bishoprics, abbeys, and priories. *Rolle*, has therefore no authority for saying, that any other patron except the king in these particular cases would have had the right of presenting to a vicarage becoming vacant during the vacancy of the rectory.

It has also been urged on the part of the plaintiff, that as an ecclesiastical patron may grant a right of presentation to a layman by deed, he may give a

presentation that becomes vacant in his life time by his will, or that it will belong to his administrator if he makes no will.

I am not prepared to admit on the authority of the two cases cited, and I can find no other, that an ecclesiastical patron can grant the next presentation to any living in his patronage.

The case in *Hobart*, does not decide the point. The judgment was "that the words of the grant were insufficient to convey the right of presentation." The case in *Cro. Eliz.* cannot be law. The grant was of an archdeaconry, a judicial office. Without reference to the statute of *Ed. 6.* I think we should now scarcely endure to hear it argued, that one who had the appointment to a judicial office might assign that appointment. If he could grant it in his lifetime, this very case is an authority, that such a grant will not bind his successor, for the report states that such an assignment would be within the restraining statute of the 1 *Eliz.* But, although an ecclesiastical patron might grant the right of presentation when the church is full, does it follow that he could grant it when the church is void, and when his grant is not to take effect till after his death, and must bind his successor? such a grant would be against the letter of the restraining statute, and the passing of such patronage by will or letters of administration, which cannot take effect until the death of the testator or intestate, is against the spirit of that statute.

*283] *The options assigned to archbishops by bishops on their consecrations, have been mentioned. I do not pretend to decide on the validity of these grants, or on the rights of archbishops to bequeath by their wills the patronage conveyed to them. It is true that the trusts of such wills have been recognised in the Court of Chancery, but in the cases in which they came before that court, all the parties were interested in considering them legal, and no objection to their legality was made.

I have heard it said, that this right of the archbishops is derived from the Pope. *Linwood* says, the pope has "*Potestas supra jura.*" If in the exercise of this, which *Bellarmino* calls his *extraordinary authority*, he could give this right to the archbishops, such a right must be an anomaly in the law. But I think the papal power, both *ordinary* and *extraordinary*, had been overthrown in this country before these grants were first made. *Gibson* says, that the old practice was, for the archbishops to require bishops on their consecration to provide for some particular clergyman, leaving the provision to be made, and the time of making it entirely to the bishop; and that the first instance of an assignment of any particular benefice to the archbishop is to be found in the books of *Archbishop Cranmer*. If there are no such assignments of an earlier date, it would be difficult to support them without the aid of an act of Parliament.

If, after all the labor that has been bestowed in investigating this case, there still remains a doubt how it should be decided, we are, I think, then permitted to consider the decision that will most advance the cause of established religion. We should lay down such a rule as is most likely to secure the presentation of the fittest persons to fill churches that are left vacant at the death of ecclesiastical patrons. My regard for the family of the excellent person whose

*284] death has occasioned this question, is too well known for it to be supposed that the observations I am about to make can be applied to them. But, generally speaking, I think it cannot be doubted that the successor is more likely to make a judicious and disinterested choice than the personal representative of the late prebendary. A presentation in the hands of an administratrix is like lay patronage, liable to fall into the hands of a person who is unfit for the exercise of such a trust; a woman, an infant, an ignorant person, or a disappointed creditor. The successor must be a clergyman, a dignitary of the church, a person whose education and habits qualify him to appoint, and whose situation and character are the best security for his making a proper appointment.

If we wanted an instance to prove how well and how disinterestedly ecclesiastical patronage is bestowed, I might mention that of the late prebendary of *Grantham*. I believe he was selected by the University of *Cambridge*, and by two distinguished prelates, for the situation which he held, only because he was known to be a person the best qualified to discharge the various and important duties of those situations.

The clergy know that the filling the churches with learned and pious clerks, is the most effectual human means of lengthening the cords and strengthening the stakes of their tent.

Such dignitaries of the church as hold ecclesiastical patronage will, I hope, bestow it on such worthy clerks as are most able and desirous of promoting piety and morality. In this hope, I will never consent to withdraw it from the church by whom the original donors intended it should be administered, or to permit any layman under any pretence to interfere with the disposition of it. For these reasons, I think, our judgment should be for the defendants.

Judgment for defendants accordingly.



*MAVOR, Assignee of W. H. PYNE, v. PYNE.

[*285]

1. Where a verdict is found for the plaintiff in an action by assignees, on a contract entered into with a bankrupt, before his bankruptcy, it is no ground for setting aside the verdict, that it did not appear that 100*l.* of the petitioning creditor's debt was contracted within six years before the suing out of the commission.
2. A release executed by the bankrupt after an act of bankruptcy, to a lessee who knows of the bankrupt's insolvency, is not valid, although executed more than two months before the suing out of the commission.
3. Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a plaintiff may sue for the numbers actually delivered, although the contract be not reduced into writing, as required by the statute of frauds.

THIS was an action by the assignees of a bankrupt, for goods sold by him to the defendant. The pleas were first, the general issue. Secondly, that after the promises stated in the declaration, and before the commencement of the action, and before *W. H. Pyne*, became a bankrupt, he released the defendant from all actions. To which it was replied, that *W. H. Pyne*, had become bankrupt before the deed of release; and on this replication issue was joined. At the trial before *Best*, C. J., *Guildhall* sittings, after *Trinity* term, it appeared that the bankrupt was author of a work called, *The History of the Royal Residences*, which he published by subscription, in twenty-four numbers, at one guinea a number. The numbers were printed, and left at the publisher's house ready for delivery monthly. Each subscriber received his numbers at the house of the bankrupt. The whole twenty-four numbers were completed. The defendant only took away eight numbers, although he was informed that the remainder were ready for him. With respect to the release, although executed more than two months before the suing out of the commission, it appeared to have been executed after an act of bankruptcy; the defendant knew that the bankrupt was insolvent at the time of executing it; and it did not appear that 100*l.* of the petitioning creditor's debt had been contracted within six years before the suing out of the commission of bankruptcy.

[*286]

The jury having found a verdict for the plaintiff on both the issues,

Vaughan, Serjt., moved for a nonsuit on several grounds. First, that it did not appear that 100*l.* of the petitioning creditor's debt had been contracted

within six years before the suing out of the commission. Secondly, that the release was valid, inasmuch as it was executed more than two months before the issuing of the commission of bankruptcy, and that, at all events, the plaintiff ought to have averred in his replication that the defendant knew of the act of bankruptcy when he took the release. Thirdly, that the assignees could not sue the defendant till the bankrupt's part of the contract was performed by the delivery of the whole twenty-four numbers; and, lastly, that the contract not having been reduced to writing was void by the statute of frauds, as the work was not to be completed within a year. *Boydell v. Drummond*, 11 East, 142.

BEST, C. J. The first objection which has been made to the verdict, is, that it does not appear, that 100*l.* of the petitioning creditor's debt was contracted within six years before the suing out of the commission of bankruptcy. I think it would be highly inconvenient to allow a debtor of the bankrupt's estate to make such an objection. This point was decided by the Court of King's Bench, in the case of *Quantock v. England*, 5 Burr. 2628, after much consideration, and Lord *Mansfield*, in a case at Nisi Prius held, that the bankrupt himself could not, after having surrendered to his commission, avail himself of the statute of limitations.

*287] These decisions came under the consideration of the *present Chancellor in *Ex parte Devodney*, 15 Ves. 488, and his Lordship confirmed the case of *Quantock v. England*, but held that the rule in that case should be confined to actions brought by assignees against the debtors of the estate, and could not be extended to cases in which the bankrupt disputed his bankruptcy, or to oppositions made by creditors to the proof of debts under the commission that were more than six years standing. We ought to diminish as much as possible the difficulties of maintaining actions to recover debts due to a bankrupt's estate. It would be wiser, I think, to prevent the bankruptcy from Vide 6 Geo. 4, c. 16, being questioned in any action, except such as are brought for the purpose of trying the validity of the commission, by the bankrupt or any creditors who have a right to dispute it.

The second objection is, that although the release was after an act of bankruptcy, and the defendant knew that the bankrupt was insolvent at the time it was executed, yet as the commission was not issued within two months after the release, Sir *Samuel Romilly's* act rendered the release valid, the plaintiff not having in his replication alleged that the defendant knew that the bankrupt had committed an act of bankruptcy or was insolvent.

I think the defendant having pleaded that the release was executed before the bankruptcy, and it being proved at the trial that it was executed after, the plea was negatived, and the plaintiff was entitled to a verdict on this issue.

The third objection was, that this action could not be maintained, the bankrupt not having performed his part of the contract. The short answer to this objection is, that the defendant put an end to the contract, consequently the plaintiff was entitled to recover for the amount of what he had performed.

*288] *If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received. The bankrupt was the author of a work called, *The History of Royal Residences*, which he published by subscription in twenty-four numbers, at the price of one guinea each number. The numbers were printed and left at the publisher's house ready for delivery monthly. Each subscriber received his numbers at the house of the bankrupt. The whole twenty-four numbers were completed.

The defendant only took away eight numbers, although he was informed that the remaining numbers were ready for him.

The defendant broke his bargain in not taking the other numbers, and was

liable to pay for those he had, and the verdict is only for the eight that were received by him.

The case of *Boydell v. Drummond*, which has been referred to by the defendant's counsel, shows that the statute of frauds will prevent plaintiffs from recovering on the original contract, where it was not in writing, and not to be performed within a year. But neither the statute nor the case show that plaintiffs are not to be paid for numbers actually received by the defendant. In *Boydell v. Drummond*, the defendant had paid for all the numbers of the work subscribed for that he had received; and the question was, whether the executory part of the contract was binding, and the defendant bound to take and pay for the residue of the work. The reasoning of the judges in that case is against the argument of the defendant's counsel. They consider a subscription of this sort as a divisible contract.

The meaning of the contracting parties, when they say *twenty-four numbers, at one guinea each number*, is, that the publisher shall be paid as the numbers come "out, not that he is to wait until the work is complete [*289] before he receives any money.

One of the reasons for publishing in numbers is, that the publishers have not sufficient capital to complete an expensive work. Many of the most beautiful works which the public now possess, could never have been brought out unless the publishers had been paid as the numbers were delivered.

If the defendant had not put an end to the contract, I should have no difficulty in saying, that the bankrupt was entitled to be paid one guinea by him for every number that he received.

The rest of the court concurring, the rule was

Refused.



WAISTELL v. ATKINSON.

A tender and payment into court, by which the plaintiff's claim is reduced below 40s., will not entitle the defendant to enter a suggestion on the London court of conscience act, although the issue on the tender is found for the defendant.

ASSUMPSIT for the hire of a gig. Plea of tender, and payment into court as to 5l. part of the demand, and *non-assumpsit* as to the rest. The plaintiff having taken the 5l. paid in on the plea of tender, and having proceeded to trial, there was a verdict for the defendant on the tender, and for the plaintiff on the *non-assumpsit*, with 1l. 19s. damages.

Spankie, Serjt., on the part of the defendant, upon an affidavit stating that he resided within the city of London, moved for a rule to show cause why he should not be at liberty to enter a suggestion on the roll, in order to entitle himself to the benefit of the London court of conscience act, 39 & 40 G. 3. c. 104. He cited *Horne v. Hughes*, 8 East, 346, and *Cook v. Johnson*, 2 Price, 19, to show *that where a debt was reduced by part payment [*290] below 5l. before action brought, the case was within the act; he argued that a tender was equivalent to part payment, and he distinguished the case of *Heaward v. Hopkins*, Doug. 448, in which the contrary had been holden, on the ground that it was decided on a different act of Parliament, and before part payment had been holden to bring cases within the act.

Best, C. J. The case in *Douglas* is decisive on this point. The court was of opinion in that case, that where a tender only was pleaded, no suggestion ought to be entered. There is no subsequent case in which that prin-

ciple has been affected. In the case in the Exchequer, there was part payment, and to that extent the debt was extinguished, but it cannot be said to be extinguished by a tender.

Rule refused.†

† But see *Jordan v. Strong*, 5 M. & S., 196.

ANDERSON v. SHAW.

Where a plaintiff does not appear, a verdict cannot be taken against him, though the defendant pleads a tender.

The defendant, who had pleaded a tender, and paid money into court, took down the record by proviso, and the plaintiff not appearing, a verdict was taken for the defendant upon the authority of *Gutheridge v. Smith*, 2 H. Bl. 377, and *Harding v. Spicer*, 1 Campb. 327, where it is laid down that a plaintiff cannot be nonsuited after a plea of tender.

**Onslow*, Serjt., on the authority of *Hicks v. Young*, 2 Barnes, 458, [291] *Gardener v. Davis*, 1 Wils. 300, and *Dennis v. Dennis*, 2 Wms. Saund. 336 b., in which the practice is laid down the other way, obtained a rule nisi to set aside this verdict.

Taddy, Serjt., who showed cause, contended that the opinion of *Heath*, J., in the two cases cited at Nisi Prius was correct, because the judgment of nonsuit is, "that the plaintiff take nothing by his writ," whereas upon a plea of tender and payment of money into court, it appears he takes something, and, therefore, cannot be supposed to abandon his suit.

BEST, C. J. My opinion at the trial was, that as there was one issue on the plaintiff, and the tender applied only to a part of the demand, a verdict could not be given against the plaintiff in his absence.

The case of *Gutheridge v. Smith* was cited to me. I understood that in *Gutheridge v. Smith*, it had been decided by the Court of Common Pleas, that when a tender was pleaded, there could not be a nonsuit, but the defendant must have a verdict. I find that no other Judge says anything on this point, but Mr. Justice *Heath*. The case in *Campbell* was also decided by the same learned Judge. No man can entertain a higher respect for the opinion of any Judge than I do for that of Mr. Justice *Heath*. If there was anything like a defect in the comprehensive and accurate mind of that excellent man, it was, that it could not easily descend to the consideration of such points as that now to be decided. It was the practice to call the plaintiff in every case: if he did not answer, no verdict could be given against him. At this day if the plaintiff's "counsel informs the court, whilst the jury are considering [292] their verdict, that the plaintiff does not appear, a nonsuit is entered. Can there then be anything but a nonsuit, when, instead of disappearing just before the end of the cause, he does not appear at all? It is said, that when there is a tender, he takes something by his writ; so he does, if money be paid into court, and he takes it out, and it has been often held, that a plaintiff may be nonsuited after payment of money into court.

The verdict must be set aside.

PARK, J. I am of the same opinion; there cannot be a verdict unless the plaintiff appears, and there is no case which has established a contrary rule. In the case on which so much reliance has been placed, it is said, "in joint

actions there cannot be a nonsuit, because of the incongruity." There is the same incongruity in the present instance, and though we have been pressed with the opinion of Mr. Justice *Heath*, the weight of authority the other way must prevail here.

The rest of the court concurring, the rule was made

Absolute.



MUNN v. GODBOLD.

The plaintiff had lost his part of an agreement under seal after it had been duly stamped. At the trial of an action on the agreement, the defendant, upon notice, produced his part, unstamped, and the plaintiff, the draft of the agreement. Held, that the defendant's part, unstamped, might be received in evidence.

Covenant on an agreement under seal, by which, in consideration of the plaintiff having for that purpose paid the defendant 300*l.*, the defendant agreed to consign to the plaintiff 600*l.* worth of *Godbolt's Vegetable Balsam*. Plaintiff was to be the agent, and the "defendant was to take back, at the [293] price paid for the same, all that the plaintiff should be unable to dispose of in six months. Averment that the plaintiff in that time was able to dispose of no more than would produce 13*l.* 6*s.* 8*d.* Breach, that the defendant refused to take back the residue, pursuant to his agreement. The plaintiff excused himself from *profert*, by an allegation that the deed was lost. At the trial before *Best*, C. J., London sittings, after *Trinity* term last, the plaintiff, after having given the defendant notice to produce the counterpart, and having proved the loss of the deed declared on, which had been executed by the defendant only, offered in evidence the draft of the deed; the defendant's counsel at the same time produced the counterpart, executed by the plaintiff only, and unstamped, and insisted that the draft could not be received, because the counterpart was in court; and that the counterpart could not be received, because it was unstamped. The objection, however, having been overruled, and the unstamped counterpart helden to be admissible evidence of the lost deed, the jury found their verdict for the plaintiff.

Bosanquet, Serjt., having on the above objections obtained a rule *nisi* for a new trial,

Wilde, Serjt., now showed cause. The plaintiff was entitled to produce in evidence either the draft or the counterpart of the lost deed, because if both were rejected the defendant would obtain an advantage by his own wrong in omitting to stamp the counterpart. The counterpart, if read, must be read as a copy, and not as a deed, because if it were read as a deed the plaintiff must have been nonsuited, inasmuch as he had declared on a deed executed by the defendant, and the counterpart was executed only by the plaintiff. As a copy, it required no stamp.

**Bosanquet*. When a deed is lost, the next best evidence must be produced; and the counterpart is the next best: *Rex v. Castleton*, 6 T. R., 236, *Villiers v. Villiers*, 2 Atk. 71, Bull. N. P. 254. But if the counterpart be produced, it must be produced as a deed, not as a copy; it being to all intents an original. If it be produced as a deed, it ought to have a separate stamp under the provisions of 55 G. 3 c. 184, if on no other ground, at all events, because the two instruments contain together more than 2160 words.

Best, C. J. On the trial the plaintiff proved that there were two parts of the deed, on which, the action was brought, one of which, executed by the

plaintiff, was delivered to the defendant, and the other, executed by the defendant, was delivered to the plaintiff. The loss of the latter was then shown, and the plaintiff's counsel offered a copy in evidence. Upon this the counsel for the defendant produced the part executed by the plaintiff, which was not stamped, and insisted that this part could not be read for want of a stamp, but that as it was in existence, and the best evidence of the contents of the lost deed, I could not receive any copy in evidence. I thought this part was the best evidence of the contents of the lost deed, but that it was admissible without a stamp; and it was accordingly read.

When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than any other copy; and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The courts have, therefore, always required, that if one part of a deed be lost and another part be in existence, it must be produced, or shown to be in the hands of the *295] opposite party, and then on his refusing to produce on notice a copy may be received. In *Buller's Nisi Prius*, 254, it is said, "If it come out in evidence, that there are two parts executed, and the loss of one only is proved, perhaps a copy could not be admitted." In *Villiers v. Villiers*, Lord Hardwicke says, "If an original deed is lost the counterpart may be read; and if there is no counterpart forthcoming, then a copy may be admitted." In *The King v. Castleton* it was held, that a person who had one of the parts of an indenture of apprenticeship ought to have been called to produce such part, and that no other evidence of the indenture could be received.

These cases prove that the part of the indenture in the hands of the defendant was the proper proof of the contents of the part that was lost.

Then comes the question, could this part be received without a stamp? I think it required no stamp. It was not produced as a deed, but merely as secondary evidence of the contents of another instrument which was lost.

It could not be read as a deed by the plaintiff, because it was not executed by the defendant, it was only used as an authenticated copy of the deed, which the defendant had executed. Copies need not be stamped, and, therefore, this, which could only be read as a copy, required no stamp. In *Waller v. Horsfall*, 1 Campb., 501, the defendant being in possession of a stamped agreement, the plaintiff proved a notice to produce, and then offered an unstamped part, which had been executed by both parties. Lord Ellenborough said, "It may be received as a copy, although, if properly stamped, it might have been used as an original." In *Garnons v. Swift*, 1 Taunt., 507, the court held, that if the party who had the stamped part of an agreement did not produce it on notice, he who had the unstamped part might give secondary evidence.

*I am, therefore, of opinion, that this paper was properly received, *296] and that there ought not to be a new trial.

Rule refused.

LAKE v. SILK.

Arrest under the name of Stephen T. Silk. Bail-bond executed in the name of Stephen Thomas Silk: Held ill.

THE defendant was arrested on a *capias ad respondendum*, by the name of Stephen T. Silk; he afterwards executed to the sheriff a bail-bond, in the

name of *Stephen Thomas Silk*, by which, as was now stated on affidavit, he had always been called and known.

Bosanquet, Serjt., having obtained a rule *nisi* to cancel the bond, under these circumstances,

Vaughan, Serjt., who showed cause against the rule, insisted, that the objection was waived by the defendant's signing the bond.

To which it was answered, that a bail-bond is signed by compulsion, and that the real waiver would have been, to have signed in the erroneous name of the arrest. *Taylor v. Rutherford*, 6 B. Moore, 264, was relied on as in point.

Cur. adv. vult.

Best, C. J. We find ourselves fettered by the decisions in this court and the King's Bench, and as the party may have acted on those decisions, the bail-bond must be set aside, but without costs. For the future we shall not give relief on motion in similar cases.

Rule absolute.



*297]

*BROOK v. CARPENTER.

An action may be brought to recover damages for a malicious suit, even where such suit is terminated by rule of court, and the rule is evidence of the termination of the suit.

This was an action against the defendant, for maliciously lodging against the plaintiff, when a prisoner in the *Fleet*, a detainer, and detaining her, in an action on a bill of exchange for 10*l.*, having at that time no reasonable or probable cause for such detainer.

The termination of the defendant's suit on the bill was averred as follows: "That such proceedings were thereupon had, that in *Easter* term 1825, by a certain rule or order made in the suit by the Court of Common Pleas, it was ordered, that the defendant in that suit should be discharged out of the custody of the warden of the *Fleet* as to Plaintiff's suit in that action, and that all further proceedings in the cause should be stayed, and the bill of exchange on which the action was brought be delivered up to the defendant; and the said action was and is, by means of the premises, and according to the course of the court, wholly ended and determined."

At the trial before *Best* C. J., *Middlesex* sittings after *Trinity* term last, the prothonotary was called, and produced the rule of court in the above terms; he stated it to have been obtained on the affidavit of the party.

The admission of the rule was objected to, on the ground, first, that it did not show any termination of the suit; secondly, that having been obtained by the affidavit of the party, it would, if received, enable her indirectly to give evidence in her own cause: but the learned Chief Justice permitted it to be read, and a verdict was found for the plaintiff.

**Wilde*, Serjt., moved for a rule *nisi* to set this verdict aside and *298] enter a nonsuit, on the objections above stated. He cited *Habershon v. Troy*, 3 Esp., 38, where in an action for a malicious arrest, Lord *Kenyon* refused to admit as a witness, to prove the circumstances of the preceding suit, an arbitrator who had examined the parties, and had made an award in favor of the defendant in that suit.

Vaughan and *Lawes*, Serjts., showed cause. The rule was admissible from necessity. It was necessary for the plaintiff to show the termination of the preceding suit; and as it was terminated by the rule, the rule was the

only evidence of its termination. In *Habershon v. Troby* the arbitrator was called, not merely to show the termination, but the circumstances of the preceding suit.

Tuddy and Peake, Serjts., in support of the rule.

The termination of the prior suit is a material fact towards the support of the plaintiff's action; and if she be permitted to prove it by the rule, she does in effect prove it by her own affidavit, which cannot be permitted. Thus the record of a conviction is never admitted as proof of any injury for which redress is sought by action, for if it were, the plaintiff would succeed by his own testimony. *Gibl. Evid.* 30, 31. *Rex v. Boston*, 4 East, 572, *Burdon v. Browning*, 1 Taunt., 520. In an action against the hundred, indeed, for a robbery, the party is permitted to give evidence of the robbery, from the necessity of the case, because in general no other evidence can be procured. But in the present instance the rule of court might probably have been obtained [299] by other evidence than the plaintiff's affidavit, and, therefore, ought not to be admitted in support of her action.

BEST, C. J. I was exceeding desirous that a rule to show cause why there should not be a new trial, should be granted in this case, that we might ascertain whether I had allowed the rule for staying the proceedings in the first cause to be applied to the questions of malice or want of probable cause, or to influence the jury in assessing the damages. I recollect that I had admitted it in evidence, only to prove that the first cause was ended, because it was the only evidence by which that fact could be proved. It is now admitted, that it was used for no other purpose. Of this and of this only I now think it was legal evidence. It has been well observed at the bar, that when a suit has been terminated by rule of court, unless the rule can be received in evidence, an action for maliciously holding to bail can never be brought in such a case. The rule of court is receivable, on the principle of necessity, as you allow a plaintiff to prove by his own testimony that he was robbed, in an action against the hundred, robberies being usually committed when no one is near but the person robbed and the thieves. Another case has been mentioned to me by brother *Gaselee*—where a rule of court is received in evidence, and none of us ever heard that it was objected to, because obtained on the oath of the party by whom it is produced; namely, in an action for trespass, when the trespass is committed under a writ that is set aside by the court for irregularity. In that case the rule goes immediately to the point on which the whole cause turns.

In the present case the rule was only to prove a collateral fact. It has been said in argument, that if a party intends to bring an action for maliciously holding [300] him to bail, he must have the original cause disposed of by a verdict in his favor, or he must not offer his own affidavit in support of any rule that he intends to use in such an action. It would be a barbarous law that refused redress for an unjust imprisonment, because he who had suffered it chose to seek relief from his misery by a reference, or other legal mode by which it could be ended in a short time, and did not wait until he could bring his oppressor to a regular trial.

In this case, the plaintiff at first only applied to be discharged out of custody. Upon that application being made, both parties, on the recommendation of the court, agreed to refer the whole cause to the prothonotary, whose award was the foundation of the rule for determining the cause. With respect to the party's not joining in the affidavit, if he intends to offer in evidence the rule that he seeks to obtain, I think the court would not be inclined to grant such a rule, if the party applying for it did not join in the affidavit. We should suspect that we were not informed of the whole truth. I am also disinclined to say, that a rule cannot be used in evidence for the purpose for which this rule was used, if obtained on the oath of the party using it. Regard to truth, which is the foundation of the law of evidence, can never require so strict a rule,

and it would prevent us from affording relief in many cases of great oppression. I mean not to infringe on the principle, that a verdict in a criminal case cannot be given in evidence by the prosecutor in support of a civil action. We should, as far as we can, take from prosecutors every temptation to go beyond the truth in their evidence. This is a general rule, but necessity has occasioned some exceptions to it. A prosecutor obtains by the conviction of a felon restitution of his goods, and yet the prosecutor is a competent witness on the trial of the felon. The owner of goods stolen can maintain no action to recover them until he has prosecuted the supposed thief. 301

If you prevent the owner of goods stolen from giving evidence on the trial of an indictment for the felony, because he may by such evidence obtain restitution of his goods without an action, you would often defeat public justice. It would be absurd to expect a prosecutor to bring his action, after the person who stole his goods is convicted.

In the present case it cannot be proved that the original suit is ended, but by the order by which the proceedings in it were stayed: from necessity, therefore, that order must be permitted to be read in evidence, for the purpose of proving the proceedings stayed, and for that purpose only. I am of opinion that the rule for a new trial should be discharged.

PARK, J., concurred.

BURROUGH, J. The production of this order was to prove nothing but that the former suit had terminated. As to the means by which that order was obtained, it would make no material difference whether it were procured at the instance of the party, or immediately upon her affidavit. It would be most oppressive, if the party could by any such objection be prevented from maintaining this action. She is unjustly confined in jail, and according to the argument which has been used, she must lose all hope of redress for the wrongful imprisonment if she applies to this court for her enlargement. The rule of court which terminated the former suit, must indeed be received in evidence from the necessity of the case. If, as is clear, the termination of the suit must be proved, it can only be proved by showing the act of the court which affected its termination; and though that act should have been occasioned by the affidavit of the party, that circumstance, as it cannot dispense with, so it ought not to exclude the only proof of which the thing is capable. But in actions against the hundred, and other instances in which the evidence of the party interested is the only evidence which the case furnishes, it has always been received. *302

GASELEE, J. The question for the decision of the court lies in a narrow compass. In order to sustain an action for a malicious prosecution, the party suing must show that the former suit is at an end; he must also state this in his declaration, as well as the means by which the suit was ended. In the present case the suit complained of was ended by rule of court; and how can that be proved except by the production of the rule? The rule is put in, merely to show that the suit was ended, and it is immaterial how the rule was obtained. It is urged, indeed, that the jury may be prejudiced by hearing the contents of the rule; (although the rule in the present instance shows none of the circumstances of the former cause;) but there are many cases in which evidence cannot be excluded, although it may avail to produce an unfavorable impression, as where the confession of a prisoner is read, which has often a tendency to implicate others. In civil actions too, what is said by one defendant is often binding upon another; so that this circumstance alone cannot be any ground for excluding the evidence; and as there was no other mode by which the fact could have been proved in the present case, the rule which has been obtained on the part of the defendant must be

Discharged.

*SAME CASE.

THE rule for a new trial in this case having been discharged as above, *Wilde*, afterwards moved in arrest of judgment, that it did not appear upon the record that the first action was at an end before the second had been commenced. He argued that a stay of proceedings by rule of court was not a termination of a suit, because the stay might be only temporary, and the action afterwards proceeded in, and because it would not, like a regular termination, be a bar to an action for the same cause in another court: further, as it was obtained by the affidavit of the party, he ought not to be permitted to proceed against his opponent upon no better foundation than his own testimony.

BEST, C. J. It has been insisted that it does not appear on this record, that the action in which the plaintiff was maliciously and without probable cause detained in prison, is at an end.

The declaration states a rule of court by which it was ordered that the proceedings in this action should be stayed, that the defendant should be discharged out of custody, and that the plaintiff should deliver up the bill of exchange on which the action was brought. After such a rule that action could never be stirred again in this court. If this court had authority by rule to put an end to the cause, it was at an end. There are many cases in which actions may be stopped by rules of court. If ever this may be done, the court will presume that it was rightly done, when it is attempted to arrest the judgment after the verdict of a jury. All of us know that the power of stopping the action was properly exercised in this case.

*304] *Stopping the cause by rule of court would not, it is urged, prevent the plaintiff from bringing another action in another court; neither does a nonsuit on the merits; and yet if it were determined that when the plaintiff in the original cause was nonsuited, no action could be brought against him for maliciously holding to bail, such a determination would be a receipt for a safe mode of indulging in oppression or revenge. A person who had gratified his malice by immuring in a prison a fellow creature for months, by not appearing when an indignant jury were about to deliver a verdict against him, might, if this were law, avoid an action for maliciously holding to bail. All that is required in such an action is, to show that the first action is at an end, not that the cause of such action is finally decided on.

I am, therefore, of opinion, that it does appear in the declaration in this case, that the original action was at an end when the action for maliciously holding to bail was brought, and that we should not grant a rule to show cause why the judgment should not be arrested.

Rule refused.

STRONG v. HARVEY.

1. An association of ship owners for the mutual insurance of each other's ships, in which each member is only liable to the extent of his subscription, is not illegal under the 6 G. l. c. 18.
2. Where, by the terms of a policy, losses were to be paid in three months after an adjustment by a committee of the insurers, and the committee refused to adjust upon the request of the insured: Held, he might sue on the policy, notwithstanding there had been no adjustment.

3. When a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, will not support a plea, stating that a certain portion of the sum was tendered for the debt of one.
4. An offer of a certain sum in full of a demand is not a legal tender.

THE declaration stated, that plaintiff, before and at and after the time of making the policy of assurance thereafter mentioned, (to wit,) on the 15th *of February, 1822, and from thence continually until the 15th of Feb-
ruary, 1823, was a ship owner and member, together with defendant [*305
and divers other persons, of a certain society or association called the *Pacific*
Association ; and that the ship or vessel thereafter mentioned was from the
day of the date and making of the policy of assurance, admitted into and
entered in the said society ; that plaintiff theretofore, (to wit) on the 7th of
March, 1822, caused to be made a certain policy of assurance, purporting
thereby and containing therein, that plaintiff, as well in his own name as for
and in the names and names of all and every other person or persons to whom
the same might appertain in part or in all, did make insurance on the ship
Waterloo, at and from all ports and places, not excepted by the rules of the
association, from the 15th of February, 1822, to the 15th of February, 1823,
for 1500*l.*, against all perils and losses ; the assurers agreeing to contribute,
each one according to the rate and quantity of his sum therein assured, and
confessing themselves paid the consideration due to them for that assurance
by the assured, at and after the rate of 12 guineas per cent per annum : And
plaintiff averred, that the rules and regulations of the *Pacific* Association, men-
tioned in and referred to by the policy, and the indorsement thereon, were as
follows : First, that Messrs. *Thomas Jackson, John Phillips, S. F. James,*
Davis Hewson, Samuel Bryan, Richard Harvey, and Benjamin Barrett, be
appointed a committee for settling averages, and managing affairs of that associa-
tion for the then present year :—The plaintiff then set out several other
rules to the number of twenty-four, among which were,—Third, that before
any ship should be insured there should be paid five shillings per cent. on the
sum insured, towards defraying the necessary expenses ; and there should
also be paid the charge for the policy and power of attorney : Sixth, that ships
under two hundred tons should have two hundred fathoms [*306
of cable, three bower anchors, and two kedges, and ships of two
hundred tons and upwards, should have two hundred and forty fathoms
of cable, three bower anchors, and two kedges, and that a chain cable
of ninety fathoms, approved by the surveyors, should be allowed in
lieu of one rope cable for a vessel of two hundred tons and upwards, and
that eighty fathoms of such chain cable should be allowed to a vessel of a less
tonnage, but that ships of three hundred and fifty tons and upwards, sailing to
the *East Indies*, should have not less than three hundred fathoms of good
cable : Eighth, that no sails cut away or lost (save and except those going
with the masts,) nor cables washed from the decks, should be allowed under
average : Fourteenth, that in case of loss or average, the same should be paid
for in two months from adjustment : Twenty-fourth, that the several ship
owners, whose names were thereunder written, did severally and respectively,
but not jointly or in partnership, or the one for the other of them, but each of
them only, in his own name and on his own account, thereby mutually agree
to insure each others' ships, from twelve o'clock at noon of the day of entry
of each vessel into that association, until twelve o'clock at noon of the 15th
of February, 1823, and that the foregoing rules were and always should be
considered as binding upon all the members, as if inserted in and made a
component part of the policies : plaintiff then averred that the policy of
assurance with the said memorandum and indorsement was so made by him
for and on the part and behalf of himself ; that the assurance so made was
made for the sole use and benefit of himself ; and that the said writing or
policy of assurance was subscribed with the name of defendant and divers

other persons, by an agent of the said several persons, as assurers for the sum of 1500*l.*, upon the premises in the policy of assurance mentioned: And thereupon, in consideration of the premises, and that plaintiff had paid five *307] shillings *per cent. on the said sum of 1500*l.*, towards defraying the necessary expenses, and also the charges due, according to the third rule or regulation above-mentioned; and that plaintiff, at the special instance and request of defendant, undertook and promised to the defendant to perform and fulfil all things in the said policy of assurance, memorandum, and rules and regulations contained on his part and behalf to be done, performed, and fulfilled; the defendant undertook and promised, that he would become and be an assurer to plaintiff, for his part and proportion of the said sum of 1500*l.*, of and upon the said ship or vessel, upon the terms and according to the policy of assurance, memorandum, and rules and regulations, and would perform and fulfil all things in the policy of insurance, memorandum, and rules and regulations contained on his part and behalf to be performed and fulfilled: And the said ship or vessel was, from the day of the date of the same policy of assurance, (to wit) on the said 15th of *February*, 1822, admitted into and entered in the said society or association.

The plaintiff then averred, that he was interested to the extent of the sum insured, and alleged damage by stranding, in consequence of which he was obliged to lay out money (to wit, 1000*l.*) in repairs, to throw goods overboard, to be piloted and assisted into the port of *Savannah* by the crew of another vessel, whereby general average losses became chargeable, the proportion of which, payable by plaintiff, amounted to a large sum, (to wit) 1000*l.*

Averment, that plaintiff had always been willing that such losses and damage should be adjusted according to the rules of the association, and that defendant had notice of this; that plaintiff requested defendant and the committee to settle and adjust the losses and damage, but that they refused to do so, *308] although a *reasonable time for that purpose had long since elapsed; and in particular, two months since the time when the adjustment ought to have been made: by means of which premises the defendant was liable to pay his proportion of the 1500*l.*

There were several other counts, but the above came nearest to the case made out in evidence.

The defendant pleaded, that as to the alleged necessity of being piloted and assisted into the port of *Savannah*, and as to the residue of the demands in the declaration, except as to the extent of 3*l.* 2*s.* 9*d.*, he did not undertake and promise in manner and form as the plaintiff had complained. As to the 3*l.* 2*s.* 9*d.*, he pleaded a tender, on which issue was taken.

At the trial before *Best*, C. J., *London* sittings, after *Trinity* term last, it appeared that the plaintiff and defendant were members of an association of ship owners, who, under the regulations indorsed on the policy on which the plaintiff had declared, had entered into a mutual engagement for the insurance of each others' ships. The plaintiff's ship, the *Waterloo*, within the time for which she was ensured, had run upon the *Tortugas* shoals, on the coast of *Florida*, in her homeward voyage from *Jamaica* to *England*. Upon that occasion she sustained some damage, but after throwing part of her cargo overboard, was assisted in getting off the shoal by a privateer under *Colombian* colors, and some pilots called wreckers from *New Providence*, to each of whom a portion of the cargo was given for their services. The plaintiff, who was on board his own ship, instead of proceeding to the *Havannah*, the nearest port, or to *New Providence*, received into the *Waterloo* the lieutenant and six of the crew of the privateer, sailed to *Savannah* in the United States, of which country the captain and lieutenant of the privateer were natives. The *309] lieutenant then *instituted in the Admiralty Court at *Savannah* a suit for salvage, when 12,000 dollars were awarded to the privateer for her services, though the cargo of the *Waterloo* had cost no more than 24,000 dollars.

The members of the association having reason to suspect that the whole of the transactions at *Savannah* were a fraudulent contrivance between the plaintiff and the captain of the privateer, requested to examine the plaintiff touching those transactions before they adjusted the average : The plaintiff attended the committee, but upon his refusing to explain how he became possessed of a sum of more than 5000 dollars, with which he had purchased at *Savannah* a considerable portion of the ship's cargo which had been sold to satisfy the decree for salvage, the committee refused to adjust the average. The plaintiff then commenced actions on the policies for 1522*l.* 5*s.* 1*d.* when the members of the association by their agent, offered to the plaintiff, and afterwards to the plaintiff's attorneys, to pay 400*l.* 11*s.* 1*d.* in full of the plaintiff's demand, explaining to one of the attorneys, that that sum included the defendant's contribution to the insurance, 3*l.* 2*s.* 9*d.* It did not appear that the money was actually produced, but the plaintiff's attorneys made no objection to the offer as being an informal tender, although the party making the offer said he had no bill less than 10*l.* with him : however, the offer being refused on the ground that more was due, the cause proceeded. In the progress of the trial it was agreed, that if the claim in respect of what had been paid for salvage, should be found untenable, it should be referred to an arbitrator to determine whether the 400*l.* 11*s.* 1*d.* tendered to the plaintiff was sufficient to pay the whole loss sustained, independently of the decree for salvage. After a very detailed investigation of the proceeding at *Savannah*, the jury found a verdict for the plaintiff, but found also that his conduct at *Savannah* was fraudulent : thereby negativing in effect that part of [*310 his claim which rested on the decree for salvage.

Vaughan, Serjt., obtained a rule nisi to set aside this verdict and enter a nonsuit, or a verdict for the defendant, on the ground that the plea of tender had been sufficiently made out ; or to arrest the judgment on the ground, among other objections, that the policy declared on was void under the 6 G. 1. c. 18., and that an adjustment of the loss by the committee of the association was a condition precedent, the fulfilment of which was necessary to entitle the plaintiff to sue.

Taddy, Serjt., who showed cause, was relieved by the court from arguing the questions respecting the tender and the nullity of the policy. He then contended, that the adjustment by the committee was not a condition precedent to be alleged in the declaration, but a matter the absence of which was to be proved by the defendant in opposition to the plaintiff's claim ; and he likened the case to that of *Hotham v. East India Company*, 1 T. R. 638, where a covenant in a charter-party, that no allowance should be made for short tonnage, unless such short tonnage should be made to appear on the ship's arrival, on a survey to be taken by four shipwrights, was held not to be a condition precedent, but matter of defence : at all events, if the adjustment were a condition precedent, the plaintiff was discharged, by having offered to do all in his power to fulfil it, and by the defendant's refusal to proceed after he had called on them.

Vaughan and *Wilde*, Serjts., in support of the rule, argued that the tender having been made to a professional person, and no objection having been made by *him, on the ground that the money was not actually produced, that [*311 circumstance did not invalidate the tender ; the ceremony of producing the money might be dispensed with, and had been dispensed with here. Then as to the adjustment by the committee, it was the first and most important of all the regulations of the association, was the chief object which the members composing it had in view, in order to avoid more expensive modes of settling disputes, and was therefore clearly a condition precedent. The plaintiff calling on the committee to come to an adjustment was not a sufficient performance of the condition on his part ; he ought to have furnished the committee with all the materials to enable them to form a judgment.

The objection on the statute 6 G. 1. was not further insisted on, being of a nature likely to affect the credit of the association.

BEST, C. J. It is properly admitted that the policy of insurance in which this action is brought is not against the 6 G. 1 c. 18. That statute (to secure to the two great companies the monopolies they had purchased of government,) rendered invalid the policies of insurance of other corporations, or of any persons insuring as a society or in partnership; but permitted parties to insure with individual underwriters as before. The assured and all the underwriters on this policy, are members of a society for the insurance of ships. But this society has no joint stock; it enters into no joint contract; the individual members are alone answerable for any loss that may happen to property insured, according to the terms of their separate contracts.

The advantages of insuring in such a society are, that the members know each other's responsibility better than they can know that of general underwriters: as none are admitted members but such as are possessed "of ships of their own, all of them have some property to answer for any losses for which they may render themselves liable. Men united in such a society can better detect frauds in the assured, and at the same time they will restrain each other from setting up dishonorable defences against fair claims. These are great advantages, but, fortunately, they were not thought of when the statute of George the 1st was passed, or they would, probably, have been bartered away for a further loan to the state. There is neither the inclination nor the power to do such things now.

It is insisted that the plaintiff cannot recover, because his loss has not been adjusted according to the terms of the 14th article on the back of the policy. It was proved that the plaintiff applied for an adjustment, and that the defendant refused to adjust, and this proof supports some of the counts in the declaration. But it is said that the defendant refused to adjust, because the plaintiff's claim was fraudulent. If this were true to the extent of his whole claim, it would be an answer to the action, but the jury have found that there was nothing fraudulent in the plaintiff's conduct, until after the ship was carried into *Savannah*, and the plaintiff had a claim for general and particular average before the ship arrived at *Savannah*. This part of the claim the defendant ought to have adjusted, and paid two months after adjustment. The amount of this part of his claim is referred to arbitration. If that exceeds what is paid into court on the tender, the plaintiff must have a verdict for that on the general issue.

This brings me to the question on the tender. The witness who was to prove the tender said that he offered the plaintiff 400*l.* 11*s.* 1*d.* *in full* for his claim on the policy, and that the plaintiff went away before the witness had an opportunity of telling him what part of this money was on account of the defendant. The witness then went to *Cross*, one of the attorneys of the plaintiff, offered him the same sum, informed him that 3*l.* 2*s.* 9*d.* was on account of defendant, and told *Cross* this was in full for the plaintiff's demand. The witness tendered the same sum, and in the same manner, to *Lowless*, the other attorney of the plaintiff.

He never mentioned to the plaintiff or *Lowless* what was offered on account of the defendant. He never gave either of the persons an opportunity of taking the defendant's proportion of the 400*l.* 11*s.* 1*d.* They could not have taken the 3*l.* 2*s.* 9*d.*, for the witness said he had no bill of less than 10*l.* with him. When a man has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, will not support a plea stating that a certain portion of the sum offered was tendered for one of them. It is not true that the sum stated in the plea was ever tendered.

To make it a good tender, the plaintiff should have had an opportunity of having the 3*l.* 2*s.* 9*d.* on account of the defendant, and without taking what was offered on account of the other underwriters.

A creditor might be disposed on many accounts to take less than his demand against one debtor, and to exact all that he thought due to him from others.

If one sum may be offered for all the debtors, a creditor can make no such distinction between them. Besides, the witness said, that what was offered was to be taken in full of the plaintiff's claims. It has been properly ruled at Nisi Prius, that the making such a condition prevents the offer from being a legal tender.

It is enough that the plaintiff, after a tender, goes on at the peril of paying costs, if he does not recover more than that amounted to. The defendant has no right to say, if you will not give up all further claim that you may have, you are not to take what by my offer I admit is due to you.

*I think, therefore, the verdict negativing the tender should not be disturbed. Whether the verdict on the general issue is to be for the plaintiff or defendant, must depend on the award of the arbitrator, to whom the amount of particular and general average, excluding that occasioned by the condemnation and sale at *Savannah*, is referred.

PARK, J. I am of the same opinion. The legality of this policy turns on the statute of 6 G. 1. It has been holden with reference to deeds such as the present, that if they contain a provision for rendering all the subscribers liable in case of the insolvency of one, such provision will constitute a partnership; but if each subscriber be only individually liable, the association does not fall within the meaning of the statute. *Lees v. Smith*, 7 T. R. 338, *Harrison v. Millar*, 7 T. R. 340, in *notis*.

With regard to the tender, I regret it cannot be considered valid; but it is impossible to overrule the numerous cases on that subject.

BURROUGH, J. This association does not constitute a partnership, because there is no joint profit and loss to be divided among the members. The tender having been conditional, cannot be supported.

GASELEE, J. As the tender was offered in full of all demands, I am bound to say that it was conditional. The verdict must, therefore, be entered for the plaintiff, with nominal damages on the plea of tender.

Rule discharged.



*STRONG v. RULE.

[*315]

Where the regulations of an association of ship-owners, combined for the mutual assurance of each others' ships, were indorsed on the back, and were declared to form part of a policy of insurance, to which the ship-owners were subscribers: Held, that the declaration in an action for a loss under the policy ought to set out the regulations as well as the policy.

THIS was an action against another underwriter on the same policy as in the preceding case, but the plaintiff having omitted to set out in the count of the declaration to which the evidence applied, the rules and regulations of the association indorsed on the back of the policy, a verdict was taken for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit instead.

Vaughan, Serjt., having obtained a rule *nisi* accordingly, on the ground of the variance between the contract stated in the declaration, and that proved at the trial;

Taddy, Serjt., who now showed cause, argued that the insurance being stated in the declaration to be on the ship at any port or place, "not excepted

by the rules of the association," the rules were sufficiently referred to, to be given in evidence, and as there had been no demurrer, the count was sufficient after verdict. It is only necessary to set out so much of a contract as contains the entire consideration, *Clarke v. Gray*, 8 East, 584, and the entire consideration, the twelve guineas premium, is stated here. The regulations on the back of the contract do not amount to exceptions to its generality, in which case they must have been set out, *Latham v. Rutley*, 2 B. & C. 20, or conditions precedent; but are in the nature of a defeasance, and might furnish matter of defence if they had been contravened.

*^{316]} *Best*, C. J. The contract stated in the declaration, and that proved at the trial, are entirely different. The regulations of the *Pacific* association are by the last rule to be considered as binding on all the members, as if inserted in and made a component part of the policies. Many of these regulations form part of the contract of insurance.

The third and twenty-fourth qualify the meaning of the words "confessing ourselves paid the consideration due to us for this assurance by the assured, at or after the rate of twelve guineas per cent. per annum," and show that twelve guineas was not paid in money as the declaration states, but by an assurance to that amount by the plaintiff on the ships of the underwriters in his policy. The sixth article obliges the assured to provide a specified number of anchors and a certain quantity of cable to the satisfaction of the company's surveyor, instead of leaving it as under a common policy to the ship-owner to provide such anchors and cables as are fit for his ship. The eighth relieves the underwriters from particular averages to which, under the policy set out in the declaration, they would be liable.

It is unnecessary to mention any other of these rules that materially alter the situation of the contracting parties. None of the regulations being set out in the declaration, the contract on which the action is founded is not correctly stated. The averment of the payment of a money premium is disproved, and the rule for entering a nonsuit must, I think, be made absolute.

The rest of the court having expressed opinions to the same effect, the rule was made

Absolute.

To place a wheat crop in shocks of varying numbers, and throw out the tenth sheaf, is not a legal mode of setting out tithes, although there be no fraud.

This was an action against the defendant for not properly setting out his tithes.

At the trial before *Burrough*, J., last *Hereford* summer assizes, it appeared that the defendant, after reaping his wheat, set it up in shocks of varying numbers, 6, 7, 8, and 9, the binder throwing out every tenth sheaf for the parson. It was admitted that no fraud was intended, and the jury found a verdict for the defendant.

Wilde, Serjt., obtained a rule *nisi* for a new trial, on the ground that this mode of setting out tithes was illegal, as not affording the parson an opportunity of judging whether or not the sheaf thrown out was fairly chosen.

Taddy, Serjt., who showed cause, maintained that this was a question solely for the jury, and that in the absence of fraud it must be presumed that the parson had a fair opportunity of comparison.

BEST, C. J. The fairest mode of setting out the tithe of wheat is in the sheaf, and that is the mode prescribed by the common law.

The tithe-owner has a better opportunity of judging of the equality of the size of the sheaves when they are lying on the ground, than after they are huddled together in shocks.

But the uncertainty of weather, which often makes it proper for the interest of the tithe-owner as well as the farmer, that wheat should be put up into shocks before *the tithes can be taken, has given rise to customs for setting out the tithe in shocks. But where such custom prevails, [*318 shocks must all contain the same number of sheaves of equal sizes, otherwise the clergyman, without a minute examination of each shock, cannot be assured that he has as much as he is entitled to. The witnesses say that some of the shocks contained six sheaves and some eight. The clergyman could not, without great trouble, take his tithe from a crop of wheat so disposed. It is said, that there was in this case no actual fraud; but the law requires that the farmer, although he acts honestly, shall not so set out his tithe, as to make it difficult for the clergyman to know whether he act honestly or not.

I think there must be a new trial.

PARK, J. In questions concerning the setting out tithes, the absence of fraud is not the only circumstance to which the courts will direct their attention; they will take care, not only that there shall be no fraud, but no possibility of committing it.

BURROUGH, J. It is clear that this mode of setting out tithes is bad. Putting the sheaves in shocks of six instead of ten is productive of great inconvenience to the tithe-owner, and I told the jury that such a mode of setting out tithes could not be sustained.

Rule absolute.†

† Gazeles, J., was absent at Chambers.

*CROFTS v. WATERHOUSE.

[*319

The driver of a stage-coach gathered a bank, and upset the coach. He had passed the spot where the accident happened, twelve hours before, but in the interval, a land-mark had been removed. In an action for an injury sustained by this accident, the Judge told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict.

A verdict having been returned accordingly, the court granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence.

This was an action against a coach proprietor for having, by the negligence and improper conduct of his servants, overturned and injured the plaintiff in travelling by the defendant's coach. At the trial before Littledale, J., Dorset Summer assizes, 1825, the plaintiff's witnesses proved, that the defendant's coachman, in turning a corner on the right hand side of the road, had driven so near to the side as to gather a bank, by which the coach was overset; that, though this was between two and three in the morning, there was a full moon,

and light enough to distinguish objects of all kinds ; that the road was twenty-four feet wide, and, at the time, clear of all obstructions, so that there was nothing to prevent the coachman from keeping to the middle or even the left side of the road. The defence set up, was, that between the time of the disaster, and the time when the coachman had last past the spot where it happened, (about twelve hours before,) the first of two cottages which stood close to the corner in question, had been pulled down and the rubbish left by the side of the road ; that the coachman mistaking the second cottage for the first, and wishing to save his horses by going as close to the corner as possible, drove out of the road over the rubbish of the demolished cottage.

The learned Judge who tried the cause told the jury, that as there was no obstruction on the road, the *coachman ought to have kept within the limits of it ; and that the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict. A verdict having accordingly been found with 150*l.* damages,

Wilde, Serjt., moved for a new trial on the ground of a misdirection, contending that it ought to have been left to the jury to ascertain whether the deviation had been occasioned by negligence or by unavoidable accident, because if it happened by unavoidable accident the defendant was not responsible ; a carrier of passengers, not being, like a carrier of goods, an insurer against all hazards except the act of God, or the king's enemies ; nor a coachman, bound to keep to the left side of the road when no other carriage is passing ; for which he cited *Aston v. Heaven*, 2 Esp. 533, and *Christie v. Griggs*, 2 Campb. 79, and he likened the case to that of a master of a ship who should fall into peril by reason of a sea-mark having been removed or varied.

A rule *nisi* having been granted,

Onslow, and *Taddy*, Serjts., who showed cause, insisted that deviation from the limits of the road, on a moonlight night, was of itself an inexcusable act of negligence ; and the deviation having been noticed in the charge to the jury, the question of negligence was sufficiently before them.

Bestr, C. J. The coachman was bound to keep in the road if he could ; and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption have found a verdict for the plaintiff. But the learned Judge, instead of leaving it to the jury to find whether there was any negligence, told them that *the coachman having gone out of the

*321] road, the plaintiff was entitled to a verdict.

This action cannot be maintained unless negligence be proved ; and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted. The coachman must have competent skill, and must use that skill with diligence ; he must be well acquainted with the road he undertakes to drive ; he must be provided with steady horses ; a coach and harness of sufficient strength, and properly made ; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when every thing has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may, in a dark night, be obscured by fog ; the horses frightened, or, as it happened in the present case, the coachman may be deceived by a sudden alteration in objects near the road, by which he had used to be directed on former journeys.

It is not his fault, if having exerted proper skill and care, he from accident gets off the road ; and the proprietors are not answerable for what happens from his doing so. I think this case must be again submitted to a jury.

Park, J. The distinction between carriers of goods and carriers of passengers was not sufficiently left to the jury. A carrier of goods is liable in all events except the act of God, or the king's enemies ; a carrier of passengers is only liable for negligence. It is not clear that negligence can be laid

to the defendant's charge in the present case, for his coachman had no means of knowing that the cottage, his accustomed land-mark, had been [•322 removed.

The rest of the court concurring, the rule was made absolute.

Rule absolute.



HOMER v. ASHFORD and AINSWORTH.

Declaration.—that the defendant, for the considerations mentioned in the deed declared on, (which the plaintiff brought into court,) covenanted to submit to certain particular restraints in the carrying on of his trade, which covenant he afterwards broke : Held, on general demurrer, that this was a sufficient statement of consideration for the restraint agreed to.

Covenant. The plaintiff declared,—for that whereas before the making of the indenture thereafter mentioned, the defendant, *Joseph Ashford*, had hired himself to the plaintiff for a certain term, determinable in a manner then agreed upon by them the plaintiff and *Joseph Ashford*, in the capacities of clerk, book-keeper, and traveller, in the trade of a saddler's ironmonger, then carried on by the plaintiff ; and *Joseph Ashford*, had agreed with the plaintiff not to work for or be employed by any other person during the said term, without the license and consent of the plaintiff in writing under his hand for that purpose, first had and obtained ; and whereas *Joseph Ashford* afterwards, and whilst the said term was still undetermined, was desirous of entering into partnership in the same trade of a saddler's ironmonger, with the defendant, *James Marsh Ainsworth*, but was prevented therefrom by reason of the said term being still undetermined ; and thereupon afterwards by a certain indenture made between the plaintiff of the one part, and the defendants of the other part, (one part of which indenture, sealed with the seals of the defendants, the plaintiff brought into court.) reciting (among other things) that in pursuance of a proposal to that effect made by the defendants, and assented to [•323 by the plaintiff, the defendants, for the considerations therein mentioned, did thereby for themselves, jointly and severally, and for their joint and several heirs, executors, and administrators, covenant and agree with the plaintiff, his executors, administrators, and assigns, that the said defendants or either of them, their or either of their traveller or travellers, or any other person or persons on their or either of their behalfs, should not nor would, on any account or pretence whatsoever, enter into or pass through to solicit or take orders, the towns mentioned in the schedule B., thereunder written, or any of them, in taking their first north and west journey, within forty-two days of the several days set opposite the said towns respectively in schedule B., at which the plaintiff presumed that he by himself or his traveller or travellers should enter, or should leave the said towns in the said schedule respectively mentioned ; and also, that the defendants or either of them, their or either of their traveller or travellers, or any person or persons on their or either of their behalfs, should not nor would during the term of fourteen years from the day of the date of the deed, on any account or pretence whatsoever, enter into or pass through to solicit or take orders, the towns mentioned in the schedules A. and B., after their said first north and west journey as aforesaid, nor the towns mentioned in schedule C., thereunder written, within fifty-six days of the several days set opposite the towns respectively in the said several schedules

mentioned, at which the plaintiff presumed that he by himself or his traveller or travellers should enter or should leave the said towns respectively, without the license or consent in writing of the plaintiff, his executors or administrators for that purpose first had and obtained ; and *that in case the said defendants or either of them, their or either of their traveller or travellers or other person or persons on their or either of their behalf, should and did enter into and pass through to solicit or take orders the said towns mentioned in the said schedule B., or any of them respectively, in taking their said first north and west journey, within forty-two days ; and the towns mentioned in schedules A. and B., after their first north and west journeys as aforesaid, and the towns in schedule C. within fifty-six days of the several days set opposite the said towns respectively, in the said several schedules, during the term of fourteen years from the day of the date of the deed, without the license and consent in writing of the plaintiff, his executors or administrators, for that purpose first had and obtained ; then that the defendants or one of them, their or one of their executors or administrators should and would immediately after entering the said towns in the said several schedules mentioned, or any or either of them, within the times aforesaid, well and truly pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the full and just sum of 50*l.* of lawful money of *Great Britain*, as and in the nature of stipulated damages for every order which they or he, or their or either of their traveller or travellers, or other person or persons on their or either of their behalf, should solicit or take for the sale of any goods, wares, or merchandizes in any and every of the said towns which they or he, or such traveller or travellers, or other person or persons, should so enter.

Breach, that the defendants entered *Cheltenham*, *Exeter*, and *Oxford*, and other towns mentioned in the schedules, and solicited and obtained orders within the days and term prohibited.

*325] Plea, that the performance and observance by the *defendants of their covenant in the said indenture and declaration mentioned ; and of which covenant, the plaintiff had assigned the breaches, would entirely and wholly hinder, restrain, and prevent the defendants for a long space of time, to wit, for the space of fourteen years, from carrying on, using, and exercising their aforesaid trade and business of saddlers' ironmongers in any or either of the said towns of *Cheltenham*, *Exeter* and *Oxford* ; and, therefore, the covenant in the said indenture mentioned and so declared upon as aforesaid, was and is in restraint of trade ; and, therefore, the said covenant was and is void.

Demurrer and joinder.

Taddy, Serjt., was to have supported the demurrer, but the court called on *Adams*, Serjt., for the defendants. He abandoned the plea, and argued that the declaration was bad, as not showing any consideration for the restraint imposed on the defendants. *Prima facie*, every restraint on trade is illegal : a general restraint is wholly void ; and in order to sustain a restraint for a particular place or time, there must be a consideration, of the adequacy of which the court must be enabled to judge : *Mitchell v. Reynolds*, 1 P. Wms. 181 ; Serjt. *Wms.*, note to *Hunlocke v. Blacklow*, 2 Wms. Saund. 156 ; *Chesterman v. Nainby*, 2 Str. 739 ; *Davis v. Mason*, 5 T. R. 118 ; *Gale v. Reed*, 8 East, 80 ; and though deeds in general are presumed to be made on sufficient consideration, yet this presumption cannot to be raised in favor of a deed which is on the face of it illegal, and which can only be shown to be legal by the allegation and proof of an adequate consideration. But as the declaration in the present case does not show what was the *consideration for the defendants' submitting to the restraint imposed on them, the court has no means of determining its adequacy, and the deed cannot be supported.

Taddy contra. It appears on the declaration that there was a consideration.

for it is stated that the defendants agreed for the considerations contained in the deed; if those considerations had been inadequate, their inadequacy ought to have been pleaded. The law requires that there shall be a consideration for every restraint of trade, but not that the consideration shall always be set out on record. The adequacy of the consideration is a matter of fact which may be made the subject of proof, but the court is not bound to go into it without such proof, unless its insufficiency appear on record.

Cur. adv. vult.

BEST, C. J. The first object of the law is to promote the public interest; the second to preserve the rights of individuals.

The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in *the kingdom*, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen, (and the present case is a strong instance of it,) that individual interest and general convenience, render engagements not to carry on trade or to act in a profession in a particular place, proper. Manufactures or dealings cannot be carried on to any great extent without the assistance of agents and servants. These must soon acquire a "knowledge of the manufactures or dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants, if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry. For partial restraints, however, there must be some consideration, otherwise they are impolitic and oppressive.

What amounts to an adequate consideration is to be decided by the courts of justice. We have none of us had any difficulty in saying, that the consideration stated in this record is abundantly sufficient to support the deed on which the action is brought.

The counsel for the defendant admits that the plea is bad, and insists that the declaration does not state a sufficient consideration. If he had specially demurred, his objections would have been worthy of consideration; but although the declaration may be loosely drawn, we think we can see upon it enough to support the action. It appears from it, that *Ashford* had engaged himself as the *clerk, bookkeeper, and traveller* of the plaintiff for a term that was not expired, and that during this term of service *Ashford* was not to be employed for any one without the plaintiff's consent in writing: that *Ashford* was desirous of entering into partnership with *Ainsworth* for the purpose of carrying on the same trade as the plaintiff was engaged in, but was prevented from forming such partnership by his engagement with the plaintiff: the declaration does not state in terms that *Ainsworth* was desirous that *Ashford* should be released from his engagement with the plaintiff: *Ainsworth*, however, is a party to the deed by which *Ashford* was released from his engagement to the plaintiff, and was "enabled to employ the knowledge of business, and his influence with the plaintiff's customers for the benefit of the firm of which *Ainsworth* was to be a member. It seems to us, that it was a reasonable condition of releasing *Ashford* from his engagements, and thereby enabling both defendants to form their partnership, that they should not be permitted to seek for orders in the towns which *Ashford* had travelled as the rider of the plaintiff, until after the plaintiff had been enabled to visit his old customers, who resided in these towns, for the space of fourteen years from the date of that deed. We know the influence that a rider has over the

customers of his employer, and with how much effect he may use the argument—encourage young beginners. This influence is gained by the liberality of his employer, and ought not to be used against him. But it has been argued, that all deeds in restraint of trade are bad, unless a sufficient consideration for such restraint appears on such deeds. I think, that if a sufficient consideration is admitted by the pleadings, the deed may be supported, although the deed itself does not express a sufficient consideration. None of the cases on deeds restraining trade have decided that the consideration must appear on the deeds. There are other cases which prove that considerations out of the deeds may be shown by the pleadings. These cases are referred to in the great case on the subject before us, in *Peere Williams*; 1 Vent., 108; Dyer, 146. It might be different if the pleadings instead of admitting a consideration, had raised a question whether there was any consideration. Perhaps the rules of evidence would not admit that any thing should be added to what was stated in the deed. I throw out this only that I may not be precluded by our judgment this day from considering the question whenever it shall be necessary to decide it. We all think, that as the declaration states that the defendants for the *considerations in the deed mentioned, covenanted,* *329] it "appears that the deed was for *some* consideration. The defendant should have craved oyer of the deed, if he meant to object to the sufficiency of the consideration, and not having done so, we are to presume that it contains a legal consideration.

For this reason, the court is of opinion that judgment must be for the plaintiff.

Judgment for the plaintiff accordingly.

A'COURT v. CROSS.†

Defendant being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a three-penny receipt stamp, and I will never pay it;" Held, not such an acknowledgment as would revive the debt against a plea of the statute of limitations.

This was an action of *assumpsit* to recover the sum of 30*l.*; to which the defendant pleaded the statute of limitations, averring that the cause of action did not accrue within six years.

The cause was tried before *Gasee*, J., at the last *Somersetshire* assizes, when the plaintiff, in order to take the case out of the statute, proved that the defendant said, on being arrested, "I know that I owe the money; but the bill I gave is on a threepenny receipt stamp, and I will never pay it."

The learned judge did not consider this a promise to pay, so as to take the case out of the statute, and directed the plaintiff to be nonsuited, giving him leave to move to set the nonsuit aside, and enter a verdict for the sum of 30*l.*

Wilde, Serjt., accordingly obtained a rule *nisi* to set aside this nonsuit and enter a verdict for the plaintiff, upon the ground that the acknowledgment of the debt made by the defendant had taken the case out of the *statute of limitations. *Bryan v. Horseman*, 4 East, 599. *Swan v. Sowell*, 2 B. & A. 759. *Mountstephen v. Brooke*, 3 B. & A. 141. *Rowcroft v. Lomas*, 4 M. & S. 457. *Leaper v. Tatton*, 16 East, 420.

Spankie, Serjt., who showed cause, contended that the effect of the recent

†The Reporter was furnished with this case by a friend.

cases was almost to throw the statute into desuetude; but even in *Bryan v. Horseman* the court intimated, that if the matter had been *res integra*, their decision might have been the other way: and in the earlier and better authorities, better because they came nearer to contemporaneous expositions of the statute, it had always been holden that a mere acknowledgment was not sufficient, but that there must be an express promise to take a case out of the statute. *Bass v. Smith*, 12 Vin. Abr. 229, *Lacon v. Briggs*, 3 Atk. 105. In *Hyeling v. Hastings*, Ld. Raym. 422, the court thought that the acknowledgment was, at most, only evidence of a promise, but not matter upon which, if found specially, the court could give judgment for the plaintiff. If, however, the court would imply a promise from a bare acknowledgment, unaccompanied with a refusal to pay, they could never imply a promise in the face of such an express refusal as had been proved in the present case. To do so would carry the consequences of an acknowledgment far beyond anything hitherto decided. The statute was passed with the salutary intention of ensuring tranquillity, and of protecting men against claims which might be brought forward after a lapse of time, during which the evidence necessary to repel them might entirely have disappeared. But the intention of the statute would obviously be defeated, if an unguarded acknowledgment were [**331] holden to bind a party at any distance of time.

Wilde relied on the recent decisions, particularly *Bryan v. Horseman*, *Trueman v. Fenton*, Cowp. 548, and *Lloyd v. Maund*, 2 T. R. 762, in which the point had been settled after much consideration.

BEST, C. J. I am sorry to be obliged to admit that the courts of justice have been deservedly censured for their vacillating decisions on the 21 Jac. 1. c. 16.

When by distinctions and refinements, which, Lord *Mansfield* says, the common sense of mankind cannot keep pace with, any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute; or if it be in the common law, settling it on some broad and intelligible principle. But this must be done with caution, otherwise we shall increase the confusion that we attempt to get rid of: the authority of no one court is sufficient in such a case. I will therefore go no further to-day than I am authorised to go by the authority of the modern decisions.

The statute says, that actions on the case, account, trespass, debt, detinue, and replevin, shall be brought *within six years after the cause of action, and not after*.

These actions, it will be observed, are mentioned in the same section of the act, and the limitation of the time within which they must be brought is the same in all of them.

In all of them, except *assumpsit*, the six years commences from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgment. But in *assumpsit* it has been holden, that although six years have elapsed since the debt was contracted, if the debtor promises to pay it within six years, he cannot avail himself of the protection of this statute, because this promise, founded on a moral consideration, is a new cause [**332] of action. It seems to me the plaintiff should have been required to declare specially on this new promise, and ought not to have been permitted to revive his original cause of action, for which the statute expressly declares no action shall be brought. By the present practice, the defendant has not such distinct information, as, I think, he is entitled to, that the plaintiff means to avail himself of some promise to recover a stale demand. The real cause of action is kept entirely out of view, and one that cannot be supported brought forward. This is inconsistent with what is said to be the intent of special pleading.

The courts, however, have not stopped here; they have said acknowledgment of a debt is sufficient, without any promise to pay it, to take a case out of the statute. I cannot reconcile this doctrine, either with the words of the

statute, or the language of the pleadings. The replication to the plea of *non-assumpsit infra sex annos* is, that the defendant did undertake and promise within six years. The mere acknowledgment of a debt is not a promise to pay it: a man may acknowledge a debt which he knows he is incapable of paying, and it is contrary to all sound reasoning to presume from such acknowledgment that he promises to pay it; yet without regarding the circumstances under which an acknowledgment was made, the courts, on proof of it, have presumed a promise.

It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have heard it often called by great judges, an act of peace. Long dormant claims [333] *have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The legislature thought that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal power of recovering it. I think, if I were now sitting in the Exchequer Chamber, I should say, that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it the protection of the statute of limitations. But I should not, after the cases that have been decided, be disposed to go so far in this court, without consulting the judges of the other courts. There are many cases from which it may be collected, that if there be anything said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute of limitations.

In the present case the defendant, at the time he acknowledged the debt, said he would not pay it, because the plaintiff had arrested him.

I cannot, therefore, say that there was any cause of action within six years before the bringing of the action, and the rule for setting aside the nonsuit must be discharged.

The rest of the court concurring, the rule was

Discharged.

Where a general verdict was given on a declaration, some of the counts of which were bad, the court amended the *postea*, by entering up judgment on a single count, after argument in error, in K. B.

This cause was tried before Lord Gifford and a special jury at the London sittings after Hilary term, 1824, when a general verdict was found for the plaintiff, on a declaration of several counts. In Trinity term, in the same year, this court, after three days' hearing, discharged a rule *nisi* for a new trial, and for an arrest of judgment; which arrest of judgment had been moved for on the ground that the declaration stated no consideration for the defendant's agreement, or that at all events the agreement was illegal.[†] The cause was then removed by error into the Court of King's Bench, and now,

[†] See *ante*. vol. ii. p. 229. At the time of that report, no objection having been made to the generality of the verdict, an abstract of the first count, to which alone the evidence applied, was thought sufficient.

in this term, after argument on error, but before the Court of King's Bench had pronounced judgment, it having been suggested that a general verdict had been given, and that some of the counts in the declaration were bad,

Bosanquet, Serjt., upon an affidavit that the amendment was necessary to the due administration of justice, obtained a rule nisi to amend the *posed*, by entering the verdict on the first count only of the declaration, pursuant to the notes of the learned Judge, Lord *Gifford*, who tried the cause. These notes being read, it appeared that the evidence applied to the first count: that the consideration for the defendant's agreement to reinstate the plaintiff in the command of the *Minerva East India* ship upon the contingency of certain events which afterwards occurred, was, as stated in that count, the plaintiff's surrendering at the defendant's request, the command of that ship for [*335 certain voyages to which the plaintiff had been appointed with the approbation of the *East India* Company, by owners who were about to sell the ship to the defendant: that the commander of an *East Indiaman* cannot be removed after he has been approved of for a particular voyage, without the consent of the company: that the former owners wished to sell the *Minerva* as a ship to which no commander was attached: that the plaintiff refused to give up the command: that the defendant, after his agreement with the plaintiff, wrote to obtain the consent of the *East India* Company to the plaintiff's exchanging the command of the *Minerva* for that of the *Marquis of Ely*; and that at the end of this letter the plaintiff wrote that the exchange was made with his sanction and approbation, whereupon the company assented to the exchange.† It also appeared that his lordship was satisfied with the verdict, and thought the amendment ought to be made. It was observed that the original record remained in this court, a transcript only being transmitted to the court of error, and *Williams v. Breedon*, 1 B. & P. 329, *Short v. Coffin*, 5 Burr. 2730, *Doe v. Perkins*, 3 T. R. 749, and *Petrie v. Hannay*, 3 T. R. 659, were cited to show that such an amendment might be made after error, or at any time. The rule was granted on condition of a retaxation of costs, under which the plaintiff was to return what he had received on the counts to which the verdict did not apply.

Lawes, and *Wilde*, Serjts., showed cause against the rule at considerable length. Their argument in substance was, that this being an application to the discretion of the court, "it would not be a proper exercise of that discretion to allow the amendment, after so great a length of time had been permitted to elapse through the laches of the plaintiff": *Grant v. Astle*, Doug. 730, *Harrison v. King*, 1 B. & A. 161, that he ought at the trial, or within the next term, to have elected on which count he would enter his verdict: *Lee v. Muggeridge*, 5 Taunt. 36, that the application ought to have been made to Lord *Gifford*: and that the plaintiff having received the costs upon all the counts of the declaration, he was, in a manner, estopped, to apply to confine his verdict to one. They observed that whatever *dicta* might be found, there was no decision in which an amendment so important as this had been made after argument on error: that in all the cases reported, the amendment had been confined to mistakes of the officer of the court, and had never extended to errors committed by the party; for which they cited, not only *Doe v. Perkins*, and *Petrie v. Hannay*, but *Williams v. Breedon*, *Short v. Coffin*; and they read the language of *Buller*, J., in *Eddowes v. Hopkins*, Doug. 376. "If there were only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the Judge, and entered only on those counts; but if there were any evidence which applied to the other bad or inconsistent counts, as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,

† The above particulars are taken from the judgment of the Chief Justice; post, 338.

there the *postea* could not be amended, because it would be impossible for the Judge to say on which of the counts the jury had found the damages, or how they had apportioned them : " *Holt v Scholefield*, 6 T. R. 695. As it did not appear but that the evidence in the present case, or some part of it, might *337] have applied to many counts besides the first, it was "impossible to say on which of them the jury had given their verdict,

BEST, C. J. It has been admitted by those who oppose the rule, that it is a question of discretion whether we should allow the *postea* to be amended or not.

In the exercise of our discretion, we must be governed by these considerations ; first, is the count on which it is now proposed to enter the verdict, supported by the evidence offered at the trial ? secondly, was all the evidence given at the trial admissible under that count ? thirdly, are we prevented from acceding to the application on account of its having been made after the record has been removed by a writ of error, and the case has been argued in the Court of King's Bench ?

Upon the first question, **Lord Gifford**, has informed us that the evidence given at the trial proves the first count. In strictness, perhaps, we ought to look no further, but be satisfied with the opinion of the Judge who tried the cause. But as he has referred us to his report of the evidence, it has been read to the court, and I think it fully proves the first count.

An agreement was given in evidence, exactly corresponding with that count. It appears from this agreement that the plaintiff was commander of the *Minerva*, an *East India ship*, which the defendant was disposed to purchase, provided the plaintiff would give up the command of her, and allow one *Mills*, to be appointed to her upon condition of the plaintiff's being reinstated in case of *Mills*'s death, and provided the *East India Company* would assent to this agreement between the plaintiff and defendant.

This imports, that either in consequence of some bargain between the former owner and the plaintiff, or some rule of the *East India Company*, the plaintiff could not, without his consent, be removed from the command *338] of the ship. This is completely made out by the evidence.

It appeared at the trial that the former owners had, with the approbation of the Company, appointed the plaintiff to command the ship for the next voyage.

If this had been a common merchant's ship, the appointing the master for the voyage and his acceptance of that appointment, would have amounted to an agreement that the master should go that voyage, and if the owners afterwards removed the plaintiff from the ship, without just cause, they would have been liable to an action for breach of the agreement.

But this was an *East Indiaman*, and it appears further from the evidence, that the commander of an *East Indiaman*, cannot be removed after he has been approved of for a particular voyage, without the consent of the Company.

It was proved at the trial that the former owners wished to sell this as a free ship, that is, a ship to which no commander was attached, and that the plaintiff refused to give up the command of her to them.

It was further proved, that after the agreement between plaintiff and defendant, the defendant wrote to the directors of the *East India Company*, requesting them to permit the plaintiff to exchange the *Minerva*, for the *Marquis of Ely*, under which letter the plaintiff wrote, that this exchange was with his sanction and approbation.

It was then proved by a person from the *India House*, that upon the receipt of this letter, orders were sent to swear the plaintiff into the command of the *Marquis of Ely*, and *Mills*, into the command of the *Minerva*.

It seems to me, that this shows that the plaintiff could not have been compelled to give up the then next voyage in the *Minerva*; and that it was pro-

bable, that if he conducted himself properly, the Company would *have obliged the defendant to continue him in command of that vessel, during the other voyages for which he was engaged. [339]

At all events, the giving up the first voyage was a sufficient consideration to support this agreement. The death of *Mills*, was then proved, the plaintiff's application to be restored to the *Minerva*, the defendant's refusal, and the loss occasioned to the plaintiff by that refusal.

Upon the second question, namely, whether any evidence that was not admissible under the first count was received at the trial? I must observe, I can find no evidence that was not admissible under the first count. That being the case, the jury can have given no damages which they were not warranted in giving in a verdict upon that count.

I can see no objection to confining a verdict to one count, where no evidence was given but what was admissible under such count, even although it might prove some other count. In the cases of slander to which we have been referred, evidence was received of the speaking of words that were not actionable, and that, not by way of aggravation of the words which were actionable, but as amounting to a substantive cause of action. These words would not have been permitted to have been so proved, but for the bad counts which the declarations contained. If in these cases the courts had allowed the verdict to be taken on the good counts only, the plaintiff would have recovered damages for words which were not the subject of an action.

In *Eddowes v. Hopkins, Buller, J.*, says, "If there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the Judge, and entered only on those counts; but if there was any evidence that applied to the bad counts, (as, for instance, in an action for words, *where some actionable words were laid, and some not actionable, and evidence given on both sets of words, [340] and a general verdict,) then the *postea* could not be amended, because it would be impossible for the Judge to say on which of the counts the jury had found the damages, or how they had apportioned them."

This learned Judge is not here made to express himself with his usual distinctness. It might be inferred from the words, "If there was only evidence at the trial upon such of the counts that were good," that if the evidence proved the bad counts as well as the good, the *postea* could not be amended: but the reference to an action of slander where some words were proved, which were not actionable, shows that Mr. J. Buller, meant that the *postea* could not be amended where evidence was admitted under the bad counts, which could not have been received under the good. In the case of *Williams v. Breedon*, we find the same learned Judge, concurring with the rest of the court in allowing such an amendment where evidence had been given which could not have been received under the good counts, it clearly appearing that the jury had not been induced by such evidence to give any damages. This is the true principle. The damages in the present case cannot have been increased by the bad counts, because there is no evidence that would not have been submitted to the jury if those counts had not been upon the record.

Is this application made too late to be attended to? There are authorities for our amending the *postea* after argument in a court of error. It is never too late to do (in proper terms) what is necessary to be done to prevent injustice. If such an objection as has been started in this case, had occurred to me sitting in the Exchequer Chamber, I should have proposed to that court, without any application from the bar, to send to the *King's Bench, to ascertain if the difficulty would not be removed by amendment. In *Grant v. Astle, Lord Mansfield*, laments that so ill-founded a rule should ever have been established as that in civil actions, one bad count should oblige the court to arrest the judgment, whilst, in criminal cases, a

prisoner might suffer the last punishment on an indictment, which has many bad, and only one good count; but, says his Lordship, as the rule is now settled, we have gone as far as we can by allowing verdicts in such cases to be amended by the Judge's notes. It is true, his Lordship did not think that could be done after judgment. Such amendments, however, have been made after judgment in many cases that have come before the court since that of *Grant v. Astle*.

I am of opinion that this rule should be made absolute.

PARK, J. I am of the same opinion. This rule is to amend the postea. It has been argued that this is an application to the discretion of the court, meaning the sound and legal discretion of the court: that in order to set that discretion afloat, it is requisite to show some necessity: and that the affidavit on which the application is made, states no other necessity than the due advancement of the administration of justice. I cannot conceive a case of much greater necessity. If the court did not make this amendment, they would be defeating the due administration of justice, instead of advancing it. For as the case now stands, I must take it for granted, and the court thought so in the former occasion, that the jury have done quite right in giving heavy damages. It has been contended that my Lord *Gifford* should be applied to on this occasion; but that is not necessary. Application is usually made to the judge who tried the cause, and if he be a judge who has left the court, [342] the court itself, by its authority, may amend the postea. But it is said, this application is too late, though it is admitted that if it had been made at Nisi Prius to Lord *Gifford*, or the counsel had been called on to say on what count they should take the verdict, it would have been of course to have entered it so. Might not the application have been made in the next term? Undoubtedly it might. It is impossible counsel can direct their attention to these things always at the moment; and has the attention of the court ever been drawn to this point before? It has not. The case was argued generally on the insufficiency of consideration, and the court in giving judgment, not having their attention drawn to this or that particular count, stated generally there appeared to be a sufficient consideration. The case of *Doe v. Perkins*, which shows that length of time is not of itself a sufficient objection to allowing the amendment, has been met by the case of *Harrison v. King*; that case, however, has no bearing on it at all on the present. There the alteration was proposed after a writ of error argued, judgment reversed, and a lapse of eight years. It would have been most outrageous to have acceded to such an application, and the court would have shown a bad discretion, if after that, they had amended. But that does not contravene the point that when the error is discovered, as appears in this case before the judgment of the court of error is pronounced, the parties may come to the original court in which the proceedings were, to endeavor, if they can, to rectify what is a mere slip or omission of counsel; for there is no earthly reason to suppose that if application had been made to Lord *Gifford* at the time of the trial, or within a short period of time afterwards, he would not have directed the alteration to be made.

Under these circumstances, I am of opinion that the rule should be made absolute.

*BURROUGH, J. I am of the same opinion. I remember the case being argued; the court took great pains to understand the question as to the bye-laws of the India Company; the counsel for the defendant stated every thing they could state; and it was not, until after very full consideration, we formed an opinion on it. I have formed an early opinion on the present point I admit, for I have known this subject canvassed in public and in private a hundred times over, and I know the principle is, that you may permit an amendment to be made at any time when you can see your way. That has been the course uniformly all my time. Under all the circumstances, I think,

upon the merits of the case, there cannot be a question on the point; if there were any difficulty about the damages, we might refuse the application, but there is none. The first count is proved, and the damages are applicable to the breach of agreement alleged in that count.

We have applied to the proper source, to the learned judge who tried this cause; he has furnished us with his notes, and has expressed himself satisfied, not only that this amendment may be made, but that it ought to be made; and I am clearly of opinion that this rule ought to be made absolute.

GASELEE, J. We have been called on to consider whether, circumstanced as this court is, we can make the amendment required, or whether it should be made by the learned judge who tried the cause. If that judge were now a judge of this court, we should not have interposed; but he has been applied to, and he has reported to the court what his opinion is: he doubts if he is the proper person to make the amendment, and he calls on us for our assistance.

I consider the court as sitting at the request of Lord Gifford, to consider the case, and it appears to *me, the court acting in aid of Lord Gifford, [*344 and having heard the arguments addressed to it, may proceed on those arguments, coupled with the evidence which he has reported to us.

With respect to the time of the application I should have felt some difficulty, had I not found that in a case cited the amendment was allowed, after a writ of error had been brought and an argument had taken place. It does not appear to be material whether the error be the misprison of the clerk or the misprison of the attorney who takes the verdict. I think the true ground is this; whether or not there are substantially differing and distinct causes of action stated on the record, on all of which evidence is given, so that it is impossible to sever the damages. It was with that view the attention of the bar was called to the case of *Williams v. Breedon*. The marginal note of that case is, "When a general verdict has been given on two counts, one of which is bad, and it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only, the court will amend the verdict, by entering it on that count, though evidence was given applicable to the bad count also." In this case it appears the several counts disclose but one cause of action, and the evidence given applies precisely to the first count. Looking at the statement in the record, if there had been distinct breaches, and evidence had been given as to breaches which were not contained in the first count, I should have said you could not have obtained judgment on the first count; the court would have presumed some damages were given for some of those breaches in the second or third count; but the breaches assigned in the various counts alleging in effect the same cause of complaint, this could not have been the case. It has been stated, the plaintiff has gone on against repeated notice. But I do not find, when this *case was before the court, on a motion for a new trial or arrest of judgment, that our attention was drawn to the difference between the counts. I have before me the assignments of error, which say, not, that the third and fourth counts do not state a sufficient consideration, but that the declaration aforesaid does not disclose or set forth any good or sufficient consideration in law for the plaintiff to have or maintain his action. Upon these grounds I am of opinion, that this rule, which is limited to the amendment of the *postea*, agreeably to notes of Lord Gifford, ought to be made absolute. [*345

Rule absolute.

The defendant refusing to allow the judgment roll to be amended by the *postea*, the rule was made absolute without calling on the plaintiff to refund the costs received on the insufficient counts.

*SAME CASE.

The court having amended the *postea*, after argument in error in K.B., amended the judgment roll conformably with the *postea*, after judgment in error entered of record.

VAUGHAN, Serjt., after the delivery of the preceding judgment, and the amendment of the *postea*, moved for a rule *nisi* to amend the judgment roll by the *postea*; when it was announced that the Court of King's Bench had that moment pronounced judgment in error, by awarding a *venire de novo*. The court, nevertheless, granted a rule *nisi*, against which *Lawes* and *Wilde*, Serjt., now showed cause. They contended, first, that this court had no jurisdiction to make the amendment, the record being by intendment of law in the Court of King's Bench, so that no execution could issue on the judgment out of this court; secondly, that the application came too late after judgment of reversal with an award of *venire de novo* pronounced in error, and entered on record; of which fact they produced an affidavit, and said the record was in court. They relied on *Harrison v. King*, 1 B. & A. 161.

Vaughan and *Bosanquet*, Serjts., in support of the rule. It is sought only to amend the judgment roll, which is still in this court, not the transcript which is in the Court of King's Bench, and the court would be guilty of a gross inconsistency if it permitted the *postea* and the judgment roll in the same case to contain contradictory allegations. *Wood v. Matthews*, Popb. 102, and *Frend v. Duke of Richmond*, Hardr. 505, are conclusive to show that whatever remains in this court may be amended. And *Pickwood v. Wright*, *347] 1 H. Bl. 642, and *Hardy v. Cathcart*, 1 Marsh, 180, show that the application is not too late. In *Harrison v. King* it was not made till eight years after judgment.

BEST, C. J. An opinion has prevailed that a writ of error to this court removes the original record into the King's Bench, but that a writ of error to the King's Bench, only removes a transcript of the record of that court into the Exchequer Chamber, or House of Lords. This opinion has perplexed me, for I thought that we could not amend a record which had been removed from us into another court. We find from our officers that the original record is not removed, and that a transcript only is carried to the King's Bench.

There is no difference in this respect between the return of a writ of error to the King's Bench, and from the King's Bench. By the 27 *Eliz.* c. 8., the writ of error to the King's Bench, commands the Chief Justice of that court to cause the *record* and all things concerning the judgment to be brought before the Justices of the Common Bench, and Barons of the Exchequer. The Court of King's Bench does not, as has been supposed, send a *copy* of the record, but the *record*. And the record is so completely gone from the King's Bench, that if the Exchequer Chamber, affirms the judgment of the King's Bench, that court would have nothing on which it could award execution.

The Court of Exchequer Chamber having no officers to make out writs of execution, or to tax costs, the statute of *Eliz.* has directed that if the judgment of the King's Bench, shall be affirmed or reversed, the said record, and all other things concerning the same, shall be removed or brought back into the said Court of King's Bench, "that such further proceedings may be thereupon as well for execution as otherwise, as shall appertain." The same reason that is given by the statute for returning the record into the King's Bench, is given by Lord *Rolle*, (1st Roll. Abr. 753,) for the Chief Justice's carrying back the record of the King's Bench, after he had produced it to the House of Lords, and delivered a transcript of it to that house.

The record, that is, that instrument which is to be acted on, is removed by writ of error from both the King's Bench, and Common Pleas. But if any

doubt arises in the court of error, whether that which they possess is a correct record, that doubt is to be decided by reference to the original record, which remains in the court in which the suit was commenced, and which either the Exchequer Chamber, or Court of King's Bench, will cause to be brought before them by one or more writs of *certiorari*. We find from *Roll. Abr.* 765, 766, and *Cases Temp. Hardwick*, 118, that after joinder in error, both those courts have awarded a *certiorari*, for the purpose of informing their consciences, and that they might not reverse a judgment on account of *some formal objection*. We have, therefore, the original record, which the Court of King's Bench will inspect, if it be suggested to them that the record which they have is not correct. If that original record be incorrect, and we have something by which we can correct it, surely we ought to do so. Our record is incorrect, for it states the verdict to be taken on all the counts; now, by reference to the *postea*, it will appear that it was only taken on the first count. If we do not make this amendment, the Court of King's Bench, must give judgment on a false record, and on the miserable technical objection, that Lord *Mansfield*, lamented was a tenable one, namely, that some of the counts to which the attention of this court was never called, are bad. We are doing what will enable the Court of King's Bench to do justice.

*It appears from the authorities in the books, that there are two [^{*349} modes of attaining the object of this rule; one is, by amending the *postea*, certifying to the Court of King's Bench, that such amendment is made, and leaving it to them to amend the record; the other, to amend the *postea* and record here; and then it will become the duty of the King's Bench, to amend their record by the amended record of this court. In *Popham*, 102, there are two instances of amendment made from the *postea* by the Court of King's Bench, and one of an amendment made in the same manner by the Exchequer Chamber. In *Dunbar v. Hitchcock*, 3 M. & S. 594, the Court of King's Bench, introduced into a record that had been removed into that court from the Common Pleas, the allowance of double costs certified by the Chief Justice of the Common Pleas. This amendment was made by the King's Bench, after the record was removed into the House of Lords, and errors assigned in that House.

Lord *Ellenborough*, in giving judgment, uses these words: "Here the House of Lords, have a defective record, diminution has been alleged, and when it has been amended in this respect, *upon being certified unto the House of Lords*, they will direct the transcript to be amended."

Unfortunately this case was not mentioned to the Court of King's Bench, for we have been told, that although that court were informed from the bar that we had amended the *postea*, they have reversed our judgment, and have been asked if, after this, we will grant this rule. If they have reversed our judgment they have affirmed our opinion, for they have granted, it seems, a *venire de novo*.

It would have been absurd to grant a *venire de novo* *if the declaration contains in no one count a legal consideration. What the King's [^{*350} Bench has done renders it necessary for us immediately to make this rule absolute to prevent a verdict given by a special jury, approved by the Judge who tried the cause, and by this court, from being set aside on an objection of mere form.

I have no doubt that the King's Bench, will suspend their judgment, but should we be disappointed in this, and the defendant in error, instead of taking a *venire de novo*, brings a writ of error, it will be our duty to certify to the House of Lords, as the Court of King's Bench did in *Dunbar v. Hitchcock*, that the record sent to that house is a defective record, which will enable the House of Lords, to set this matter right.

In *Frend v. The Duke of Richmond*, Lord *Hale* says, "if a record be removed into the King's Bench, out of the Common Pleas, by writ of error, and

afterwards amended by rule of the *Common Pleas*, the Court of King's Bench *must* amend it accordingly."

The word *must* is, without explanation, too strong. We pretend to no power of compelling the Court of King's Bench, to do any thing. But every court must and will do justice, and if through these mistakes, to which all human beings are liable, any courts fail to do what justice requires, some superior tribunal will prevent the effects of such mistakes. This is, I think, the meaning of Lord *Hale*.

In making this amendment, after the record is removed by writ of error, we follow the precedents furnished by the Court of King's Bench, in *Short v. Coffin*, *Petrie v. Hannay*, and *Dunbar v. Hitchcock*.

PARK, J. I am clearly of the same opinion. The case of *Mellish v. Richardson*, did not pass as a slight judgment, it was very maturely and deeply [351] considered. *And though the verdict stands, or rather was taken on all the counts, and judgment was given in this court on the whole declaration, it was merely because no counsel drew the attention of the court to any distinction between them. A writ of error was brought, and we have since altered the *postea* according to the truth of the facts, because the attention of the court was never before called to the state of the record. What is the consequence? It is agreed that there are two entries, one on the *postea*, the other on the judgment roll. Are we to let one stand amended, and the other unamended, with a contradiction on the face of it? It seems the greatest absurdity that can be stated; and when we are to make our own records consistent with each other, we have a right to do that which justice shall require. I am, clearly of opinion, we ought to do it in this case, and we should be guilty of the grossest injustice and absurdity in leaving the record imperfect.

BURROUGH, J. The question is, in what sense this record has gone from the court. In a technical sense the record has gone, in point of fact it is here; and the other is a copy of it transmitted to the court above. What we have already done is confirmed by the cases which we have had cited to day.

The question is, what we are to do now? We cannot do otherwise than pursue the course we did yesterday: it follows as a matter of necessity, we must amend this record. No doubt the Court of King's Bench, will suspend their judgment; they will enquire what we have done; they will consider whether it ought to have been done. I have no doubt that they will say the defendant in error may allege diminution, and they will return the transcript to us in the legal course, for it is an irregular judgment as it stands in their court. When that is done, they will see that the verdict and judgment stands [352] on the *first count only, and if that first count be bad, they will reverse the whole. They probably granted a *venire de novo* on the supposition that they could not discover clearly on what counts the verdict might have passed.

GASELEE, J., was not in court.

Rule absolute.



CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
HILARY TERM,

SIXTH AND SEVENTH YEARS of the REIGN of GEORGE IV., 1826.

ARNOTT v. REDFERN et al.

1. Where, after the creditor has endeavored to obtain payment, there has been a wrongful withholding of a debt arising out of a contract which does not carry interest, the jury may allow interest in the shape of damages for the unjust detention of the money.
2. Unless the contrary be shown, the court will presume that the decision in a foreign judgment is consonant to the justice of the case.

The plaintiff declared in *assumpsit*, on a judgment obtained by him against the defendants in the High Court of Admiralty in *Scotland*, by which the judge of that court "found that by accounts made up by the plaintiff, there was due to him from the defendants a balance amounting to 236*l.* 6*s.* sterling, and decreed and ordained the defendants to make payment to the plaintiff of [354] the said sum of 236*l.* 6*s.* sterling *accordingly, with interest thereof from the 16th of March, 1811, till paid; with the sum of 30*l.* 14*s.* 2*d.* sterling, being the modified expenses of process found due; and also 1*l.* 10*s.* 1*d.* sterling, being the fees of extracting that decree and stamp." There were also in the declaration the usual money counts, and a count upon an account stated. Plea, general issue. At the trial before *Best*, C. J., *London* sittings after *Trinity* term last, the case was as follows.

The defendants, wholesale grocers in *London*, wishing to extend their trade.
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to *Scotland*, employed as their agents the plaintiff, who lived at *Leith*, under the terms of the following letter which was written by him at *London*, and there delivered to them :—

"I have no objections to conduct your concerns in *Scotland*, should you approve thereof, by a few lines confirming the terms below stated: viz.

"I shall make a point of going my journeys regularly as the routes left with you, to sell and collect, and remit regularly all money received, upon receiving such; and also will guarantee one-fourth part of such sales, and allow my whole commission to stand over for the purpose of making up any deficiency, if any, so far as the said fourth part of the real loss. This I do upon your paying me one per cent. upon the amount of the whole sales made in *Scotland*, or goods sent thereto by your house, and one-half per cent. more upon said gross amount as a compensation for said one-fourth guarantee: all postages and carriage of parcels, &c. to be paid by you. That is, one and a half per cent. upon the whole amount for commission and for the guarantee.

"At *London*, 17th Sept. 1808."

In 1811 the defendants discontinued their business in *Scotland* but the plaintiff's accounts were not finally made up till 1815.

In 1818 he obtained upon these accounts, in the *High Admiralty Court of *Scotland*, the judgment set out in the declaration. [355]

In 1819 he commenced the present action, which was stayed in consequence of his not complying with a rule of the defendants, calling on him to give security for costs, he living out of the jurisdiction of the court.

In 1825 he came to reside in *London*, and proceeded with the action.

The *Scotch* judgment having been put in and proved, it was objected, on the part of the defendants, that the contract on which the plaintiff sued was made in *England*; that the *English* law did not allow interest on such a claim as that which had arisen out of this contract, and that the courts here were not concluded by the judgment of the court in *Scotland*.

The jury, then, under the direction of the chief justice, found a verdict for the debt, excluding the interest, with liberty for the plaintiff to move to increase the damages, by adding thereto such sum of money as the court should direct for interest.

Taddy, Serjt., having obtained a rule *nisi* to that effect in *Michaelmas* term last,

Vaughan, Serjt., who showed cause, assuming, first, that the plaintiff's claim was one upon which the law of *England* did not allow interest, and that the contract having been made in *England* must be regulated by the laws of *England*, *Robinson v. Bland*, 2 Burr. 1078, proceeded to argue, secondly, that the court might and would, in a case of contract like the present, impugn the judgment of the *Scotch* Admiralty Court, upon any point in which it had decided in a manner at variance with the laws of *England*; in other words, that such judgment gave "the party who sued upon it only a *prima facie* claim, and that it was not conclusive in the courts of this country." [356]

Taddy, in support of his rule, contended, that the judgment, unless unduly or irregularly obtained, was conclusive in the courts of this country. However, as the court gave no opinion on this point, the argument on it on both sides is now omitted. But *Taddy* also insisted, that the plaintiff's claim was one on which interest, at least in the shape of damages, might be allowed by the law of *England*. Where a part of the transaction arising out of a contract made in this country, was carried on in a country, the laws of which allowed interest upon debts arising out of such transaction, the law of *England* also allowed interest upon the debt arising on that part of the transaction which was carried on abroad; *Auriol v. Thomas*, 2 T. R. 52, *Hurvey v. Archbold*, 3 B. & C. 626. A contract made in *England* might also expressly have reference to performance in another country; and in that case it was

governed by the law of the country in which it was to be performed. The interest on a *West India* mortgage might be paid in *London*, and yet *West Indian* interest would be allowed, because the security lay in the *West Indies*; so upon a debt contracted in respect of business performed in *Scotland*, interest might be allowed, according to the law of *Scotland*.

Vaughan. In *Auriol v. Thomas* the contract originated in the *East Indies*, and in *Harvey v. Archbold*, the transaction upon which foreign interest was allowed was directed to and completed at *Gibraltar*.

Cur. adv. vult.

*357] **Best*, C. J. It was assumed at the trial, and also on the motion in *Bank*, that a court in *England* could not have allowed a jury to give interest in this case. Taking what was so assumed for granted, we found ourselves embarrassed with two questions of international law, of some difficulty, because not of frequent occurrence; and important, because depending on rules by which justice is to be done to the subjects of other countries.

We thought it therefore right to delay the giving of our judgment until this term, that we might take the opportunity which a vacation afforded us of giving these questions the consideration that they appeared to deserve. We now think that we ought not to have taken it for granted, that if this case had been tried first in *England* instead of the Admiralty Court in *Scotland*, the plaintiff could not have recovered interest; and that it is not necessary to consider whether this case ought to have been decided according to the law of *England* or *Scotland*, or whether the judgment pronounced by the *Scotch* court can be impeached here, or must be enforced with qualification or objection.

It has been decided by the highest authority, in the case of *Sinclair v. Fraser*, vol. 20 of *Howell's State Trials*, 469, and *Douglas*, 4, that "Foreign judgments are *prima facie* evidence of a debt, although it is competent to the defendant to impeach the justice of them, or to show that they are irregularly or unduly obtained." This is founded on a plain and obvious principle of natural justice. To whatever country a debtor flies, justice requires the courts of that country to compel him, if he can, to pay his debts. It will often be impossible to prove debts in a foreign state by the testimony of witnesses. The only way in which they can be established is by the judgments of the courts of that country in *which the parties and their witnesses resided.

*358] The only objection made to the *Scotch* judgment was, that it gave the plaintiff interest for a debt due for work and labor, which would not bear interest in *England*. If, under any circumstances, a jury would have been authorized to give interest in the shape of damages for such a debt in *England*, the objection is answered.

We have now looked into the proceedings to see if the circumstances of this case were such as would have allowed damages to be given for interest; we consider the rule to be, that if it could be given in any such case, we must presume, in the absence of any evidence to repel such presumption, that the circumstances of this case entitled the plaintiff to interest from the day on which the *Scotch* court has given it. If interest is to be given, then, according to our own rule, it may be calculated up to the time when the payment of the principal may be enforced under the judgment.

We cannot then object to the terms of the *Scotch* judgment, by which it is awarded, that interest is to be paid up to the time when the principal debt shall be discharged.

The original action was to recover a stipulated compensation of one per cent. on the amount of certain payments for goods, for the labor of selling those goods and receiving the payments, and for becoming responsible for the solvency of the purchasers, to the extent of one-fourth of the value of the goods sold. The plaintiff had no opportunity of paying himself out of the

money that he received for the defendants, because he had agreed to remit the whole of what he received to them, and leave his one per cent. in their hands, as a security for his paying what might become due to them for goods not paid for by the purchasers. Such a contract does not import that interest should be paid for any money "that should become due under it." By our law, interest forms no part of the original debt; it is created only by the express terms of a contract, or by implying an engagement to pay interest from the nature of the security, or the usage of the trade to which the contract relates. [959]

This rule wisely prevents acts of kindness from being converted into mercenary bargains, and makes it the interest of tradesmen to press their customers for payment of their debts; and thereby checks the extension of credit, which is often ruinous both to tradesmen and customers.

If it had appeared by evidence that the plaintiff had taken no steps for so many years to recover his debt, interest could not have been recovered for it in this country; and the question would have arisen, whether we could have carried into execution the judgment of the Scotch court, which gave interest in a case where our law did not allow it. In *Lee v. Munn*, 8 T'aunt. 45, this court held that an auctioneer, who had a deposit in his hands four years, could not be compelled to pay interest, because the plaintiff had made no demand on him for the re-payment of the deposit. But we have no right to conclude that the plaintiff quietly permitted the debt due to him to remain in the hands of the defendant. In many cases it is presumed, that when nothing is proved to have been done, that nothing has been done; but here the judgment is, in the language of the House of Lords, *prima facie* evidence that every thing was done which was necessary to support it. However a debt is contracted, if it has been wrongfully withheld by a defendant after the plaintiff has endeavored to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money.

In *Edlowes v. Hopkins* and Another, Doug. 376, Lord Mansfield held, that in cases of long delay under vexatious and *oppressive circumstances, [960] juries, in their discretion, may allow interest. In *Craven v. Tickell*, 1 Ves. jun. 60, the Lord Chancellor said, "From conversations I have had with the judges, interest is given either by the contract or in damages upon every debt detained." From these words, it appears there are two principles on which interest is given in our courts; first, where the intent of the parties that interest should be paid, is to be collected from the terms or nature of the contract; secondly, where the debt has been wrongfully detained from the creditor. Our law would not do what it professes to do, namely, provide a remedy for every act of injustice, if it did not allow damages to be given for interest where a creditor has been kept out of his debt (he using all proper means to recover it) by his debtor. Upon the principle that the debt has been improperly detained, juries are allowed to give interest in actions on judgments. It is immaterial in such actions whether the original debt bear interest or not. In cases where the original debt did not bear interest, there is neither an express nor implied contract enabling the court to allow interest on an action on the judgment. In *Blackmore v. Fleming*, 7 T. R. 446, Lawrence, J. said, if the defendant would not consent to a reference to the master to ascertain the amount of interest, in an action on a judgment, the court would order a writ of inquiry. In *Hillhouse v. Davis*, 1 M. & S. 169, Abbott informed the court that the action in *Blackmore v. Fleming* was for a tailor's bill. In *Hillhouse v. Davis* a verdict for interest was allowed, on the principle that the defendant had wrongfully withheld the payment of damages found by a jury to be due for an injury occasioned by the making the Bristol Docks. Le Blanc said, in giving judgment in that case, "The jury having given interest, we cannot set their verdict aside without being satisfied that they have done what they were not warranted to do by law. But there is no positive rule of law against their giving interest on a sum ascertained." [961]

Hillhouse v. Davis was subsequent to *Calton v. Bragg*, 15 East, 223. But neither *Hillhouse v. Davis* nor our judgment in this case touch the principle of that decision. *Calton v. Bragg* determined when interest was due by virtue of the contract. The court in *Hillhouse v. Davis*, and we, now say that although it be not due *ex contractu*, a party may be entitled to damages to the amount of interest for any unreasonable delay in the payment of what is due under the contract. We say, in the words of *Le Blanc* J., that we cannot set the judgment aside without being satisfied that the court has done what it was not warranted to do. We are therefore of opinion, that as there is nothing to impeach the justice of the *Scotch* judgment, we ought to carry it into complete execution. The rule, therefore, for increasing the damages to the amount of the interest must be made absolute.

Rule absolute.

KNIGHT v. BENETT.

Plaintiff entered a farm under an oral agreement for a lease for ten years; though the time of paying rent was settled, it did not appear what was the amount to be paid; the lease was never executed; but plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years:

Held, that the lessor might distrain.

REPLEVIN. Avowry, for two years' rent, payable half yearly, and due March 25th, 1824. To this the plaintiff pleaded *non-tenuit*, and *riens en arriere*. There were other avowries for the same amount of rent payable yearly, to which the plaintiff pleaded *riens en arriere* only, paying into court a sum which would cover the alleged rent to *Michaelmas*, 1823.

At the trial before *Graham* B., *Sussex* summer assizes, *1825, a witness proved that he had arranged the terms of a proposed lease between the plaintiff and avowant for ten years from *Michaelmas*, 1820, as to every thing but the amount of the rent; that he told the plaintiff the rent was to be paid half-yearly, at *Lady-day* and *Michaelmas*; and that in *April*, 1821, the plaintiff, who had entered on the occupation of the farm, had told him he should pay the defendant half a year's rent in a few days.

No lease was ever drawn up. Another witness proved that the plaintiff had paid rent to *Michaelmas* 1822, corresponding with the amount specified in the avowry; and that in *April* 1824, he had promised to pay up to the preceding *Lady-day*.

It was objected that the plaintiff held only under an agreement for a lease, and not under any actual demise, and that there being no stipulation for the payment of a fixed rent, the avowant had no right to distrain.

A verdict, however, was found for the avowant, with leave for the plaintiff to move to set it aside, and enter a verdict for the plaintiff.

Wilde, Serjt., accordingly, in the last term, obtained a rule *nisi* to this effect, on the authority of *Hegan v. Johnson*, 2 *Taunt.* 148, and *Hamerton v. Stead*, 3 *B. & C.* 478.

Taddy, Serjt., who showed cause, suggested, that as the agreement was invalid under the statute of frauds, the plaintiff became tenant from year to year, and by the payments he had made, had sufficiently fixed the amount of the rent to entitle the defendant to distrain; when the court called on

Wilde to support his rule. He insisted as before, that there was an absence

of any express demise or *of any stipulation as to the amount of rent to be paid, both of which were necessary conditions to the validity of [363 a distress on an alleged demise for a sum certain.

BEST, C. J. I am not disposed to question the authority of the cases which have been cited to show, that the merely entering on premises in expectation of a lease will not constitute such a tenancy as to entitle the lessor to distrain. But these cases do not show that such a tenancy as would authorise a distress, cannot be created by any other means except a formal lease. Such a tenancy may be implied from circumstances, and the question is, whether in the present case, sufficient circumstances were left to the jury to warrant them in drawing the conclusion they have come to. They were perfectly warranted in finding as they have done. It would be strange if a man could be allowed to occupy land for three years, and after having paid two years' rent and promised to pay what rent had since become due, could be permitted to say, "I have not been a tenant: I have only occupied in expectation of becoming a tenant."

The evidence here is all one way. The witnesses prove that the tenancy was to commence from *Michaelmas*; that rent was to be paid half-yearly, and that it had actually been paid for two years, at the rate mentioned in the avowry. The facts of this case are, therefore, distinguishable from those which have been cited, and the verdict of the jury must stand.

PARK, J. The length of time, during which the plaintiff was in possession and paid rent, obviates the difficulty which might have otherwise been occasioned by the omission to execute a lease.

In this view, the cases which have been cited support the avowant's claim. In *Hegan v. Johnson*, the "occupation had only continued for three-quarters of a year, and the court said, "The occupier certainly did not [364 become tenant from year to year at the beginning of the first month, or first three months;" from which, as well as from the language used in *Hamerton v. Stead*, it may be inferred that he would have been esteemed a tenant from year to year, if he had staid beyond the first year.

BURROUGH, J. concurred.

GASELEE, J. The agreement for a lease for ten years not having been reduced to writing was invalid: but the plaintiff having entered and occupied for more than a year under the terms of that agreement, it is clear, according to all the cases, that he was tenant from year to year.

Rule discharged.



KNIGHT v. BENETT.

By agreement, as well as by custom of the country, a tenant was to have the use of the barns and gate-rooms to thrash out his corn and fodder his cattle till the *May-day* after the expiration of his term; his term expired at *Michaelmas*, 1824; he was then restrained by injunction from carrying off the premises, corn in the straw: in January, 1825, his landlord distrained a rick of corn on the premises: Held, that the distress was valid.

THIS was another replevin between the same parties, upon a distress of a rick of corn standing in a field. The avowry was for half a year's rent alleged to be due at *Michaelmas*, 1824, upon the same demise as in the preceding case. The plaintiff pleaded *non tenuit*. 182

Upon the trial it appeared that the plaintiff had, under a notice to quit, ceased at *Michaelmas*, 1824, to occupy the premises in respect of which the

*365] distress was *made : that by an injunction out of chancery he had been restrained from carrying off the premises corn in the straw ; but that by the conditions under which he had occupied, as well as by the custom of the country, he was to have the use of the barns and gate-room, &c., to thresh out his corn and fodder his cattle, till the *May-day* after the expiration of his term. The distress was made in *January* 1825.

A verdict was found for the avowant, with liberty for the plaintiff to move to set it aside and enter a verdict for the plaintiff, on the ground that the plaintiff's interest in the premises having determined, and he having ceased to occupy them, a distress could not be made under the statute of 8 *Ann.* c 14.

Wilde, Serjt., having obtained a rule nisi accordingly, the court stopped *Taddy*, Serjt., who was to have shown cause, and called on

Wilde, to support his rule. The plaintiff's interest in the premises determined at *Michaelmas*, 1824. The custom of the country prevails only for the benefit of the occupier, to enable him to carry off the crops he may have raised ; and if he does not claim the benefit of the custom, he cannot be liable to the burthens it may impose. The plaintiff disclaimed any intention to occupy beyond the expiration of his term ; and his corn was detained on the premises against his will by the party who afterwards distrained it. If he had left the corn voluntarily, it might have been liable to distress by virtue of the custom, but the avowant ought not to be allowed first to detain, and then to distrain the corn. The statute 8 *Ann.* c. 14, only applies where the tenant continues in possession ; but the plaintiff had quitted the premises long before the distress.

*366] **BEST*, C. J. The express contract between these parties is for a holding from *Michaelmas* to *Michaelmas*, but there is an implied contract under the custom of the country, that the tenant shall continue possession for the purpose of thrashing and foddering, up to the *May Day* ensuing ; and the question is, whether the landlord could distrain between *Michaelmas* and *May Day*, for the rent due at *Michaelmas*. The statute of *Anne* does not apply to the point, because that statute gives a right to distrain for six months after the determination of the lease, where the interest of the landlord and the possession of the tenant continues.

But in the present case the interest under the lease was not determined ; and the case of *Bevan v. Delahay*, 1 H. Bl. 5, decides the question. It was helden in that case that a custom for a tenant to leave his away-going crop in the barns of the farm for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left after six months have expired, from the determination of the term. Lord *Loughborough*, said, "It has often been determined that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease ; and it is not material whether the interest and connection between the landlord and tenant be extended by such holding over, or by the operation of a custom."

PARK, J. This case is one of a continuing tenancy, and *Bevan v. Delahay*, is conclusive on the point under consideration. That decision was confirmed in *Boraston v. Green*, 16 East, 71, where *Bayley*, J., considered such *367] a custom "a prolongation of the term during which the landlord might distrain for the off-going rent. The statute of *Anne*, does not apply, because the term is continued by the custom of the country.

BURROUGH, J. In corn countries the custom of the country arises out of the necessity of the thing, for without such a custom the tenant could not get in his corn in late harvests. But as he is bound to thresh it out on the land, the custom of the country enures as much to the benefit of the landlord as of the tenant. The tenant by taking away his corn could not put an end to the contract under which he was bound to thresh it on the premises ; and the tenancy continuing by the necessary custom of the country, the object of the

injunction was only to compel him to do what he was bound to do under his contract. I have no doubt that the tenancy continued, and that the landlord had a right to distrain independently of the statute of *Anne*.

GASELEE, J. The question is, what was the expiration of the tenant's term, and the case of *Wiglesworth v. Dallison*, Doug. 201, clearly shows that the expiration may depend on the custom of the country.

Rule discharged.

*CROWDER v. AUSTIN.

[*368]

The vendor of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to 23*l.* after a *bona fide* bidder had bid 12*l.*:
Held, that the sale could not be enforced against a subsequent bidder.

The plaintiff sought to recover the price of a horse sold by him to the defendant at a public auction, one condition of which auction was, that the horse should be sold to the best bidder. The defendant, himself a horse dealer, resisted completing the contract, on the ground that after a *bona fide* bidder had bid 12*l.* a servant of the plaintiff's, stationed by him at the auction, made repeated biddings up to 23*l.*

At the trial before *Best*, C. J., London sittings, after *Michaelmas* term, the plaintiff having been nonsuited upon proof of these facts,

Wilde, Serjt., now moved for a rule *nisi* to set aside this nonsuit. He argued, that the decisions in which it had been holden that a contract of sale might be avoided upon proof that the seller had resorted to puffing, turned upon a presumption that a fraud had been practised upon the purchaser, *Howard v. Castle*, 6 T. R. 642. But since those decisions, puffing, or at all events, bidding with a view to buy in, had become so much the recognized practice of auctions, that it was impossible to say that any purchaser could be deceived by it, much less such a purchaser as the defendant, himself a horse dealer, and conversant with every mode of disposing of horses.

The practice of bidding for the purpose of buying in, is recognized by the legislature, which has provided for the remission of the duty: [*Best*, C. J., but *notice ought to be given of the intention to buy in.] And the [*368] Lord Chancellor has sanctioned it in sales under the authority of the Court of Chancery. *Conolly v. Parsons*, 3 Ves. jun. 625. Whether the buyer has notice from the seller, or from the notoriety of the general usage, is indifferent. The language of Lord *Mansfield*, in *Bexwell v. Christie*, Cowp. 395, applies to a period when the practice was not so notorious as at present.

Best, C. J. I am of the same opinion as I was at the trial, where I thought the whole transaction was a fraud on the defendant; but as the question is of importance, it may not be improper to grant a rule *nisi*.

PARK, and **BURROUGH**, Js., thought a rule ought not to be granted, expressing their entire concurrence in the opinion expressed by Lord *Mansfield*.

GASELEE, J., thought Lord *Mansfield's* decision satisfactory, but as it had once been objected to, was willing that a rule *nisi* should be granted.

A rule *nisi* was granted accordingly; but

Wilde, Serjt., on a subsequent day finding the court still of the same opinion, said he was instructed by his client to carry the case no further. By his own consent, therefore, the rule was

Discharged.

*Doe dem. SPENCER v. CLARK.

This court will not stay the proceedings in an action brought by the provisional assignee of the insolvent debtors' court, on an objection that it was not proved at the trial of the cause that the assignee had, pursuant to 1 G. 4. c. 119. s. 11., the authority of the insolvent debtors' court to proceed.

A VERDICT was recovered for the plaintiff in this ejectment, on the demise of the provisional assignee of the Insolvent Debtors' Court. At the trial, the lessor of the plaintiff did not show that he was authorized by that court, and by the major part in value of the creditors of the insolvent, to bring the action: and upon this ground, a rule *nisi*, to set aside the verdict, having been discharged, 3 Bingh. 203.

Wilde, Serjt., after referring to 1 G. 4. c. 119. s. 11. (by which it is enacted, with respect to actions by assignees of an insolvent debtor, "That no suit in law be proceeded in further than an arrest on *mesne* process," "without the consent of the major part in value of the creditors of the prisoner," "and without the approbation of one of the commissioners of the said court,") obtained a rule *nisi* for staying proceedings.

Lawes, Serjt., who showed cause, objected that the application was too late after verdict, and he referred to *Leigh v. Kent*, 3 T. R. 362, in which the court refused after verdict to stay proceedings in debt on a penal statute, though no affidavit had been filed pursuant to 21 Jac. 1. c. 4, that the offence was committed in the county where the action was brought, and within a year before the bringing of it. The application, too, ought to have been made to the Insolvent Debtors' Court.

*371] **Wilde*. The Insolvent Debtors' Court could not stay the proceedings of a superior court. The statute of 1 G. 4. c. 119. s. 11, and 3 G. 4. c. 123. s. 2, are express, that the assignee shall not proceed after *mesne* process without the sanction of that court; and in the present case, he might have applied for and have obtained that sanction, if the Insolvent Debtors' Court had been willing to afford it, in the interval between the discharge of the rule for setting aside the verdict and the present application.

Best, C. J. This application to the court depends on the eleventh section of 1 G. 4. c. 119., by which it is enacted, "That no action in law be proceeded in further than an arrest on *mesne* process," "without the consent of the major part in value of the creditors of the prisoner," "and without the approbation of one of the commissioners of the said court;"

And on the second section of 3 G. 4. c. 123., by which it is enacted, "That it shall be lawful for the provisional assignee to sue in his own name, if the said court shall so order, for the recovery, obtaining, and enforcing of any estate, debts, effects, or rights of any such prisoner."

We have already decided, that it was not inquirable at the trial of this cause, whether or not the provisional assignee sued with the authority of the Insolvent Debtors' Court. It was not the object of the legislature to provide a defence to such as did not pay what they owed to an insolvent estate, or wrongfully kept possession of any property belonging to such estate. The defendant could not be permitted to raise this objection either in this court or *372] the Court for the Relief of Insolvent Debtors. I do not mean to say that this court might not, on the application of a creditor of an insolvent, stay an action that was brought by the provisional assignee of the Insolvent Debtors' Court without the consent of the major part in value of the creditors and the approbation of one of the commissioners of the Insolvent Debtors' Court. But it must be a very extraordinary case in which we should interfere; the intent of the legislature in introducing these clauses into the acts being only to prevent insolvents' estates from being wasted in useless litigation. We should say go to the Insolvent Debtors' Court, who have better

means of knowing than we can have, whether the suit instituted is likely to be beneficial to the creditors or not. It has been said that the Insolvent Debtors' Court, cannot stay the proceedings in an action in this court, but they can order the provisional assignee, who is their own officer, not to go on with the cause; and if he disobeys their order (which is not very likely) they can punish or dismiss him. The Chancellor cannot prevent a court of common law from proceeding in an action, but he may commit the party and his attorney to the *Fleet*, who moves a court of common law to proceed after service of injunction. We do not stop a cause on equitable grounds of defence, but leave a defendant to his remedy in a court of equity. In cases of bankruptcy the assignees are not entitled to commence a suit in equity without the consent of the creditors at large; but if they do so, the practice is not to stay the proceedings, but to restrain the assignees for the future.

PARK, and BURROUGH, Js., concurred.

GASELEE, J. The legal estate in the insolvent's property has been conveyed to the provisional assignee, *and the defendant has no right to withhold from the creditors what belonged to the insolvent. In *ex parte Witchurch*, 1 Atk. 210, though the court reprobated the assignee of a bankrupt for suing without authority, they did not stay the proceedings, but only restrained the assignee for the future. The Insolvent Debtors' Court, is more likely to interfere with effect than we, where any of its assignees have misconducted themselves, and to that court the present application ought to have been made.

Rule discharged.

TOOTH v. BAGWELL.

Where, upon the day appointed for the trial of a writ of right, only three of the knights appeared, and the sheriff returned, that the fourth was too ill to appear in that or the ensuing term, which return was confirmed by the affidavit of a medical man, the court granted a summons for another knight.

THIS being the day appointed for the trial at bar of a writ of right between the above parties, the grand assize was called, when only three of the knights appeared, and the sheriff returned, that Sir *George Alderson*, the fourth knight, was too ill to attend either in this or the ensuing term.

There was also an affidavit from a medical man, that it was improbable Sir *George* would ever be sufficiently recovered to attend; upon which,

Bosanquet, Serjt., moved, that the process issued for choosing and summoning the grand assize should be taken off the roll, and a new *ventrie*, with an entry of continuances, be issued, for summoning four knights to choose the grand assize, or

That a suggestion should be entered of the inability of Sir *George Alderson* to attend, by reason of sickness *and infirmity; that he should be discharged from his attendance, and that a summons should issue [*374] for another knight, with a *distringas* to compel the future attendance of the three who were present.

In support of this motion he referred to a *dictum* in *Lord Windsor v. St. John*, Dyer, 98, confirmed by 22 Ed. 3, fol. 18., from which it appeared that a rule in the latter alternative had been granted where one of the knights had died; and he cited *Rex v. Cowle*, 2 Burr. 859, in which Lord *Manfield*, had said, the law was clear and uniform under which the court had exercised a jurisdiction over its own process.

Vaughan, and *Wilde*, Serjts., opposed the motion, on the ground that it was discretionary with the court whether they should comply with or discharge such an application, and that the discretion of the court had never been exercised to assist a writ of right, which was deemed a vexatious suit. In *Adams v. Radway*, 1 Marsh, 602, they had refused to quash a writ of summons in a similar proceeding; and as to the case in the *Year Books*, there was a great difference between death and a temporary infirmity, which was too uncertain a ground for such an application as the present; besides, that case was not, as the present, advanced to a stage beyond that in which the knights had made their election.

BEST. C. J. Rights to easements are perfected by twenty years enjoyment, and lost by *nonsuitor* for the same period of time. There is no reason why one who is under no disability to assert his claim, should be allowed sixty years to bring a writ of right, although an *ejectment*, which is the most convenient mode of deciding a "right to real property, cannot be brought after twenty years from the commencement of the plaintiff's title. Whilst the title to lands remains in doubt, all improvements are suspended. The public interest, as well as that of the possessors', require that titles should be rendered indefeasible as soon as those who may be supposed to have claims on estates have had a fair opportunity of establishing them. I much wish that the legislature would shorten the time allowed for bringing writs of right, render the proceedings under them less complicated and dilatory, and give the party who succeeds his reasonable costs. But whilst the law allows such writs to be brought at any time within sixty years from the accruing of the title, judges cannot assent to the argument, that all such writs are vexatious, and that the courts should take advantage of any accident to prevent the defendant's proceeding. Judges have no authority to defeat a legal right, because they think it ought not to be insisted on. If a law be inconvenient or unwise, I am not for defeating it by indirect means. Let the full force of its inconvenience be felt, and then the legislature will alter it in a proper manner. This court has certainly refused to allow an irregularity in the proceedings on a writ of right occasioned by the negligence or mistake of a party to be cured by amendment, although they would permit a similar defect to be amended in any other species of action. But there is a difference between a difficulty arising from the blunder of a party, and one that is occasioned by the act of God. It is one of our maxims, that "*actus Dei nemini facit injuriam.*" The defendant in this case is prevented from proceeding by the illness of one of the knights; and it is proved by affidavit and returned by the sheriff, that it is highly improbable that this knight's health will ever be so much improved as to allow him to attend the trial of this cause. We cannot postpone the trial in the hope of Sir *George Alderson's* recovery, and why are we to wait for his death before we summon another knight to fill the place, which he is as incapable of filling as if he were dead. A little common sense is sufficient without any authority to direct us in so plain a case. Two modes of relieving the defendant have been pointed out to us by the law; one, that the process issued for choosing and summoning the grand assize should be taken off the roll, a new *venire* be issued for summoning four knights to choose the grand assize, and the entry of proper continuances be made: the other, that a suggestion should be entered that one of the knights is disabled by sickness, which appears likely to be permanent, from attending the trial, and that he has been on this account discharged from further attendance; that a summons should issue to another knight to supply the place of the knight incapable of attending, and a *distringas* to compel the attendance of the knight now present at the day of trial. I prefer the latter mode, first, because nothing is done more than the necessity that has arisen requires. There is no occasion to summon four knights when three are already summoned, nor to choose a

grand assize when one is already chosen. Secondly, if what I think so reasonable should be thought by others unreasonable, or that which is reasonable not legal; if the latter mode be pursued, what has been done will appear on the record, and the tenant may question the propriety of it by writ of error. In the case in *Burrow*, referred to in the argument, Lord *Mansfield* says, that every court has authority to control its own process. There is no exception to this general rule; this rule is essential to the due administration of justice in the case of a writ of right. In *Lord Windsor v. St. John*, one of the judges said, that when one of the knights was dead, it was the practice to do what is desired to be done in this case. *What is fit to be done in the case of the death of a knight, is equally fit when one of them is prevented by a permanent illness from attending the trial. I think, therefore, a suggestion should be entered, and a new *venire* and *distringas* issued as prayed by the counsel for the defendant.

PARK, J. It is true, that the books furnish us with no case in which the court has been applied to, to supply the absence of a knight who has been prevented by sickness from attending in his place; but the principle is the same where the attendance has been prevented by death.

We have here a sufficient reason on record for the discharge of Sir *George Alderson*, and when there is a complete assize except as regards him, why should not a new *venire* issue for another knight? *Adams v. Radway* does not apply on the present occasion, because the party in that case had proceeded irregularly; but the act of God cannot work injustice, and we must therefore issue a *venire facias* for another knight.

BURROUGH, J. As long as writs of right are allowed by law, we must act upon them. Where, indeed, the parties have been irregular, the courts have not shown any indulgence, because the proceeding is a late one, but in cases of the act of God there is no instance of the courts refusing assistance.

GASKLEE, J. It is no indulgence to accede to this motion in the second alternative. If a party is entitled to have his cause tried, the court must not interpose unnecessary obstacles, and there can be no error in stating on the record, the reason why the cause has not proceeded now. It appears to the court that there is no probability of the attendance of Sir *George Alderson*, and the defect must be supplied by commanding another knight to come in his stead. A day must be given until three weeks after Easter, and the rule for a *venire* to summon another knight must be made

Absolute.

SCAMON et al., v. MAW.

A feme covert, entitled to a copyhold, surrendered it after secret examination by the steward, to the use of her husband with his assent, testified by his immediate admission: Held, that this surrender was valid.

THE following case was sent for the opinion of this court from the vice-chancellor:

Mary Bullen, the wife of *Philip Bullen*, was entitled to a certain copyhold tenement, consisting of a messuage with the outbuildings, and fifty-six acres of land, within and parcel of the manor of *Greetham*, in the county of *Lincoln*.

At a court baron and customary court, holden in and for the said manor on the 10th of December 1795, by the steward of the said manor, the said *Mary Bullen* was duly admitted to the said tenement, to hold to her and her heirs at the will of the lord, according to the custom of the said manor, by the ac-

customed rent and services; and immediately afterwards, at the same court, the said *Mary Bullen*, being first solely and secretly examined by the said steward, did surrender into the hands of the lord of the said manor, by the acceptance of the said steward, the said tenement to the use of the said *Philip Bullen*, his heirs and assigns for ever. To which said *Philip Bullen*, then personally present in full court, the lord of the said manor, by his steward, did grant thereof seisin by the rod, according to the custom of the said manor, to have and to hold the said tenement and premises unto him, the said *Philip Bullen*, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor, by the accustomed rents and services; and the said *Philip* thereupon paid the fine payable for such admittance, and did fealty, and was admitted accordingly.

*379] There is no special custom in the manor of *Gresham* as to the surrender of copyhold estates belonging to feme covert.

The question for the opinion of the court was, whether the aforesaid surrender made by the said *Mary Bullen*, to the use of her husband, the said *Philip Bullen*, was a valid surrender of the said copyhold tenement to the use of the said *Philip Bullen*, his heirs and assigns.

Wilde, Serjt. The surrender was valid. It is clear that the husband and wife together might, without the aid of a custom, make a valid surrender. But the assent of the husband is equivalent to his joining in the surrender; and his assent appears by his being admitted at the same court at which the surrender was made; by his taking under the surrender, and paying the fine. There is no reason for joining him in the surrender, except to express his assent. The entire interest in the property is in the wife; he can neither convey nor forfeit the estate. The wife is admitted notwithstanding her coverture, and she alone does fealty. In *Compton v. Collinson*, 1 H. Bl., 334, the wife surrendered without her husband, and the court thought it sufficient if his assent appeared. And if she may convey alone by fine, there seems to be no reason why she should not convey by surrender.

Bosanquet, Serjt., contra. It has been helden, that under a special custom, a feme covert may surrender alone, with the assent of her husband. *380] But it seems to follow, if this be law, that she cannot do so without a custom, and no custom is stated in the present case. A custom to convey without the assent of the husband has been helden bad; *Stephens dem. Wise v. Tyrrel*, 2 Wils. 1; and the case of a fine is very distinguishable from the present, because the female is separately examined in court. *Taylor v. Philips*, 1 Ves. sen. 229, however, is in point, to show that the surrender by the wife alone is insufficient; and *Compton v. Collinson*, 2 Br. C. C., 377, note, Eden's edition, which has been overruled, was decided on the ground that the feme covert, upon whose acts the question arose, was virtually a feme sole, there being a suspension of the marital rights. But according to the present opinion of the courts, marital rights cannot be suspended. *Marshall v. Rutten*, 8 T. R. 545.

Cur. adv. vult.

Having heard this case argued by counsel, and considered it, we are of opinion that the surrender made by the said *Mary Bullen* to the use of her husband, the said *Philip Bullen*, having been made in his presence and with his assent, testified by his immediate admittance under it, and she having been first solely and secretly examined by the steward, was a valid surrender of the said copyhold tenement to the use of the said *Philip Bullen*, his heirs and assigns.

W. D. BEST.
J. A. PARK,
J. BURROUGH,
S. GASLEE.

*(IN THE EXCHEQUER CHAMBER.)

POWELL et al., v. SONNETT et al.

The record stated a verdict for plaintiffs on twelve counts, and that the jury were discharged on eight others.

The issues on these latter counts being immaterial, the court refused to reverse, on error, the judgment for plaintiff, on the ground that the discharge of the jury was not stated on the record to be with the consent of the parties.

Assurer. The declaration contained twenty counts, twelve of which were special.

The defendant below pleaded the general issue to all the twenty counts, and the statute of limitations, and set off to the last eight counts.

The plaintiffs below replied to the plea of the statute, that they were beyond seas ; and to the plea of set off, *nil debent*.

The defendants below rejoined that the plaintiffs below were not beyond seas, and issue was joined on that and the rest of the pleadings.

The jury found for the plaintiffs below, damages 24,000*l.* on the twelve special counts, for the defendants below upon the remaining eight, for the plaintiffs below on the issue *ultra mare*, and on the issue on the set off, the jury were discharged.

The defendants below brought error into this court, assigning as a ground, that it was not stated on the record that the jury had been discharged on the issue arising out of the plea of set off to the last eight counts, with the consent of the parties.

Patterson, for the plaintiffs in error, argued that the jury could not be discharged by the authority of the judge ; that the consent of the parties was material ; and that it was equally material that such consent should appear on record ; though he could not find any old entry in which there [*382] was any mention of the jury having been discharged.

Brodrick for the defendants in error contended, that the eight issues on the set off applying to the same causes of action as those on which the verdict had been found for the defendants in error on the general issue, those eight issues became immaterial, and that upon an immaterial issue the jury were discharged by operation of law ; for which he relied on *Cosy v. Diggons*, 2 B. & A. 546, and refused to amend the record, which the court offered to allow him to do.

BEST, C. J. The court entertains no difficulty, but the sum at stake being large, they were anxious, by allowing an amendment, to take away all pretence for carrying the cause further. As it does not appear on record that there was any bill of exceptions, or motion for a new trial, or in arrest of judgment, we must presume that all which is stated on the record to have been done was rightly done, and the judgment of the court below must be

Affirmed

*DOUGAL v. KEMBLE et al.

Goods were consigned to *L. C. & Co.* or their assigns, "he or they paying freight for the same." *L. C. & Co.* indorsed the bill of lading to *K.*, their broker, and then became bankrupt; the ship-owner, in ignorance of these circumstances, applied to *L. C. & Co.* for the freight, and then sued *K.* for it:

Held, that *K.* was liable.

THIS was an action of *assumpsit*, to recover the freight and primage of some sugars conveyed by the plaintiff from the *West Indies* to *London*.

At the trial before *Best, C. J., London* sittings after *Trinity* term last, a verdict was found for the plaintiff for 200*l.* damages, subject to the opinion of the court on the following case :

The brig *Pursuit*, whereof the plaintiff was the owner, took in a cargo of sugars at the island of *St. Lucia*, and arrived with the same in the *West India Docks*, where the cargo was afterwards landed and warehoused. Sun-dry hogsheads of sugar forming part of the cargo were marked *C. L.*; others, *F. D.*; others, *M. D.* Bills of lading were signed by the captain of the ship for the sugar in question, by two of which, the portion of sugar marked *F. D.* and *M. D.* was made deliverable to the shipper's orders, or to assigns, he or they paying freight for the same, with primage and average accustomed. By the third, the sugars marked *C. L.* were made deliverable to *J. R. Le Cointe & Co.*, or to assigns, he or they paying freight for the same, with primage and average accustomed.

The bill for the sugars marked *F. D.* was indorsed, "Deliver the within hhds. of sugar to Messrs. *Le Cointe & Co.*, provided they accept my draft of his day's date in favor of Messrs. *D. Ferguson & Co.* for 200*l.* sterling, at ninety days sight, otherwise to the holder of the said draft, 18th *September*, 1824." (Signed *Salvigny*.)

*The bill of exchange referred to by the bills of lading was duly accepted by *Le Cointe & Co.* previously to the bills of lading being handed to them.

The sugars marked *F. D.* and *M. D.* were entered on the 9th of *November*, 1824, by the owner of the ship at the custom-house, to be warehoused in pursuance of the statute of 4 *G. 4. c. 24.*

On the same day, the captain, on the part of the owner of the ship, gave notice to the directors of *West India Docks Company* to stop the sugars *F. D.* and *M. D.* till the freight was paid.

The sugars marked *C. L.* deliverable by the bills of lading to *Le Cointe & Co.* were not then stopped as the others.

On the 25th of *November*, and 10th and 13th of *December* respectively, the defendants presented at the *West India Docks* office, the three bills of lading before mentioned, the one of which for the sugars marked *C. L.* had been previously indorsed and delivered by *Le Cointe & Co.* to the defendants; and the two bills of lading for the sugars, marked *F. D.* and *M. D.* had been indorsed by the shippers to *Le Cointe & Co.*, and had also been indorsed and delivered by *Le Cointe & Co.* to the defendants: and under and by virtue of the bills of lading and indorsements thereon, the defendants obtained the transfer of the sugars into their names in the warehouse and books of the Dock Company.

On the 16th of *November* the defendant's clerk applied to Messrs. *Robertson & Co.*, who were brokers for the ship, on account of the plaintiff, and requested that the stop which had been put upon the sugars in pursuance of the captain's notice before mentioned, might be taken off from the sugars

*385] marked "*F. D.* and *M. D.*", and that the said sugars might be delivered out of the docks; and Messrs. *Robertson & Co.* thereupon signed an order, addressed to the collector of the *West India Dock Company*, with-

drawing the stop, and desiring that the goods in question might be delivered to *Le Cointe & Co.*, the consignee thereof, or their assigns.

This order was brought by the defendant's clerk to the dock collector.

On the 16th *December*, *Le Cointe & Co.* suspended their payments, on the 1st of *January*, 1825, committed acts of bankruptcy, and on the 5th of *January*, a commission of bankruptcy was issued against them, which was inserted in the *Gazette* of the 8th of *January*.

The plaintiff's brokers, who collected the freight for the ship, on account of the plaintiff, on or about the 4th of *January*, in the usual course, sent an account of the freight note to Messrs. *Le Cointe & Co.*, charging them as debtors for the same. *Up to and at this time the brokers did not know that the bills of lading had been endorsed by Le Cointe & Co. to the defendants, or that Le Cointe & Co. had suspended their payments, or had committed any acts of bankruptcy.*

On the 8th of *January*, the plaintiff's brokers applied at *Le Cointe's & Co.* for payment of the freight, and *were then first informed of their having suspended their payments.*

And the plaintiff's brokers, on the same 8th of *January*, *first learnt by enquiring at the West India Dock office, that the bills of lading had been indorsed to the defendants; the brokers thereupon applied for and obtained back the freight note from Le Cointe & Co., and on the 8th day of January delivered a freight note to the defendants, charging them as debtors for the same.*

*On the 10th and 11th of *January*, 1825, Messrs. *Robertson & Co.* [*386 and the plaintiff gave further notice to the directors of the Dock Company, countermanding the withdrawal of the stop for freight, and ordering all the goods to be detained.

The sugars were subsequently delivered out of the docks to the order of the defendants, who paid the dock dues for landing all the sugars, which included three months' warehouse rent for the same from the time of landing.

The freight for the sugars, according to the bills of lading, was

		£.	s.	d.
For sugars marked C. L.	-	-	-	38 12 10
Do. - F. D.	-	-	-	85 19 8
Do. - M. D.	-	-	-	1 6 10
				<hr/> £125 19 4

which freight, according to the course of trade, was payable on the *Saturday*, upon or next after the expiration of two months from the ship's report, viz. on the 15th of *January*, 1825.

The defendants were sugar brokers in the city of *London*; were employed by *Le Cointe & Co.* to sell the sugars in question, and had advanced *Le Cointe & Co.* sums of money on account thereof at the times the bills of lading were delivered to them as aforesaid.

The defendants, in their account with *Le Cointe & Co.* debited them with the amount of payments made by the defendants in respect of the sugars, and paid over to the assignees of *Le Cointe & Co.*, subject to the decision of this question, the balance of the proceeds of the sale of the sugars, after deducting such payments, and the charges of sales, and also after deducting the advance which they had made, *and the amount of the freight claimed in the [*387 present action.

The question for the opinion of the court was, whether the plaintiff was entitled to recover the whole or any part of the sum of 125*l.* 19*s.* 4*d.*, and the verdict was to be entered accordingly.

Wilde, Serjt., for the plaintiff. By the general rule of law, a party who

receives a bill of lading, knowing that freight has not been paid, receives it under an implied contract to pay the freight; *Bell v. Kymer*, 1 Marsh. 146; *Cock v. Taylor*, 13 East, 399; and under the act for regulating the *West India Docks*, goods in dock are in the same situation with respect to claims for freight as goods on board ship. Here the freight is made payable by the holder of the bill of lading; the defendants receive the goods under the bill, with notice that the freight is not paid; and as to the plaintiffs taking the stop off the goods, that was no more than a consent that they should be delivered pursuant to the terms of the bill of lading, without releasing any party who might be found liable to pay the freight. The demand on *Le Cointe & Co.* was made in ignorance that the bill of lading had been transferred, and therefore cannot affect the plaintiff's case.

Here the court called on

Taddy, Serjt., for the defendants. Freight is only recoverable by reason of a contract; a contract cannot be transferred, and the owner of a ship contracts for his freight with the shipper. [*Gaselee*, J. According to the cases the knowledge of the terms of a bill of lading is evidence of a new contract.] It sometimes happens that the ship owner has no remedy against the original *shipper; and in those cases the courts have holden the receiver of ^{*388]} the goods liable; that was the ground of the decision in *Cock v. Taylor*; but the court said, in *Wilson v. Kymer*, 1 M. & S. 157, which is in point for the present defendant, that they would not go beyond that case. In *Wilson v. Kymer* the defendants were at first holden not liable; and although the ultimate decision was different, yet that turned on the ground of previous dealing between the parties. In *Cock v. Taylor* the defendants were purchasers of the bill of lading; in the present case the defendants are not purchasers of the bill of lading, nor do they receive the goods under it, but by virtue of the order of *Robertsons*, as the agents of *Le Cointe & Co.* In *Moorson v. Kymer*, 2 M. & S. 303, where ship owners were to be paid for the hire of a ship under the terms of a charter party, and the bill of lading was to deliver the goods to the charterers or their assigns, he or they paying freight as *per charter party*, it was holden that the indorsees of the bill of lading were not liable to the ship owner upon an implied *assumpsit* arising out of the receipt of the goods under the bill of lading. And though in *Bell v. Kymer* they were holden liable to the charterer, that decision turned upon the particular conduct of the indorsers.

The liability of consignees rests on the custom of trade, *Roberts v. Holt*, Show, 443, which does not extend to indorsees. The credit here was certainly given by the ship owner to *Le Cointe & Co.*: he applied to them first for payment; if he had sued them, it would have been no defence for them to have said that the bill of lading had been handed over to *Kemble & Co.*; and if *Le Cointe & Co.* are liable, *Kemble & Co.* are discharged. They only act as brokers, and it will be a great hardship if they are held liable. At all events, a ^{*389]} count on general *assumpsit* for freight is not sufficient as to those goods for which the freight was to be paid by the acceptance of a bill at ninety days sight. That was a special engagement, and ought to have been described in a special count.

Best, C. J. It being clear that justice will be done by allowing the verdict for the plaintiff to stand, the court has only to see that its judgment is not inconsistent with previous decisions. It has been insisted, on the part of the defendants, that the verdict for the plaintiff is inconsistent with the law of *England*, because the contract on the bill of lading is with the shipper or *Le Cointe & Co.*, and that the liability of these parties cannot be transferred to the defendants. But this argument is founded on an inaccurate statement of the terms of the bills of lading. Neither the shipper nor *Le Cointe & Co.* agree by these instruments to pay the freight. These are receipts for the goods, with an undertaking on the part of the captain that he will deliver

them to the legal holder of these bills, on such holder's paying the freight. The captain has a lien for the freight against whoever shall become the owner of the goods. The owner could not compel the captain to deliver the goods from his actual possession without paying the freight. The act for regulating the *West India Docks*, continues the lien for freight whilst goods delivered from a ship, and liable to freight, remain in those docks. Whoever obtains the delivery of goods under such a bill of lading, contracts, by implication, to pay the freight due on them. There is no assignment of contract, no shifting of liability. The receiver of the goods is an original contractor to pay the freight of them. With respect to the alleged hardship on brokers, they know the terms of the bill under which they claim, they know what freight is due, and they need not make *advances beyond the value of the [*390 goods subject to freight; the hardship on the ship owner would be much greater if after having brought the goods to *England*, he should not be entitled to recover freight from the parties who possess them under the bill of lading. *Cock v. Taylor*, is expressly in point for the plaintiff. It has been attempted to distinguish that case from the present by the circumstance, that the plaintiff in that case had made no application to the consignee before applying to the defendant, and that the defendant was there a purchaser of the bill of lading. With respect to the application to the consignees, it was made when the plaintiff supposed them to be the holders of the bills of lading; the moment the plaintiff discovered that the bills of lading had been transferred to the defendants, he applied also to them; and a man is not bound by what he does in ignorance of the actual circumstances of his case. As to the circumstance of the defendant in *Cock v. Taylor*, being a purchaser of the bill of lading, the effect of that is got rid of by *Bell v. Kymer*, in which the defendant was only a broker, and in which *Gibbs*, C. J., said, "the holders of a bill of lading were bound to know that they were liable for the freight." That decision is not touched by any subsequent case, for *Wilson v. Kymer*, turned on a different point; and every Judge in that case confirmed the decision in *Cock v. Taylor*. In *Wilson v. Kymer*, the defendants did not obtain the goods under the bill of lading, but under the order of the consignees. In *Moorsom v. Kymer*, the inference of an implied contract was repelled by the existence of a special contract under a charter party; and *Le Blanc*, J., said, "The law will not raise an implied promise where there is an express agreement between the parties." But he also said, "Where the ship is a general ship, and there is no other to whom the party can resort, the law will imply a promise to prevent a failure of justice." *There would be a [*391 failure of justice if such a promise were not implied in the present instance.

With respect to the declaration, the contract having been executed, the plaintiff is entitled to recover on the general count for freight, which was the form of the declaration in *Cock v. Taylor*.

PARK, J. The arguments which have been urged on the part of the defendants to-day, were pressed in many of the prior cases, but in vain; and the authority of *Cock v. Taylor*, has remained unimpeachable.

Wilson v. Kymer, and *Moorsom v. Kymer*, are plainly distinguishable on the ground stated by my Lord Chief Justice. And in *Bell v. Kymer*, which was decided by *Gibbs*, J., a man most eminent for his knowledge of commercial law, the defendants were brokers, and the decision in *Cock v. Taylor*, was confirmed.

BURROUGH, J. I agree as to the justice of this case, and that we are now bound by the decision in *Cock v. Taylor*, although if I had been a Judge of the Court of King's Bench, when that case was argued, I am doubtful whether I should have concurred in the decision.

With respect to the declaration, I think that a general count for freight is not sufficient between these parties. It might have been sufficient between

the ship-owner and the consignees after the contract was executed, but when the ship-owner parts with the goods, he relies on the undertaking of the party to whom the goods are delivered; and as against him the declaration should be framed specially on the undertaking, and not on the common liability to pay freight, which seems to attach only on the shipper or consignee.

GASELER, J. It is not material now to decide whether an action like this [392] against the indorsees of a bill of lading, ought originally to have been sustained on a general count for freight; such a count has been sustained in *Cock v. Taylor*, and that decision has never been overruled. I concur, therefore, with the rest of the court that there must be

Judgment for the plaintiff.

BUTTERY v. ROBINSON.

Devises of lands to *A.* for life, remainder to *B.* in fee, subject to and charged with the payment of 20*l.* a year to *C. D.* during her life, to be paid by *A.* as long as she should live, and after her decease to be paid by *B.*: Held, a charge on the land, for which *C. D.* might distrain.

REFLEVIN. The defendant avowed for the arrears of a rent charge which he claimed under a will by which one *Mathew Robinson*, devised the premises in which, &c., to his wife for life, remainder to his sons in fee, "but subject nevertheless to and charged and chargeable with the payment of the yearly rent or sum of twenty pounds, thereby then and there devised and given by the said *Mathew Robinson*, to the said defendant and her assigns, during the term of her natural life, to be paid by his the said testator's said wife, so long as she should live, and after her decease to be paid by his said sons equally between them, by four equal quarterly payments, the first payment thereof to begin and be made at the end of three calendar months next after his the said testator's decease."

Plea. That the said *Mathew Robinson*, did not give in or by his said will any power or right of distress, nor is any clause or power of distress therein contained to enable the said defendant to levy any arrears of the said yearly rent or sum so given, and bequeathed to her by the said will as aforesaid in case such yearly rent or sum should at any time be in arrear. Demurrer and joinder.

***Spankie, Serjt.**, rose to support the demurrer, but the court called [393] on

Peake, Serjt., to support the plea. He argued that this was not a rent seck, in which case it might have been distrained for under 4 G. 2, c. 28., but a mere personal charge on the party who should be in possession of the land, to pay the annuity so long as he should possess the land; and though equity might call the land in aid of the personality if the possessor proved insufficient, yet there could be no distress under the will.

BEST, C. J. It is impossible to read the words of this will without holding the sum bequeathed a direct charge on the land, which is expressly devised "subject to and charged and chargeable with" the payment of the yearly sum.

Judgment for the avowant.

ANGELL v. ANGELL.

In a writ of right, the sheriff having returned, that he had summoned four lawful knights, to wit, *A. B.*, Esq.; *C. D.*, Esq.; *E. F.*, Esq.; and *G. H.*, Esq.: Held, on demurrer, that this return could not be traversed.

THIS was a writ of right for the recovery of certain lands in *Yorkshire*. To the precept for summoning four knights to elect the grand assize, the sheriff returned that he had caused to be summoned four lawful knights of his county, to wit, *E. P.*, Esq.; *A. B.*, Esq.; *C. D.*, Esq.; and *E. F.*, Esq.; girt with swords.

The gentlemen named in the return being called, appeared in this court the 3d of *February*, duly girt with their swords, when

Vaughan*, Serjt., on the part of the tenant, challenged them, on the ground that they were not true knights, but only esquires, and [394

Taddy, Serjt., objected that they were not described in the return with the title of Sir.

This latter objection the court overruled, holding, that in legal proceedings it is sufficient to describe a man as knight, without adding the prefix Sir.

With respect to the challenge, the court gave the tenant's counsel time to enter it on the record in the proper form, holding on the authority of *Rex v. Edmonds*, 4 B. & A. 471, that it must be entered on record; and ordered the gentlemen returned as knights to appear in court at eleven this day, adding, that the entry when made, should be considered as having been made *instanter*.

The gentlemen with swords having accordingly again made their appearance this day, and the challenge having been duly entered on record,

Bosanquet, and *Spankie*, Serjts., on the part of the defendant, after some consultation whether they should take issue on the allegation in the challenge, or should demur to it, elected to demur, contending, on the authority of *Bro. Abr.* 263, b. pl. 18., that the sheriff's return was not traversable on this ground; observing also, that there were numerous instances in which a sheriff was enjoined to return *legales milites*, as for a knight of the shire; and in which, nevertheless, the person returned was not actually a knight: it was sufficient if he possessed as much land as amounted to a knight's fee.

Vaughan, and *Taddy*, contra, argued that if the sheriff's return could not be traversed in a case like the present; *neither could it, though he should return paupers instead of knights; nor even upon common juries, though he should return one who had lost his *liberam legem*, or a person of kin to one of the parties. As to qualification by possession of a knight's fee, it could not exist subsequently to the abolition of feudal tenures by the statute of *Car. 2.*

BEST, C. J. Notwithstanding the authority of Lord *Coke*, Co. Litt. 294, a, "that the four knights, electors of the grand assize, are not to be challenged," I am of opinion that they may be challenged on substantial grounds, and that Lord *Coke's* reason to the contrary, "for that in law they be judges to that purpose, and judges or justices cannot be challenged," must be deemed insufficient; for if the law were so, a sheriff who, by virtue of his office, selects jurors, must be deemed a judge, and the array could not be challenged, however improperly a sheriff might act. It is said in *Squire v. Reed*, Moor, 67, that challenge must be made upon the appearance of the knights, and before they are sworn. This shows they may be challenged, if the challenge be tendered in proper time. But I am decidedly of opinion, that upon the point now under consideration, the return of the sheriff is not traversable. Upon subjects of this sort we cannot expect the same authority as upon points that occur more frequently; we must be satisfied with such lights as the old books

afford; and the dictum in *Brooks' Abridgement* must be taken to be conclusive, not being opposed by any other case. There is no analogy between the cases of common juries and this case: as to common jurymen, the sheriff only returns that they are good men, without stating that they are freeholders, or whether they possess the other qualifications required by statute; and *396] "except in the present case, the law does not require a return of the description of the jurors. The writ which commands a sheriff to return a member for a county is in the same terms as the writ in this case. It is seldom that persons of the order of knights are returned for counties. There is not one knight sitting for any county in this parliament. No objection was ever yet made that lawful knights were not returned, and I am persuaded that the House of Commons would not permit any inquiry to be made on this subject, but would hold the return of the sheriff conclusive. It has been said at the bar, if the court will not allow the sheriff's return to be traversed, he might return paupers, or persons related to one of the litigant parties, under the description of knights. We should allow it to be pleaded that the persons were paupers or relatives of one of the parties in the cause, because such plea would raise questions important to the justice of the cause. Any material fact may be traversed, but I take it to be a general rule, that the court will not allow a traverse on a matter altogether unimportant. Such traverses would be inconsistent with the good sense on which special pleading is founded. When all persons who held a knight's fee, and who would not be a disgrace to knighthood, were forced to become knights, to secure the return of men of sufficient knowledge and independence, it was necessary to require the qualification of knighthood for those who formed, as well as for those who chose the grand assize. Although persons that possessed a knight's fee were called "chevalier," *Selden, Titles of Hon.* 707, there are many authorities to show, that unless they were knights, they could not serve on the trial of a writ of right. But the putting an end to that abuse of prerogative so degrading to *397] royalty of compelling men to be knights, and the "abolition of the tenure by knight's service, 16 Car. 1, 20: 12 Car. 2, 24, have so altered the state of society, that it would now be difficult to find in any county knights sufficient to form a grand assize. If knights sufficient could be found, I believe no one would prefer a grand assize composed of them to one of untitled landed gentlemen. I think, therefore, we may safely act on the authority of the case cited, and hold the sheriff's return conclusive.

The rest of the court having delivered opinions to the same effect, the demurrer was allowed. The gentlemen returned as knights were sworn, and retired to elect the grand assize; they returned in about half an hour, when the list of those chosen was read, and the cause adjourned.

SAME v. SAME.

Trial at bar;—what circumstances insufficient to support an application for.

VAUGHAN, Serjt., next moved for a trial at bar in this case, on an affidavit of the tenant's attorney, which stated, that the property claimed in the action consisted of three-fourths of a certain piece or parcel of land situate in the parish of *Kelved*, in the county of *York*, near the *Spurn* point of the river *Humber*, with all rights, members, and appurtenances belonging thereto. And also three-fourth parts of certain light-houses erected and being on the

said land: and that the revenues, profits, and duties arising from and payable in respect of such light-houses were of very great annual value, three-fourth parts thereof being to the *amount of upwards of six thousand pounds [*398 by the year: that several acts of parliament had been passed relating to the said light-houses, and the said revenues, profits, and duties, and that several difficult questions were likely to arise upon the construction of the said acts of parliament, or some of them. That the said three-fourths of the said piece or parcel of land, and the said light-houses erected thereupon, were claimed by the defendant in this case as alleged heir of *John Angell*, Esq., late of *Stockwell*, in the county of *Surrey*, who died in the year one thousand seven hundred and eighty-four, and that the said *John Angell*, the alleged ancestor of the defendant, left a will, bearing date the twenty-first day of *September* one thousand seven hundred and seventy-four, and also several codicils; and that the said will and codicils were drawn and expressed in an involved and intricate style and manner, and in very ambiguous words, referring to certain pedigrees of the testator's family of great length, obscurity, and antiquity, and containing numerous bequests, devises, and limitations, and thereby giving rise to numerous doubts and difficulties both as to the legal import of many of the clauses and limitations of the said will, and also as to the persons therein designated and intended to be described. That shortly after the said testator's death, the opinions of several eminent counsel were taken as to the effect and construction of the said will, which persons did not agree, but all stated that great difficulties existed; which difficulties were likely to arise in the course of the trial of the action, as deponent had been informed and believed. That the said testator did not leave any near relations, and that it was necessary to go through long and intricate pedigrees, involving many difficult questions of law and fact, as deponent had been informed and believed, in order to ascertain who was the heir at law of the said testator. That the greater part of the *witnesses for the tenant resided in *London*, and in other places much nearer to *Westminster* than to *York*, [*399 and deponent verily believed, that a claim of so complicated a nature must give rise to much difficulty and doubt, and would require to be discussed with the greatest learning, both from its intrinsic difficulties and the importance of the right which it was brought forward to substantiate."

A rule *nisi* having been granted,

Bosanquet, Serjt., who showed cause, contended, that there was nothing in this affidavit to warrant the application for a trial at bar; and that such a trial might as well be demanded in every special jury case, as upon such grounds as were now adduced. He cited *Crofts d. Dalby v. Wells*, And. 271, *Rex v. Caernarthen*, *Sayer*. 79, *Holmes v. Brown*, Doug. 437, *Lord Rivers v. Pratt*, 1 B. & B. 265, to show that a trial at bar was never granted except in cases of unusual difficulty, and he referred to *Tidd*, 718, where it appeared that a trial at bar had been refused upon the very title now in dispute.

Vaughan and *Taddy*, Serjt., in support of the rule, insisted that the great value of property in dispute, the length and probable difficulty of the case, were the usual grounds on which trials at bar were granted. In *Lord Rivers v. Pratt*, there had been one trial at Nisi Prius before the application for a trial at bar; but the present case, in addition to other grounds for consideration, involved rights of the crown.

BEST, C. J. I think no sufficient ground has been laid for this application. When we consider the *inconvenience and difficulty of bringing twenty-four jurors from *Yorkshire*, the accidents to which they might be liable, [*400 and the possibility of the cause being postponed for want of a sufficient attendance, an absolute necessity ought to be made out before we yield to the application. No such necessity has been made out here. Causes of much greater importance in point of value have often been tried at Nisi Prius; and with respect to the difficulties, they should have been presented to us specif-

cally, in order to enable us to determine whether a judge at nisi prius could be equal to meet them or not. The nature of the doubts on the acts of parliament has not been stated, nor has the will referred to been presented for our consideration, and as for the rights of the crown, they will not be affected by the verdict in this cause.

The case which has been referred to in *Tidd*, and which appears to have arisen on the will now in question, is expressly in point. The difficulties upon that occasion must have been the same as upon the present, and unless the court was then wrong, we must refuse the present application.

The rest of the court concurred, and the rule was

Discharged.



*4017

***SMITH v. FLOWER.**

Plaintiff prescribed for a right of sole pasture "from the feast of St. Thomas until the 18th of April," and proved the exercise of the right between those periods: Held, on motion to set aside a nonsuit, that it was not necessary to allege the right in the pleadings from *Old St. Thomas's day*.

In replevin for taking cattle, the plaintiff by his pleas prescribed for the right of sole feeding and depasturing a close of pasture land called *Prior's Wood Close*, "from the feast of St. Thomas until the 18th of April yearly, and every year."

At the trial before *Gaselee*, J., at the last *Somerset* assizes, the plaintiff produced deeds, (the earliest of which was of the date of 1763,) in which deeds the right was described as commencing on *St. Thomas's day*, and ending on the 18th of *April*; several witnesses proved the exercise of the right between those periods; and that the cattle had been turned in on *St. Thomas's day*, and taken off on the 18th of *April*; but there was conflicting testimony as to the day of turning in.

Gazelee, J., being of opinion that the right proved commenced from *Old St. Thomas's day*, directed a nonsuit, with leave for the plaintiff to move to set it aside, and enter a verdict for himself, if the court should be of opinion that the *St. Thomas's day* mentioned on the record could be intended to mean *Old St. Thomas's day*.

Taddy, Serjt., having obtained a rule *nisi* to that effect,

Wilde, Serjt., showed cause. The *St. Thomas's day* mentioned on the record must mean the present statutable *St. Thomas's day*, and not that day which was *St. Thomas's day* before the alteration of the style by 24 G. 2. c. 23. s. 2. But the prescription, implying an immemorial right, must refer to the *Old St. Thomas's day*. The day, therefore, mentioned on the record for

*the commencement of the pasture is not consistent with the immemorial right alleged and proved, and the nonsuit must be sustained. This record, in case of a verdict, would be evidence of a right commencing on the 21st of December, but not on Old St. Thomas's day. A contract for a sale by the bushel, means by the statutable bushel; and if any other were proved to have been agreed on, such evidence would be a variance from the statement of the contract. *Hockin v. Cook* 4 T. R. 314. In *Doe d. Spicer v. Lee*, 11 East, 312, it was holden, that a lease from Michaelmas must be taken to mean New Michaelmas; and unless the prescription which has been alleged entitles the court to imply that St. Thomas's day must mean Old St. Thomas's day, the allegation has not been supported. Where a tenant entered at Michaelmas Old Style, a notice to quit at Michaelmas generally has been

holden sufficient, *Doe d. Hind v. Vince*, 2 Camp. 256; but there the notice has reference to the entry.

Tuldy. The plaintiff does not allege a right extending over a greater number of days than he would have alleged if this case had arisen before the statute for altering the style; and though that statute altered the time of year on which those days should fall, it did not alter the appellation or enumeration of the days; so that if it was correct to say before the statute that the plaintiff's right commenced on *St. Thomas's day*, and ended the 18th of *April*, it was equally correct to say so after the statute; and though the party entitled to the right might be bound in his exercise of it to observe the new distribution of time, he was authorized to describe it by the old denominations. It is not necessary upon the record to state the alteration effected by statute, *and which the public tribunals are obliged to recognize judicially.

By express agreement, the new or the old division of time may be [*403] observed; but, if nothing appears to the contrary, the old denominations must be taken to apply to the old division, though the exercise of rights which accrued under that division may be continued according to the new.

Best, C. J. The plaintiff claims a right of common of sole pasture from *St. Thomas's day* to the 18th of *April*; and that claim he supports by a prescription which supposes a grant of ancient date. Undoubtedly in a deed made subsequently to the alteration of the style, *St. Thomas's day* would signify the day appointed for the celebration of the feast of *St. Thomas* by the statute; but, for the same reason, the parties who speak of the *St. Thomas's day* in an ancient grant must mean the day on which the feast was celebrated at the time of the grant. If they must mean that, in speaking of the grant, so must they in speaking of the prescription; and the difficulty with regard to the 18th of *April* is to be solved in the same manner. This will not alter the rights of the parties, because they are expressly provided for by the 5th section of the statute. The right, therefore, has been well described on the record, and the rule must be made absolute.

Park, J., expressed a similar opinion.

Burrough, J. The prescription is alleged from time whereof the memory of man is not to the contrary: he who pleads such a prescription could only mean to speak of the old division of time; and though he pleads after the alteration of the style, he must in speaking of such a prescription mean the same distribution of time as existed before. Every allegation [*404] of this sort must be taken according to its legal effect; and the legal effect of an ancient prescription implies the ancient division of time.

Gaselee, J., considered the case as attended with some doubt and difficulty, but thought the safer course would be to hold the pleading sufficient.

Rule absolute.



WYNDOWE v. The Bishop of CARLISLE and FLETCHER.

Costs not allowed in *quare impedit*.

Quare impedit, in which the defendant *Fletcher* obtained judgment as in case of a nonsuit, last term.

The prothonotary having refused to tax the costs, on the ground that none were allowed in *quare impedit*,

Cross, Serjt., moved for a rule to show cause why he should not be directed to tax the defendant's costs.

He urged, that by 14 G. 2. c. 17. costs are given to defendants upon judgment as in case of nonsuit, in all cases where they would upon nonsuit be entitled to the same; that by 4 Jac. 1. c. 3. defendants are entitled to costs on a nonsuit, in all cases where the plaintiff or demandant might have costs in case judgment should be given for him; and he contended, that a plaintiff was entitled to costs in *quare impedit*. In *Pilfold's* case, 10 Rep. 116, indeed, it was holden, that where damages were newly given by a statute subsequent to the statute of *Gloucester*, the plaintiff should only recover the damages given and no costs; and in *quare impedit* damages were for the first time given by the statute of *Westminster*. But Lord Coke himself contradicts the rule laid down in *Pilfold's* case. In 2 Inst. 289, he says, "That the statute of *Gloucester* extends to give costs where damages are given to any demandant or plaintiff in any action by any statute made afterwards." The rule in *Pilford's* case has also been narrowed by several modern decisions, from which it may be collected, that the plaintiff is entitled to costs in all cases where single damages are given by statute to the party grieved, though the statute may be subsequent to that of *Gloucester*, and though costs are not particularly mentioned in it.

*405] In *Witton v. Hill*, 2 Wils. 91, Willes, C. J., seemed strongly inclined to overrule *Pilfold's* case; and in *Greethem v. The hundred of Theale*, 3 Burr. 1723. *Cresswell v. Houghton*, 6 T. R. 355, *Tyte v. Glode*, 7 T. R. 267, and *Jackson v. The Inhabitants of Calesworth*, 1 T. R. 71. the court decided, that the statute of *Gloucester* extends to give costs to the party injured, where no damages were recoverable, either before or by that statute, but have been created by a subsequent one, and which subsequent one gives damages without mentioning costs.

Thrale v. Bishop of London, 1 H. Bl. 530, is, indeed, opposed to these decisions; but *Jackson v. The Inhabitants of Calesworth* was not brought to the notice of the Court of Common Pleas in the argument on that case; nor was the passage in 2 Inst. 289, distinctly adverted to. The statute of *Gloucester* is a remedial act, and ought to have a favorable interpretation.

*406] *Best, C. J.* This question has been decided, on much consideration, in *Thrale v. Bishop of London*, and in *Pilfold's* case; and whatever may be our opinion on the merits of the case, we are bound by those decisions. The decisions turn on the general principle, that no damages are given on the recovery of a spiritual right; and where no damages are given there is no claim for costs. In the cases to which we have been referred damages were allowable; but in *quare impedit*, the plaintiff can only recover a penalty,—two years amount of the value of the living.

Whether or not the statute of *Gloucester* gives costs in cases in which damages are given by a subsequent statute we need not decide, for no subsequent statute gives damages in *quare impedit*.

The rest of the court held themselves bound by the former decisions, and the rule was

Refused.

SNOW et al., v. PEACOCK et al.

The defendants, bankers in a small town, gave notes of their own to a stranger, of whom they asked no questions, in exchange for a 500*l.* Bank of *England* note: Held, that the plaintiffs, from whom the 500*l.* note had been stolen, and who had duly advertised their loss, might recover the note of the defendants.

'TROVER for a 500*l.* Bank of *England* note. The facts of the case as made out on the trial before *Best, C. J.*, *London* sittings after *Michaelmas* term last, were as follows:

In September, 1824, the plaintiffs, bankers in *London*, received from one of their customers a dividend warrant for the receipt of 1379*l.*, the amount of which they were to place to his credit. The next day they delivered it to a confidential porter of the house, who received at the Bank of *England* in exchange for it various notes, and among them the note in question. Of this note he was robbed on his return home. Complaint was *immediately [407] made at *Bow Street*; handbills and placards published; application was made to the bank to stop payment if the note should be offered there; and its number, date, and amount, were advertised in the *Hue and Cry*, a paper circulated by the Secretary of State for the Home Department to announce the perpetration of offences.

On the 24th of April, 1825, the note was presented at the Bank of *England*, and stopped. It was then traced to the defendants, who kept a bank at *Bourne*, a very small town in *Lincolnshire*, being a branch of another bank at *Sleaford*.

The note had been presented at the bank at *Bourne*, on the 13th of April, by a respectable looking man, who two hours before had arrived in the *London* mail. The defendant's clerk, without asking any questions of this person, of whom he knew nothing, or learning any thing more about him than that he said his name was *Edwards*, after refusing to give him Bank of *England* notes, gave him 500*l.* worth of the defendant's notes, in exchange for the note in question, which was that day forwarded to the defendant's correspondent in *London*, and placed to their credit. The clerk said it was the usual course of the defendant's business to exchange notes in that way; but in the course of eleven years, during which he had been the defendant's clerk, he had never before changed a 500*l.*, a 300*l.*, or a 200*l.* note. He had never seen the *Hue and Cry*; had no suspicion that the note had been stolen; and stated that there were at that time many fairs in the neighborhood, at which it would be more convenient to negotiate the defendant's notes than a 500*l.* Bank of *England* note.

Evidence was received of the caution observed by the Bank of *England*, and *London* bankers, in the exchange of large notes; and the Chief Justice, left it to *the jury to determine, as well whether the plaintiff had acted [408] with due diligence in circulating intelligence of the robbery, as whether the defendants had exercised sufficient caution, and had observed the usual course of business, in exchanging the note.

The jury found a verdict for the plaintiffs; but added, that not the slightest suspicion attached to the motives of the defendants.

Wilde, Serjt., having obtained a rule *nisi* for a new trial, on the ground that the Chief Justice, ought to have left the case to the jury as a question purely of *bona fides* or *malu fides*, in which the exercise of caution formed only one of several ingredients.

Vaughan, and *Bosanquet*, Serjts., now showed cause. Where a loss must fall on one of two innocent persons, it has always been holden that it shall fall on him who has omitted to proceed with the ordinary caution which is required and exercised in the course of his business. This is the principle to be deduced from all the cases, *Miller v. Race*, 1 Burr. 452, *Grant v. Vaughan*, 3 Burr. 1516, *Peacock v. Rhodes*, Doug. 633, *Down v. Halling*, 4 B. & C. 330, [which have in effect overruled *Lawson v. Weston*, 4 Esp. 56,] and is expressly pointed out and relied on by *Bayley*, J., in *Gill v. Cubitt*, 3 B. & C. 466, where he reviews all the former decisions. The defendant's clerk did not proceed with the caution which the course of his business required, or which a man of ordinary prudence would have exhibited; when in a small town he gave his own notes in exchange for a 500*l.* bank of *England* note, without making any inquiry, although he had never exchanged so large a note before; the jury, therefore, was properly directed. The case of *Solomons v. The Bank of England*, 13 East, 135, is in point, [*409]

and shows, that where the due caution has not been observed, it is immaterial whether the party receives a bill of exchange or a bank note payable on demand. In *Solomons v. The Bank of England*, the court decided that the loss should fall upon the plaintiff's principals, because they had taken of a stranger, without inquiry, a 500*l.* bank note in a foreign country, where notes of such an amount were seldom seen. In *Down v. Halling*, the same principle was applied to a banker's check, and it would apply equally to current coin, if the current coin could be identified.

Wilde, and *Spankie Serjis.*, in support of the rule. Where a loss must fall upon one of two innocent persons, *potior est conditio possidentis*, provided he has acted with good faith. Want of caution is only one of many circumstances from which, taken together, an intention to act dishonestly may be inferred; and even admitting that there might have been a want of caution on the part of the defendants, the jury have found that it was not accompanied with bad faith, and the defendants having given value for the note, the chief, if not the only question that ought to have been left to the jury was, whether they had acted with *bona fides* in doing so. But the defendants acted with sufficient caution; for it would cripple the circulation of the country if the same caution were required in the transfer of bank notes as is required in the transfer of bills of exchange: conduct which may be deemed cautious in the transfer of a bank note might be esteemed grossly negligent in the transfer of a bill of exchange; and as to the course of business, there is no peculiar course which can be predicated of the transfer *of bank notes or money. They stand on the same footing, *Wookey v. Pole*, 4 B. & A. 1. In *King v. Misson*, 2 Camp. 5, Lord *Ellenborough*, held, that a public-house keeper might without suspicion or risk take a 50*l.* bank note, and give change in payment for a glass of brandy.

In *Lawson v. Weston*, Lord *Kenyon*, held it sufficient for a person who had discounted a bill of exchange to show that he had paid value for it: to require more would paralyse, he said, the paper circulation, and with it the commerce of the country. The principle of that decision applies with double force to bank notes, which are equivalent to cash, and must apply to such notes, even though it be doubted as to bills of exchange. In *Peacock v. Rhodes*, too, Lord *Mansfield*, says, "The question of *mala fides* was for the consideration of the jury;" and perhaps the opinions of dead, and, as it were, canonised judges may, upon some points, be received with more respect than the decisions of their successors. To consider the question as any other than one of *mala fides* will introduce great uncertainty.

BEST, C. J. One who has lost a note payable to the bearer of it ought immediately to give notice of his loss to the public in such a manner as is most likely to prevent innocent persons from taking it. If after such notice be given, a person takes that note from a stranger without making such inquiries as prudence would suggest to any one acquainted with the business of the world should be made, the owner of the note may recover the value of it from him. Although the loss of the note has not been duly advertised, yet if it has been received under circumstances that induce a belief that the receiver knew that the holder had become possessed of it dishonestly, the true owner is entitled to recover its value from the receiver. The negligence of the owner is no excuse for the dishonesty of the receiver. But the negligence of the one may be an excuse for the negligence of the other, and might authorise him to defend himself on the maxim that has been referred to at the bar, *potior est conditio possidentis*. The receiver might say, "If you had given notice of your loss, my attention would have been awakened, and I should not have given money for this note." I thought there was not the slightest ground for suspecting in this case any dishonest motive in the clerk of the defendants, and the defendants themselves knew nothing of the transaction. An excessive anxiety to get his employers' notes into

*411] true owner is entitled to recover its value from the receiver. The negligence of the owner is no excuse for the dishonesty of the receiver. But the negligence of the one may be an excuse for the negligence of the other, and might authorise him to defend himself on the maxim that has been referred to at the bar, *potior est conditio possidentis*. The receiver might say, "If you had given notice of your loss, my attention would have been awakened, and I should not have given money for this note." I thought there was not the slightest ground for suspecting in this case any dishonest motive in the clerk of the defendants, and the defendants themselves knew nothing of the transaction. An excessive anxiety to get his employers' notes into

circulation, prevented him from using due caution in inquiring respecting a perfect stranger for whom he discounted a much larger bill than in the course of eleven years' service he had ever before received from any one. I left it to the jury to say, whether they thought the plaintiff's had done all that it was proper for them to do to make the loss of the bill known to the world, and if they had, whether the defendants' clerk had used due caution at the time he took this bill. A new trial has been moved for, on the ground that the only question that should have been left to the jury was, whether the defendants took the bill *bona fide*, and that want of caution on their part was only to be received as evidence of *mala fides*. It has been argued, that if we raise any other question in cases of this sort we shall occasion great uncertainty. Whether this uncertainty is from our decision clashing with those of our predecessors, or that by extending the inquiry to other matters beside the integrity of the parties, we shall embrace topics on which no satisfactory judgment can be formed, has not been explained to us. Take the argument either way, there is no foundation for it: *judges have not been in the habit of getting at what they conceived to be justice in a particular case by deciding contrary to former decisions. They know this would introduce the uncertainty which those who are ignorant of the law suppose to exist: men who have knowledge sufficient to perceive how difficult it is to apply the principles established by old cases to all the complicated and continually varying transactions of the world, must be surprised that there is not much more uncertainty. The direction that I gave to the jury is supported by the concurrent authority of all the decisions in Bank. The inquiry, whether proper diligence has been used will not be too extensive or too difficult for a jury of merchants or a special jury in the country. Negotiable bills and notes, although originally created for commercial purposes, are now become the common circulating medium in all dealings. Every man's daily experience will teach him what degree of caution should be used, and what inquiries should be made before a bill or note to a large amount be taken. It has been said that bank bills are money. They have never been so considered either by lawyers or political economists; on the contrary, they are said to be things exchangeable for money. As far as respects this cause there is no difference between a bank bill and a bill of exchange payable to a particular person, and by him indorsed in blank: both are payable to bearer. Bank notes form a principal part of our circulating medium, and it would be injurious to commerce to do any thing that should have the effect of checking their free circulation. When this case was presented to me on the sudden at Nisi Prius, I felt alarmed at the difficulty of laying down a safe rule on a subject of so much importance. I thought, however, and told the jury in my summing up, that it could not impede the circulation of bank notes to require every man that dealt with them to use that proper *degree of caution and circumspection which his own interest would require him to use in all the occurrences of life, whilst the neglect of such caution could not fail to encourage the robbery of coaches, and the stealing of notes by clerks and servants. I have, since the trial, often considered this case, and am satisfied that the rule laid down by me tends rather to promote than check the circulation of negotiable notes. Money can seldom be identified. The identity of notes can easily be proved. Thieves were on that account for a long time afraid to touch them; and because persons usually carried notes with them on their journeys, highway robberies were seldom committed. The contrivances lately put in practice for getting rid of stolen notes, and the careless manner in which they have been taken, have encouraged the stealing of them. My rule will check this carelessness, and defeat the contrivances of the agents of thieves. Surely that which renders the possession of the owners more secure cannot operate as a check on the circulation of bank notes. The notes will still be taken, not on the credit for solvency of the person from whom they are received, but of

the parties to them. No other caution is required than that which is necessary to ascertain that a man who tenders a bank note of large value to a person to whom he is an utter stranger is not likely to be a thief or the agent of thieves. Should the receiver be deceived after he has made reasonable inquiry, he will be protected by the negotiability of the instrument he has taken. To require this degree of caution will increase the value of bank notes by rendering their possession more secure to the owners, and thereby giving them an advantage over gold and silver in domestic dealings.

The right to retain stolen bank notes against the owner is a right founded on the policy of increasing their circulation rather than justice. This policy [414] cannot be carried further than to protect such takers of notes as in taking them have used due diligence.

Negotiable instruments, although now generally used, were originally the creatures of commerce. By the principles of commercial law they must be governed, and that law requires, in all transactions, good faith and due diligence.

I will now consider the cases that are to be found in our books on this subject. In *Grant v. Vaughan*, Mr. Justice *Wilmot* says, "If there was negligence on one side and none on the other, that would turn the scale." Now here there is no negligence on the part of the plaintiffs, but there was great negligence on the part of the clerk of the defendants. The permitting such negligence would be, as Lord C. J. *Abbott* said, like putting up a board, "Notes taken, and no questions asked if you will take our notes in return." In *Miller v. Race*, Lord *Mansfield*, referring to a case decided by Lord *Holt*, said, that where the instrument was a small note, and taken in the usual course of business, the plaintiff was entitled to recover; but if it had been a 1000 $\text{l}.$, if it had not been in the usual course of trade, he would have no right to sue. In *Peacock v. Rhodes*, *Grant v. Vaughan*, and *Solomons v. The Bank of England*, the inquiries were, whether the bills were taken in the usual course of trade, or whether that degree of caution which the usual course of trade prescribes had been used. I admit that in many, if not in all of those cases, it was also put to the jury whether the transaction was *bona fide*, but the circumstances of the case called for such an inquiry. It seems to be admitted that the doctrine laid down in *Gill v. Cubitt* goes the whole length of establishing my directions to the jury, although Lord Chief Justice *Abbott* did not put the question to the jury in that case, precisely in the way in which I put it; [415] but the difference arose from the difference in the circumstances of the two cases. His Lordship's judgment in the King's Bench completely supports the principle on which I proceeded in the present case.

Speaking of the case of *Lawson v. Weston*, he says, he thinks that that case has led to mischief, and has facilitated fraud: he further says, "It appears to me to be for the interest of commerce that no person should take a security of this kind from another without using *reasonable caution*;"—that was the question I left to the jury.—"If he took the security from a person whom he knew, and whom he could find out, no complaint could be made of him; but if it is to be laid down as the law of the land, that a person may take a security of this kind from a person of whom he knows nothing, and of whom he makes no inquiry, it appears to me that such a decision would be more injurious to commerce than convenient for it."

He further says, "It seems to me it is a great encouragement to fraud, and it is the duty of the court to lay down such rules as tend to prevent fraud and robbery, and not give encouragement to it." I entirely subscribe to this, and I think it is our duty to put it as a question of caution. If we do that, we shall establish a principle in the law which cannot fail to have the effect of giving protection to this species of property.

Mr. Justice *Holroyd* said, "If he takes it with a view to profit arising from interest or commission, under circumstances affording reasonable ground of

suspicion, without inquiring whether the party of whom he took it came by it honestly, or if he takes it merely because it is drawn upon a good acceptor, he takes it at a risk." In the case of *Down v. Halling* the question was left to the jury exactly as I left it, and the court never doubted the propriety of the Chief Justice's direction.

*PARK, J. We should be overturning all the decisions of the courts, [^{*416} *Miller v. Race*, *Grant v. Vaughan*, *Peacock v. Rhodes*, *Gill v. Cubitt*, and *Down v. Halling*,—if we were to make this rule absolute. The decision which the court comes to on this occasion is perfectly consistent with every one of those cases. *Miller v. Race* was a case that could excite no suspicion: an inn-keeper, in the ordinary course of his business, having a guest who stayed for a considerable time, was presented with a bill or note for 21*l.* 10*s.*; but there is something which shows what Lord Mansfield's opinion would have been in a case like this: he says, "If it had been a note for 1000*l.*, it might have been suspicious, but this was a small note for 21*l.* 10*s.* only, and money was given in exchange for it." And in *Grant v. Vaughan* Mr. Justice Wilmot says, "He made enquiry about it, and then gave change." Though the inquiry might not be very important, yet that circumstance weighed with him in the decision he came to. In *Peacock v. Rhodes*, the main question was, whether the case was properly left to the jury, and the words *bona fides* are not used in the course of that argument of Lord Mansfield: the question of *mala fides*, he says, "was for the consideration of the jury: the circumstance that the buyer, and also the drawers, were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration; but they have considered them, and found that it was received in the course of trade, and therefore the case is clear." And in *Peacock v. Rhodes* it will be recollect, that though the plaintiff was not acquainted with the defendants, yet it was proved that before that time he had frequently received bills drawn by them in the course of their trade, and those bills had been duly paid. Here was the usual course of dealing. The case of *Solomons v. The Bank of England* it is impossible to distinguish from the present. But in *Lawson v. Weston*, I think Lord Kenyon [^{*417} is decidedly wrong: he lays down a principle contrary to *Miller v. Race*, and he does not feel that the amount of the bill is of any importance at all. Now, whether the bill is for 1000*l.* or 500*l.* or 50*l.* makes all the difference in each case. Lord Ellenborough indeed held at Nisi Prius, that a public-house keeper selling gin and brandy to his customer, and taking a 50*l.* note, was not an object of suspicion. I think it impossible to support that decision. But in *Solomons v. The Bank of England*, the reasoning of Lord Kenyon is extremely different from the opinion he expressed in *Lawson v. Weston*. He says, "When the plaintiffs were informed of the circumstances, and were applied to in order to give information of the person from whom they received the bill, they refused to give a satisfactory account of it. Under these circumstances it is impossible to say that there was not some suspicion thrown upon them of their being privy to the fraud, and that was all I told the jury, to whom I was about to leave the question of fact for their decision."

I entirely concur with my Lord Chief Justice in his mode of putting the question in the present case. The court in *Gill v. Cubitt* held the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man.

It has been said no course of trade has been proved here; but the clerk proved, that for the eleven years he had lived at Bourne he never knew of his employers taking a bill of this sort; how then could this bill be taken in the usual course of their business? Under these circumstances, it seems to me that we should be bringing the law into uncertainty by a decision on the present occasion different from that of *Gill v. Cubitt*.

*BURROUGH, J. I do not feel myself at liberty to be silent in this case, which is one of the most important that can come before the court. Without meaning to reflect on the defendants, I am clearly of opinion that this note has been received under circumstances, which, if they were justifiable, would tend very much to encourage the receipt of stolen goods.

What ought to have been the conduct of these gentlemen, and what has been their conduct? It has been this: A note of extraordinary amount has been presented to them at their banking-house for change; they ask not a single question; the only account they get from the party is, that his name is *Edwards*. What ought their conduct to have been? They should have asked the holder where he came from, and how he came by the note; four or five questions would have excited suspicion, which would have prevented their taking it, and it would have put a stop to this; then their duty would possibly have been to have detained the man: the probability is, he was a receiver of stolen goods. Questions of that sort would have been most important for the purpose of giving evidence against him in the event of trial afterwards. But are parties to be entirely silent when their duty to the public requires them to be active and to exert themselves; or are they to avoid asking questions, because such questions may prevent them from obtaining a note which would give them the benefit of negotiating notes of their own to the amount of 500*l.*? There was their own personal benefit on one side, and their duty to the public on the other; and they have not pursued a course tending to protect the public from frauds of this kind. I need go no further than to say, they have acted without due care. The case of *Solomons v. The Bank of England* is so much like this, that it is impossible to distinguish it. I have a note I took *419] *was stolen from *Batson & Co.* The plaintiff received it from *Hymen and Hendricks*, who were Jews at *Middleburgh*: the note was of an amount that was not of ordinary currency. The plaintiff, who was the agent of *Hendricks & Co.*, came to the Bank of *England* to ask if the note was good, and told all the circumstances. He produced the letter enclosing the note; said he had received it as the agent of *Hymen and Hendricks*, and had accepted bills for the amount. In consequence of what passed, he wrote to his correspondents at *Middleburgh* to ascertain how they came by the note: they answered, they had received it from a man in an olive-coloured coat. How like that is to this case, where the defendants never asked who or what the holder was.

Lord *Kenyon* told the jury he did not think *Hymen & Co.* had properly accounted for the possession of the note, and he manifested an opinion unfavorable to the plaintiff, upon which the counsel chose to be nonsuited. Lord *Kenyon* said, "The house at *Middleburgh* ought to have given some account how they came by the note. Notes of this amount not being ordinarily current there, if they received it contrary to conscience they ought not to recover it. The bank had a right to say, Show us that you hold this note properly; that is the point; not *mala fides*." Mr. Justice *Buller* says, "I consider the plaintiff as the agent of *Hendricks & Co.*, and the plaintiff's title is incomplete. The defendants prove that the bill is improperly obtained; the plaintiff has notice of it: if it was not stolen, but honestly obtained, they should show it, but they give no account of it at all: it is impossible they should not know of whom they had it. It would be otherwise if it were a 10*l.* note." The defendants in the present case should have made proper inquiries, and no doubt they would have found out who this man, calling himself *420] *Edwards*, was. At the last *Kingston* assizes I tried a man for putting off stolen notes, and it was proved that this *Edwards* accompanied him from *Shire-lane*. [*Bosanquet, Serjt., Edwards* is now in *Lancaster jail*.] I am satisfied his description would have been found in the *Hue and Cry* at that time, for no man was better known to the police.

I am clearly of opinion the verdict ought to stand, as agreeable both to law and justice.

GASELEE, J. I agree with the court that this case was properly left to the jury on the question, whether due diligence or due caution had been used, without its being necessary to go further, and prove that there had been *mala fides*. I think that, independent of every decision, this case may be determined on principle. The principle of the law of *England* is, that no person who acquires property by felony can communicate a title, to that property to another: there is an exception to that rule for the convenience of commerce, as to things sold in market overt; and it has been said that a person who possesses cash or bank notes, notwithstanding they have been stolen, has a *prima facie* property in them; but, on the other hand, it is incumbent on him that he shall at last (if not in the first instance,) if anything occurs to impeach his title, show how he has conducted himself with respect to the property, and the mode by which it came into his possession. The moment anything occurs to show that he has not used due caution, the onus of proof is changed, and is thrown on him to show that the party from whom he received the property had such a title as he could lawfully convey. The jury have found here that the defendants did not use due caution and diligence.

It has been urged, that inquiry would have produced no effect, because the holder would have told a plausible story calculated to deceive the bankers: but the *inquiries need not have been confined to the holder himself: [*421] the man was a perfect stranger: he came to *Bourne*, where he had never been seen or heard of before. Suppose they had inquired how long he had been in the town; at what inn he had put up, and in what manner he came. Suppose, on going to the inn, they had found that he came outside of a coach; that the very moment he got down, his first act was to go to the bank with a note for 500/. Should not that have induced the bankers to have paused before they parted with their money to a man coming under such suspicious circumstances? I am of opinion, therefore, that the direction of the learned judge to the jury was perfectly right in point of law; and I cannot see any ground of imputation on the verdict of the jury.

Rule discharged.

MARTIN et al., Assignees of a Bankrupt, v. NIGHTINGALE.

A. was a horse-dealer and livery-stable keeper: after his death his widow carried on the business of the livery-stable, and bought horses to let, which she occasionally sold to customers: Held, per Abbott, C. J., at Nisi Prius, a sufficient trading to support a commission of bankrupt against the widow.

THIS was an action by the assignees of a bankrupt. At the last Cambridge assizes, the plaintiffs, to prove the trading of a bankrupt, called a witness, who stated, that at the time of the bankruptcy she was a widow; that her husband had carried on the business of a livery stable keeper and horse dealer, and that she had succeeded in the business of the livery stables, but had never taken out a horse dealer's license. Another witness stated, that he had often bought horses for her; *that they were bought for the purpose of letting, but that she occasionally sold one if a customer desired it. [*422] Abbott, C. J., who tried the cause, held this to be sufficient evidence of a trading; and the defendant's counsel having acquiesced in his opinion, the

point of the trading was not left to the jury, and a verdict was found for the plaintiff.

Wilde, Serjt., obtained a rule *nisi* for a new trial, on the ground that the trading of the bankrupt had not been sufficiently established.

Vaughan, Serjt., who showed cause, contended that the horses, though bought for the purpose of being let, were always ready to be sold, and that a livery stable keeper must also gain a living by buying and selling corn.

Wilde, Serjt. The horses were bought only for the purpose of letting ; and there is no instance in which a purchase and sale, made ancillary to a business which is not itself a trading, has been helden to constitute a sufficient trading to support a commission of bankrupt. *Patten v. Brown*, 7 Taunt. 409.

The court took time to consider, and afterwards said, they thought there was sufficient evidence of trading to go to the jury ; and as the question had by consent been withdrawn from the consideration of the jury, and left to the judge, they would not send the cause down again.

Rule discharged.

*423]

*WALCOTT, Vouchee.

Where the vouchee became insane between the time of executing the warrant of attorney and the passing of the recovery, the court refused to pass the recovery.

When the vouchee executed the warrant of attorney, he was sane, but before the passing of the recovery his intellects became impaired.

Onslow, Serjt., upon an affidavit of the vouchee's sanity at the time of executing the warrant of attorney, moved that the recovery might pass, and referred to *Selwyn v. Selwyn*, 2 Burr. 1131 ; but

The court refused the application ; observing, that if the vouchee had been restored to reason he might have revoked the warrant of attorney before the passing of the recovery, and *Onslow*

Took nothing.

BERRY v. JENKINS.

The attorney for the plaintiff having put in bail for the defendant, and having acted on both sides, deluding the parties and preventing an interview, the court on the motion of *Wilde*, Serjt., set aside the proceedings, and made the attorney pay the costs.

*424]

*CLARK v. JOHNSON et al.

Held, upon motion for a new trial, that the mother of an illegitimate child might recover, in an action for money had and received, money deposited with a parish officer to meet any charges to which the parish might be liable in respect of the child.

This was an action for money had and received, brought by the mother of

a bastard child, against the overseers of *Osgodby*, in *Yorkshire*, to recover 60*l.* which upon the birth of the child had been deposited with them in the year 1818, on her account, to meet any charges which might accrue in respect of the child. The money, with the consent of all parties, was placed in a bank at *Scarborough*; a receipt was given by the bankers to Mrs. *Clark* (the plaintiff) and the overseers for the time being, of the township of *Osgodby*; and interest to the amount of 2*l.* 14*s.* per annum was received by the plaintiff till 1821, when the bankers became bankrupt. The defendant *Johnston* proved under the commission, and received a dividend of 5*s.* in the pound.

The child, who was still living, had never become chargeable, nor had the mother been taken before any magistrate.

At the trial at the last *York assizes*, *Hayley*, J., thought that the child being still in existence, there was a continuing liability, and he directed a nonsuit, with liberty to the plaintiff to move to set it aside and have a new trial.

Vaughan, Serjt., having accordingly obtained a rule *nisi* to this effect, on the ground that the payment of a gross sum to overseers for the support of an illegitimate child is illegal, as giving the overseers an interest in the death of the child, *Cole v. Gower*, 6 East, 110.

**Wilde*, Serjt., showed cause. The money paid to the overseers [425 was not paid in the way of discharge, but as a prospective indemnity; and though it would be illegal to take unconditionally a gross sum in discharge of the putative father's liability, the statute requiring the interposition of a magistrate, and the security of a bond for the weekly maintenance of the child, 18 Eliz. c. 3, s. 2., 6 G. 2, c. 31., 49 G. 3, c. 68, s. 3., 54 G. 3, r. 170, yet there can be objection to taking a sum conditionally to meet contingent charges; an arrangement which excludes the overseers from any interest in the death of the child. The power compelling the putative father to provide for the child was given by statute, for the security of parishes; and that which a party may be compelled to give he may be allowed to give voluntarily. Besides, the plaintiff, by receiving interest, recognized the validity of the transaction. The payment of interest to the mother shows that the overseers did not take the money unconditionally, or as a discharge; and if they might take a week or a fortnight's expenses in advance, they might equally take a larger sum on the same conditions. The taking the present sum would not have prevented them from demanding more, if the expense of maintenance had amounted to more; and whatever they received they were bound to account for to the parish; *Rex v. Martin*, 2 Camp. 268. In *Cole v. Gower*, and *Townson v. Wilson*, 1 Camp. 396, the money was taken absolutely in discharge of the putative father's liability.

Vaughan, Serjt. The money was taken unlawfully, the statutes having interposed the authority of a magistrate to prevent the mother or putative father from being imposed on, and the parish from being burdened. *Besides which, the object for which this money was paid must be presumed to have been attained, for the parish failed to show that they had incurred any charges, though seven years had elapsed since the birth of the child.

Cur. adv. vult.

Best, C. J., now delivered the judgment of the court, and, after stating the circumstances of the case, proceeded,

We are of opinion that the money for which this action was brought was illegally obtained from the plaintiff; and although to avoid a disclosure which would have brought disgrace on her, she permitted it for a long time to remain in the hands of the bankers, and received interest on it, we do not think these circumstances can make a transaction lawful which was originally unlawful. There is no law that gives parish officers any authority to require a sum of

money from the parents of an illegitimate child, either for the future maintenance of such child, or to be deposited as a security for indemnifying a parish against the charge of maintaining it. The statutes that have provided for the maintenance of bastards are 18 *Eliz.* c. 3., 7 *Jac.* 1, c. 4., and 6 *G.* 2, c. 31. By these statutes, if a woman shall be delivered of a bastard child that is *likely to become chargeable to any parish*, or shall declare herself to be with child, and that such child is likely to be born a bastard, and to become chargeable to any parish, a *magistrate may require the person charged on the oath of the mother with being the father of the child to pay a weekly sum for its maintenance, together with any previous expenses that have been incurred, and to give security to indemnify the parish*. The authority to protect the parish is not given to parish officers but to magistrates. The *427] magistrates are not empowered to "demand or accept a sum of money for security. But it may be said, May not the mother consent to deposit a sum of money with the officers rather than be exposed herself, and expose the father of the child, by going before magistrates? I think the law cannot permit such a compromise. It has been decided by the Court of King's Bench, that officers must not receive a specific sum, on condition of discharging the parents from all further liability. This is founded on a principle of policy, namely, that the paying sums of money for the maintenance of illegitimate children makes it the interest of the parish officers that the children should die, and prevents the officers from paying that attention to the children that humanity requires. The present case is not open to that objection; but the interest of parish officers in the death of a child so left to them, is but as inhabitants of the parish, to the whole of which parish, and not to the officers only, the advantage would accrue, from getting rid of the charge of its maintenance. This interest of the parish officers that the children should die is by no means the most weighty objection to allowing a departure from the mode of indemnifying parishes prescribed by law. The other objections apply to the present case as strongly as to the case in the King's Bench. Cases certainly sometimes occur in which it would be desirable to avoid publicity, and in which there would be no objection to allow officers to take *security* from the parents of illegitimate children, without going before magistrates. Such securities can never be used but for the purpose of indemnifying the parish; but the permitting deposits of money opens the door to extortion and fraud. The transaction supposes the necessity of secrecy; the vestry cannot know what bargain their officers have made. Parents whose situations require such secrecy will submit to any terms that parish officers may *428] think proper to dictate. "The parish officers may get the deposits into their own hands. In that case the parish would have no security from the deposit, nor the parents against being called on to maintain the child, if the officers misapply the money deposited. It cannot be safe to allow the persons who usually hold the situations of parish officers to have in their hands the sums that might be obtained in large parishes as deposits towards the security for the maintenance of bastard children. If the money be disposed of as it has been in this case, it is subject to the loss that has happened from the stoppage of the banks in which it is lodged; and although it be deposited in the joint names of the parents and officers, in the event of the deaths of the parents, the officers or surviving officer may possess themselves of it. How long is the money to remain deposited? If as long as there is a possibility of the child's becoming chargeable, that may be as long as it lives. As the child is likely to survive its parents, they have little chance of ever seeing their money again; although they have maintained, educated, and established their child in the world. We think, therefore, that the permitting such deposits to be required is inconsistent both with the letter and spirit of the laws relative to the maintenance of bastards, and that the plaintiff

had a right to disaffirm the bargain she had made with the defendants, and to recover back the money she has paid. The nonsuit must, therefore, be set aside, and a new trial granted.

Rule absolute.

*WILKINSON v. TATTERSAL.

[*429]

An affidavit that the cause of action arose in *Lancashire*, and not elsewhere, having been answered by an affidavit that it arose on a contract for the purchase of five hundred bags of cotton, to be shipped at *Trieste*, and delivered at *Liverpool*, the court refused to remove the venue from *London* to *Liverpool*.

The defendant, on an affidavit that the cause of action, if any, arose in the county of *Lancaster*, and not elsewhere, had obtained a rule *nisi* to change the venue from *London* to *Lancashire*.

Taddy, Serjt., showed cause, upon an affidavit that the action was brought upon a contract entered into for the purchase of five hundred bags of *Egyptian* cotton, to be shipped at *Trieste*, out of the county of *Lancaster*, and to be delivered at *Liverpool*. Also, that two material witnesses resided in *London*.

On the authority of *Neale v. Neville*, 6 *Taunt.* 565, where the practice as to changing *venues* was much considered, he contended that this affidavit was a sufficient answer to the application.

Rosanquet, Serjt., in support of his rule, urged that the evidence necessary to support the action, and the right to bring the action, were very distinguishable from the cause of action. (Per *Heath*, J., in *Clarke v. Head*, 1 N. R. 310.) That the shipping at *Trieste*, might satisfy an undertaking to give material evidence out of the county of *Lancaster*; but that the contract and cause of action, namely, the undertaking to deliver the goods at *Liverpool*, arose in *Lancashire*, and not elsewhere. But even if it should be deemed to have arisen only partly in and partly out of *Lancashire*, the court would not discharge the rule for changing the *venue*. *Henshaw v. Rutley*, 1 N. R. 110.

**Best*, C. J. The affidavit that the cause of action in this case arose in *Lancashire*, and not elsewhere, turns out to be incorrect. The point in dispute has been once carefully considered and decided; and in matters of practice particularly, where a point has been once decided, the court should abide by the decision. The case of *Neale v. Neville*, has determined this question; and the defendant's rule must be

Discharged.

BLEASBY, et al., Assignees of BYERS, a Bankrupt, v. CROSSLEY, et al.

Where a petitioning creditor's debt was created by his giving the bankrupt a check on the petitioning creditor's banker: Held, that to establish the debt, the payment of the check must be proved. That it was not sufficient (especially where the bankrupt's papers came to the hand of the petitioning creditor) to show the check to have come to his hands again, and that his bankers, the day after the date of the check, paid on his account to the bankrupt's bankers a sum corresponding with the amount in the check.

A VERDICT having been found for the plaintiffs at the trial of this cause, London sittings, after *Michaelmas* term last,

Wilde, Serjt., obtained a rule *nisi* to enter a nonsuit instead, or have a new trial, on the ground, among other objections, that the plaintiffs had not proved a sufficient petitioning creditor's debt to establish the bankruptcy of *Byers*.

The evidence at the trial as to this point was as follows:

Smith, the petitioning creditor, proved that *Byers*, came to borrow of him 100*l.*; that he lent him a check for that sum, drawn on his, the petitioning creditor's bankers, *Pole & Co.* This check, which was crossed in the hand-writing of *Byers*, with the names of *Sykes, Snaith, & Co.*, who were [431] proved to be *Byers's* bankers, was in the possession of the petitioning creditor, and produced by him at the trial, with a cross marked on it; which cross, however, was unexplained. The bankrupt's papers had also, it appeared, fallen into his possession at the time of the bankruptcy. A clerk of *Sykes & Co.* proved, that 100*l.* was received from *Pole & Co.* on *Byers's* account the day after the check was drawn; and a clerk of *Pole & Co.* proved, that that amount was that day paid by them on account of the petitioning creditor. These clerks could only verify the entries to the above effect in the bankers' books, but were unable to recollect the identical check.

Vaughan and Cross, Serjts., who showed cause against the rule, contended, that here was sufficient evidence for the jury to presume a loan of 100*l.* from the petitioning creditor to *Byers*, especially as the check had come back to the hands of the lender.

BEST, C. J. I am sorry that this objection must prevail against the justice of the cause, but no evidence has been given which will justify the jury in presuming the existence of the petitioning creditor's debt. All that distinctly appears towards raising such a presumption is the delivery of a check by *Smith* to *Byers*; for the mere circumstance of its coming back to the hands of *Smith* is not evidence that it has been paid, especially when there is no proof that it was ever in the hands of *Byers's* bankers; and when it is considered that *Byers's* papers fell into the hands of *Smith*, the clerk who paid the check ought to have been called.

The rest of the court concurring, the rule was made

Absolute.

*YRISARRI v. CLEMENT.

1. The defendant having published imputations against the plaintiff as envoy of the state of *Chili*, and the plaintiff in a declaration for libel having stated as matter of inducement, that he was *envoy* of that state: Held, upon motion for a new trial, that the admission of these two facts upon the face of the alleged libel was sufficient proof of them to enable the plaintiff to sustain his action.
2. An action of libel does not lie for any thing written against a party touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter independent of the illegal transaction, though arising out of it, an action lies.
3. Held, that the following passage, "The plaintiff lost no time in transferring himself, together with 200,000*l.* sterling of *Jake Bull's* money, to *Paris*, where he now out-tops princes in his style of living," did not impute to the plaintiff having committed a fraud on the *English* nation.

This was an action for a libel. After the usual allegation of the plaintiff's good character, the first count of the declaration proceeded,—

"And whereas, also, before the time of the committing the grievances by said defendant in this count and the four next following counts mentioned, the said plaintiff had been, and was appointed by certain persons exercising the powers or authority of government in a certain republic or state in parts beyond the seas, to wit, in the republic or state of *Chili*, in *South America*, to the

office or station of *envoy extraordinary* and minister plenipotentiary from the said republic or state of *Chili*, to and at the courts of *Europe*, and amongst others to the court of this United Kingdom, to wit, &c.

" And whereas before the time of the committing the grievances by said defendant in this count and the four next following counts mentioned, the said plaintiff had been and was authorized, empowered, and directed by said persons exercising the powers or authority of government in the said republic or state of *Chili*, in *South America*, to negotiate a loan or loans for the service of said republic or state of *Chili*, to wit, at, &c.

" And whereas, also, before the committing of the grievances by said defendant in this count and in the four next following counts mentioned, to wit, on the *1st of *January*, A.D., 1820, the said plaintiff had come to and arrived in this country, and had become and was resident therein, to [**433] wit, at *London* aforesaid, in the parish and ward aforesaid :

" And whereas, also, before the committing of the grievances by defendant in this count and in the four next following counts mentioned, to wit, on the 1st of *July* 1822, the said plaintiff, by virtue and in exercise of the said power and authority conferred on him by the said persons exercising the powers or authority of government in the said republic or state of *Chili*, in *South America*, had entered into, made, and concluded, for and on the part of said republic or state of *Chili*, a contract with certain persons, to wit, *John Hullett* and *Charles Widder*, carrying on trade and commerce in the city of *London* by and under the style and firm of *Hullett, Brothers & Co.*, for raising a certain loan of money, to wit, a loan for 1,000,000/- sterling money of this kingdom, for the service of said republic or state of *Chili*, by the sale of certain bonds or obligations, to wit, bonds or obligations of and on the part of the government of the said republic or state of *Chili*, which said bonds or obligations had been and were signed by said plaintiff as *envoy extraordinary* and minister plenipotentiary for the said republic or state of *Chili*, and by virtue and in exercise of the said power and authority conferred on him for that purpose as aforesaid, and had been and were issued by him the said plaintiff to the said Messrs. *Hullett, Brothers, & Co.*, and had been and were sold and disposed of by and through the agency of them the said Messrs. *Hullett, Brothers, & Co.*, to divers subjects of this kingdom, as the buyers and purchasers thereof, to wit, at *London* aforesaid, in the parish and ward aforesaid :

" And whereas, also, before the time of the committing of the grievances by the said defendant in this count, and the four next following counts mentioned, *one *John Hullett*, being one of the partners in the said house or firm of Messrs. *Hullett, Brothers, & Co.*, had been and was appointed by [**434] certain persons exercising the powers or authority of government in a certain other republic or state in parts beyond the seas, near or neighboring to the before-mentioned republic or state of *Chili*, in *South America*, that is to say, in the republic or state of *Buenos Ayres*, in *South America*, consul-general for the said republic or state of *Buenos Ayres*, in and towards this United Kingdom, to wit, at *London* aforesaid, in the parish and ward aforesaid :—yet the said defendant well knowing all and singular the premises aforesaid, but contriving and maliciously intending wrongfully and unjustly to hurt, injure, and prejudice, and damnify the said plaintiff in his said good name, fame, credit, and reputation, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors and other good and worthy subjects of this kingdom, and cause it to be suspected and believed by those neighbors and subjects that he had been and was guilty of fraud, and otherwise to hurt, injure, prejudice, and damnify him, heretofore, to wit, on, &c., at, &c., did falsely and maliciously print and publish, and cause and procure to be printed and published of and concerning the said plaintiff, and of and concerning the matters aforesaid, a certain false, scandalous, malicious, and defamatory libel in a cer-

tain public newspaper, commonly called or known by the name of the "*Morning Chronicle*," in the form of a letter purporting to be written to the editor thereof, containing therein, amongst other things, the false, scandalous, malicious, and defamatory matter following, of and concerning the said plaintiff, and of and concerning the matters aforesaid, that is to say, "I (meaning the person purporting to be the writer of said letter) would ask another question not irrelevant on the *present occasion."

*435] why did the appointment of consul-general (meaning the said appointment of consul-general for the said republic or state of *Buenos Ayres*, in *South America*,) to *England* fall on the person alluded to? (meaning the said *John Hullett*.) It would not surely be owing to any approbation of his (meaning the said *John Hullett's*) conduct in meddling with the affairs of a neighboring state (meaning the said republic or state of *Chili*, in *South America*), which state (meaning the said republic or state of *Chili*,) without being in want of money, or even asking for it, this *London* agent (meaning the said *John Hullett*,) saddles with a debt of one million of pounds, taken out of *English* pockets, for the benefit in reality of himself (meaning the said *John Hullett*,) and the *Creole Spaniard* (meaning the said plaintiff,) who acted the part of plenipotentiary to the Stock Exchange in that drama (meaning and insinuating thereby that the said plaintiff colluding with the said *John Hullett* to obtain money fraudulently in the matter of the said loan for one million of pounds for the service of the said republic or state of *Chili*, in *South America*, had defrauded the *English* subjects of this kingdom.) The latter worthy (meaning the said plaintiff,) lost no time in transferring himself, together with his hundred thousand pounds sterling of *John Bull's* money to *Paris* (meaning and intending thereby that the said plaintiff had fraudulently obtained two hundred thousand pounds sterling of the money of the *English* subjects of our sovereign lord the king, and had fled from this country with the same,) where he (meaning the said plaintiff,) now out-tops princes in his (meaning the said plaintiff's) style of living. This notorious transaction, that will occupy a prominent place in the annals of stock-jobbing fraud (meaning and insinuating thereby that said plaintiff had colluded with the said *John Hullett* in the matter of the said loan raised for the said republic or state of

*436] *Chili*, in *South America*, and had defrauded certain *English* subjects of this kingdom,) ought to have warned official men of the *South American* state, alluded to in Mr. Canning's speech, against trusting the management of their affairs in *England* to the same hands; but they have determined otherwise, and here are the consequences of their acting in contempt of public opinion. I (meaning the said person purporting to be the writer of the said letter,) write this not for the *English* readers of the *Chronicle*, but for the *South Americans*; they will not be at a loss to supply the names here omitted."

The four following counts set out the same libel, averring that the defendant had falsely and maliciously published it of and concerning the plaintiff and the matters aforesaid, and the various innuendoes to the words "the latter worthy lost no time in transferring himself together with 200,000*l.* sterling of *John Bull's* money to *Paris*, where he now out-tops princes in his style of living," were,

That the plaintiff in the matter of the said loan for the republic or state of *Chili*, had defrauded *English* subjects of 200,000*l.* sterling:

That he had acted fraudulently in the matter of the loan raised for the republic or state of *Chili*:

That he had fraudulently obtained 200,000*l.* from *English* subjects:

That he had committed a fraud.

The sixth, seventh, eighth, and last counts contained no allusion to the introductory matter of the first count, and merely set out the above words, with the following innuendoes:

That the plaintiff had fraudulently obtained 200,000*l.* of the money of English subjects, and had fled therewith out of the kingdom:

That he had left this country with 200,000*l.* fraudulently obtained from English subjects:

*That he had defrauded English subjects of 200,000*l.*

That he had committed a fraud.

[*437]

At the trial before *Best*, C. J., London sittings, after *Michaelmas* term, the plaintiff proved the seal of the government of *Chili*, as also that that country consisted of three provinces, two and a half of which were under the authority of the director *Don Bernardo O'Higgins*, who, with the other members of the government, made and enforced the laws. The remaining half province was in the hands of the old *Spaniards*. The plaintiff's appointment as envoy to all the courts of *Europe*, was then put in, signed by the director, as well as an authority to raise money for state purposes. A deed executed at *Paris*, and deposited in the Bank of *England*, was next put in, by which the revenues of *Chili*, were charged with the payment of the loan to be raised by the plaintiff, and a bond, by which it appeared that some payments had been made.

Evidence was also given of the independence of *Buenos Ayres*, and of the seal of that country attached to the appointment of *John Hullett*, as consul. The loan raised was to the nominal amount of one million, for which it appeared that the plaintiff had only received 675,000*l.*

After proof of the publication by defendant, it was objected on his part, that the plaintiff had failed to prove the allegation in the declaration, that *Chili* and *Buenos Ayres*, were states; the present governments of those countries not having been recognized by the government of this. Upon which the Lord Chief Justice observed, that there were three sorts of foreign states; first, states that were merely acknowledged as sovereign independent states; secondly, states in connection, or such as were connected with us by existing treaties; thirdly, sovereign states neither in connection with us nor acknowledged by our government, such as *Japan*, *Siam*, and many other states which conquest and commerce have made us acquainted with. [*438] In cases relative to the two first-mentioned states, it is only necessary to prove that our government has acknowledged them or treated them as sovereign independent states. In many cases it would be unnecessary even to adduce this proof, for the great states of the world are taken notice of in acts of Parliament made for confirming treaties and regulating the intercourse with them, and of such states the courts of law take judicial notice. The existence of unacknowledged states must be proved by evidence. The proof necessary to establish the fact of the existence of such states is, that they are associations formed for mutual defence, who acknowledge no other authority but that of their own government, observes the rules of justice to the subjects of other states, live generally under their own laws, and maintain their independence by their own force. It makes no difference that the new state formed part of another acknowledged state; states may be legitimately divided. The states of *Holland* and *America*, were treated as sovereign states by the nations of *Europe*, before their independence was acknowledged by *Spain* and *Great Britain*. The considering separated portions of an ancient state as new and independent states, does not legalize the conduct of *British* subjects, who assist them in the contest with their old governments, such governments being in alliance with *Great Britain*. His Lordship, however, reserved the point for the consideration of the court.

It was then objected, that the raising of loans for a state at war with a state which was in friendly relation with the government of this country, was an illegal transaction, and that the defendant was not responsible for any thing said of the plaintiff touching his conduct in the illegal transaction. The Chief Justice, however, overruled the objection, thinking the plaintiff had

*439] been attacked in his private character independently of the *political transaction, and a verdict was found for him on the whole declaration, with 400*l.* damages.

Taddy, Serjt., on the two objections above stated, obtained a rule *nisi* for a nonsuit or a new trial; and for an arrest of judgment, on the ground that the *innuendo* in the eighth count was more extensive than the words would bear. It might be said innocently of any person, that he set off to *Paris* with 200,000*l.* of *John Bull's* money: and if that count were bad, the verdict in a case for libel having been taken in all the counts, could not be entered up on a single one, *Holt v. Scholfield*, 6 T. R. 691. [The objection that *Chili* could not be considered as a state until recognized as such by the government of this country, and that unless it were so recognized, the plaintiff could not in a *British* court, allege his mission as envoy, or his authority to raise a loan, was urged at great length and with great learning by *Taddy*, and *Spankie, Serjts*, for the defendant; but as the court came to no decision on the subject, holding, that for the purposes of this action the defendant had sufficiently admitted those points in the libel itself, it is unnecessary to report the argument.]

The objection, that the plaintiff having been engaged in an illegal transaction, could not recover damages for any thing said of his conduct in that transaction, which was sustained chiefly on the authority of *Hunt v. Bell*, 1 Bingh. 1, was answered by the assertion, that the libel contained imputations on the plaintiff, on topics *dehors* the illegal transaction; his alleged absconding to *Paris*, with the money raised having nothing to do with the illegality of raising it.

BEST, C. J. A motion has been made in this case for a nonsuit or a new trial, and the ground stated for the *first is, that the declaration has *440] alleged there is such a state as *Chili*; that the plaintiff has been appointed minister plenipotentiary from that state to this country; that there is such a state as *Buenos Ayres*; that Mr. *Hullett*, has been appointed consul general for that state; and that there has been no proof of these allegations. I decided at the trial, that the existence of those states was proved, and I have now the satisfaction to state, that all my learned brothers fully concur with me, in thinking there is no foundation for the objection which has been raised on this head. The statement in the declaration was mere inducement, and it is sufficient if what is so stated has been admitted by the defendant on the face of the libel itself. On the face of this libel the defendant admits that there are such states as *Chili* and *Buenos Ayres*; and it was proved at the trial, that the plaintiff had been appointed minister plenipotentiary for the first, and Mr. *Hullett*, consul-general for the second. It appears to us all, that the allegations are made out.

The second objection was, that the plaintiff could not recover, as the loan which he came to negotiate was illegal, and the plaintiff, it was said, could maintain no action arising out of a transaction which was itself contrary to law.

The case of *Hunt v. Bell*, I most fully agree to, and if I then had the honor of a seat in this court, I should have decided in the same manner, for I think that where a man complains of a libel written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaints; but it appeared to me at the trial, and my opinion is now confirmed by that of my learned brothers on the bench, that if a man is guilty of an illegal transaction, fraud *ultra* that transaction is not on that account to be imputed to him; or, in other words, if a man is guilty of borrowing money in a manner which the law has *forbidden, he is not, *441] therefore, to be charged with committing a fraud upon the *English* nation.

Another point was made at the trial, which point I did not save for the con-

sideration of the court, and therefore, no nonsuit can be entered. I thought the libel imputed to the plaintiff the having committed a fraud upon the *English* nation. On re-considering the imputations in this libel, and the *innuendoes* in the declaration, I am of opinion the libel imputes to the plaintiff no fraud whatever upon the *English*. It is a rule of law essential to the liberty of the press, that in all actions for libel every part of the paper must be read, in order to collect its meaning. On reading this libel over for that purpose, I think that the plaintiff is charged with defrauding the people of *Chili*, and not, as is alleged in the *innuendoes*, with defrauding the people of *England*.

His Lordship here read the libel in proof of his opinion, and when he came to the passage, "I write this not for the *English* readers of the *Chronicle*, but for the people of *South America*," he observed, this is most important to show the meaning and object of the libel. The insinuation is, that you (the plaintiff) have raised a loan which the people of *Chili* do not want, and have applied it to your own private purposes, and that insinuation means, that the fraud is committed upon the people of *Chili*, and not on the people of *England*. If I lend a man money, that money may be said to be taken out of my pocket, but if the agent who receives it from me for the borrower, spends it instead of delivering it over to the borrower, he does not cheat me, but the borrower. I am at present of opinion, that the *innuendo*, "meaning thereby that the said plaintiff had cheated *John Bull*," is not made out, since that is not really the meaning of the passage.

As this distinction was not attended to at the trial, it is fit it should go down again.

*Mr. Serjt. *Vaughan*, submitted that this was an entirely new point, [442] and that counsel should have been permitted to be heard upon it.

The Lord Chief Justice, and Mr. Justice PARK, however, were of opinion, that if the judge who tried the cause was satisfied that sufficient attention had not been paid to an important part of the case, and the court agreed with him in that opinion, the cause must go down to another trial. The court was not finally deciding, but putting the case in a state for further enquiry.

Rule absolute for a new trial.



RULE OF COURT.

Hilary Term, 6th & 7th G. 4.

IT IS ORDERED, That all prisoners who have been or shall be in custody of the warden of His Majesty's prison of the *Fleet*, for the space of six months after they are supersedeable, although not superseded, shall be from time to time discharged out of the custody of the said warden, by the said warden, as to all such actions in which they have been or shall be supersedeable; and that no prisoner shall be entitled to any room in the said prison by reason of seniority, except from the time of his being charged in the actions in which he is not supersedeable.

By the court.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
EASTER TERM,
IN THE
SEVENTH YEAR OF THE REIGN OF GEORGE IV., 1826.

REDPATH v. WILLIAMS.

Sending process by the post in a letter which the defendant refuses to receive, is not good service, although the refusal may have been wilful, and accompanied with a long avoidance of service.

The defendant having avoided the service of a writ of *capias ad respondendum*, by causing her servant to say that she was ill, or not at home; the plaintiff's attorney having learned from her counsel that she proposed to persevere in avoiding the service, enclosed a copy of the writ in a letter, and put it into the post, where he found it afterwards remaining, the defendant when it was offered her by the postman having refused to take it in.

He then filed an affidavit of these facts, entered an appearance under the statute, and signed interlocutory judgment.

*⁴⁴⁴Wilde, Serjt., obtained a rule nisi to set aside this judgment for irregularity, against which rule

Peake, Serjt. showed cause on the authority of *Aldred v. Hicks*, 5 Taunt. 186, where it was holden, that if any person who has corresponded on the subject of an action, wilfully refuse to receive process inclosed in a letter by

the post, it shall be deemed good service, though he never read the letter; but

The court held the service insufficient, and made the rule absolute, though without costs, as they thought the attorney might have been misled by the case cited.

Rule absolute.

BECKWITH v. CORRAL et al.

In an action by the owner of a lost bill of exchange against a banker who had cashed it to a stranger: Held, that the jury were properly directed to consider whether the plaintiff had used due diligence in apprising the public of his loss, and whether the defendant had acted with good faith and sufficient caution in the receipt of the bill.

TROVER for bills of exchange. At the trial before *Best*, C. J., London settings after *Hilary* term last, it appeared that the plaintiff had on the 23d of December, 1825, been robbed of his pocket book, containing a bill dated November 21st, 1825, drawn by bankers at *Canterbury*, to the order of Mr. *H. Meredith*, upon *Remington & Co.*, bankers, *Lombard Street*, payable thirty days after sight, indorsed by *Meredith* and accepted by *Remingtons*.

On the 26th of December the plaintiff advertised the loss of his pocket book, but said nothing of the lost bill. "On the 30th he gave *Remingtons* notice of it, and requested them to stop the bill. In the advertisement, [*445] he stated that the contents of the pocket book were of no use to any but the owner.

The defendants were bankers at *Maidstone*. The bill was presented to their clerk on the 29th of December, by two young men who were strangers to him. One of them said he was the son of the indorser; and the amount of the bill was thereupon paid in notes of the defendant's bank.

The Chief Justice left it to the jury to consider whether the plaintiff had used due diligence in apprising the public of his loss, and whether the defendants had acted with good faith and sufficient caution in the receipt of the bill.

The jury having found a verdict for the defendants,

Wilde, Serjt., moved for a new trial, on the ground that the jury had been misdirected.

He argued that the defendant's title to retain the bill must depend wholly on the question whether or not they had acted with caution and good faith. The utmost negligence on the part of the plaintiff would not entitle them to retain the bill, if they had conducted themselves incautiously or with bad faith. But according to the manner in which the question had been left to the jury, they might have found a verdict against the plaintiff on the ground that he had not used sufficient diligence, although they might at the same time have been satisfied that the defendants had acted incautiously: and it did not appear upon which ground the verdict was actually given; but

The court thought that the plaintiff was bound to give notice of his loss as extensively as possible. That so far from having done so in the present instance, he "had rather misled than assisted parties to whom the stolen notes might be offered, by stating that the contents of the pocket book [*446] were of no use to any but the owner; they therefore rejected the application, and *Wilde*

Took nothing.

ODDIE, Defendant; FOSTER, Tenant; Earl of PLYMOUTH, Vouches

Recovery. Amendment.

A PART of the premises named in the deed to lead the uses had been omitted in the copy of the *præcipe* which precedes the warrant of attorney.

Bosanquet, Serjt., moved to amend by inserting the words omitted. But the court said they could not apply the warrant of attorney to premises not named in the *præcipe*, and refused the amendment.

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TOOTH v. BAGWELL.

This was a trial at bar of a writ of right; the *demi mark* having been tendered,

Vaughan, Serjt., on the part of the tenant contended, that the defendant ought to begin by showing the *seisin* of his ancestor. In *Tyssen v. Clark*, 3 Wils. 541, it did not appear that the *demi mark* had been tendered; but

*The court held that the tenant must begin. *Burrough*, J., referred [447] to a cause of *Luke v. Harris*, tried at *Exeter*, and *Gaselee*, to *Galton v. Harvey*, tried at *Dorchester*, in which this point had been expressly determined.

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JARVIS v. DEAN.

Persons had for some years been in the habits of passing up and down a new unpaved and unfinished street, which terminated in fields, where other houses were built. A jury having found a dedication to the public, the court refused to grant a new trial, which was moved for on the ground that this was not sufficient evidence of a dedication.

The plaintiff declared in case, to recover damages for an injury, occasioned by his falling one dark night into an area, which the declaration alleged the defendant wrongfully and negligently to have left open, at a house which he possessed in the parish of *Islington*, and in, near to, and adjoining a certain street called *Barnsbury Row*, which street at that time was and still is "a common public street and highway for all the liege subjects of our Lord the King, to go, return, pass, and repass on foot every year, and at all times of the year, at their free will and pleasure."

At the *Middlesex* sittings in this term before *Best*, C. J., the plaintiff proved the injury as alleged in the declaration. It appeared, however, that the area in question belonged to one of two unfinished houses, standing in a new street leading from *White Conduit Street* to some fields, in which, also, there were houses; the street was neither paved nor lighted. The inhabitants had paid highway rates and paving rates. The road through this street communicated with a public road which passed over fields to *Highgate*, and had been used as a public road for four or five years.

It was objected, on behalf of the defendant, that the street being neither paved nor lighted, and leading only *to the fields, a dedication to the public could not be presumed, so as to justify the allegation in the declaration that it was a common public highway. [448]

The Chief Justice told the jury, that if they thought the street had been used for years as a public thoroughfare, with the assent of the owners of the soil, they might presume a dedication. A verdict having been found for the plaintiff,

Vaughan, Serjt., moved for a new trial, on the ground above stated. He cited *Roberts v. Karr*, 1 Camp. 262, where it was holden there could be no partial dedication to the public; and if it appeared there had been no dedication as a carriage way, a public right to a footway could not be acquired.

BEST, C. J. I left the dedication as a question of fact for the jury. This had been a public thoroughfare for many years, and it did not appear that what had been done was done by the authority of the lessors of the houses only, without the acquiescence of the owner of the soil; and I therefore told the jury they might presume it was used with the assent of the owners of the soil. In *Wood v. Veal*, 5 B. & A. 454, the road was only used by the tenants of particular houses. There was no thoroughfare, and there were circumstances to show that the owners of the soil never had assented to the way being used as a public road. There were no such facts in the present case; on the contrary it was beneficial to their property that there should be a public approach to this street from the public roads at both ends of it. As it had been used for four or five years as a public road, the jury were warranted in presuming that it was used with the full assent of the owners of the soil. The jury *were therefore justified in the verdict they gave, and there [449] is no pretence for the present motion.

The rest of the court concurred, and *Vaughan*

Took nothing.



(IN THE EXCHEQUER CHAMBER.)

TAYLOR v. J. WILLANS.

Averment in a declaration on the gaming act, that the party lost to the defendant by playing at *rouge et noir*:

Held, sufficient on error, without alleging the money to have been lost by playing with him. 2. The plaintiff having sued *quidem*, alleged the loss at the parish of St. James, in the county of Middlesex:

Held, sufficient in error, although in Middlesex there are the parishes of St. James Clerkenwell and St. James in the liberty of Westminster.

JOSEPH WILLANS, sued *Taylor* in debt, on the statute of Anne, "as well for the poor of the parish of St. James, in the county of Middlesex, as for himself;" and alleged, "that one *William Willans*, at the parish of St. James in the county of Middlesex, did at one and the same sitting, by playing at a certain game called *Rouge et Noir*, lose to the defendant a large sum of money, to wit (50l.), and did then and there pay the same to the said defendant."

The plaintiff below having recovered, and judgment having been given for him in the Court of King's Bench, the defendant below brought error into the Exchequer Chamber, and assigned as causes of error, that there are two parishes of St. James in Middlesex,—St. James Clerkenwell, and St. James

Westminster; and that it did not appear which was meant. Also, that it was not sufficiently averred that *William Willans* lost money to the defendant below at one and the same time, by playing with him, or that the defendant below played at all, "or betted on the sides of those who did play, so

*450] as to bring the case within the 9 Ann. c. 14, s. 2.

Brodrick for the defendant below. First, as a moiety of the penalty goes to the poor of the parish, it is essential that it should distinctly appear on the pleadings in what parish the offence was committed. But that does not appear on this declaration, if the court takes judicial notice that there are two parishes of *St. James* in the county of *Middlesex*; and it must be intended that such notice will be taken of the fact, when there are many public acts of parliament which recognise the parish of *St. James* in the liberty of *Westminster*, and others, such as 28 G. 3, c. 10., 30 G. 3, c. 64, which recognise *St. James Clerkenwell*.

Unless the court will take judicial notice of this fact, the money may never be obtained by either parish; for it would be no variance to describe either of them as *St. James*. In the cases in which parishes have been helden to be mis-described, the variance has usually consisted in a mis-statement of the name of the patron saint, as in *Wilson v. Gilbert*, 2 B. & P. 281, *Harris v. Cooke*, 8 Taunt. 539.

Secondly, the 9 Ann. c. 14, s. 2, enacts, "That from and after 1st of May 1711, any person or persons whatsoever who shall at any one time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons, so playing or betting, in the whole the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, the person or persons so losing, and paying and delivering the same, or any informer, may recover it by suit."

*451] Therefore, where *A.* plays with *B.*, and bets with, and loses on the bet to *C.*, the statute does not apply. And, for aught that appears on the declaration, such might have been the case in the present instance. Now, a party who sues on a statute must show clearly that his case falls within it. *Com. Dig. Action on Stat. A. 3. Pleader, C. 6.* It must appear that the party named was either playing with the defendant or betting on the game, and in such a case nothing can be presumed after verdict that is not expressly stated. *Lynhall v. Longbottom*, 2 Wils. 36, *Spieren v. Parker*, 1 T. R. 141, *Rushton v. Aspinall*, Doug. 679, *Bult v. Howard*, 4 B. & A, 655.

Patteson, contra, was stopped by the court on the first point: on the second he urged, that one party could not lose money to another by playing at cards, unless he played with him.

Per Curiam. The declaration is sufficient. It does not appear by any act of parliament, that there are two parishes of *St. James*, in *Middlesex*. It appears that there is a parish of *St. James Clerkenwell*, and another parish, sometimes called *St. James*, and sometimes *St. James* in the liberties of *Westminster*. Looking at the statutes, therefore, there is only one parish called *St. James*.

As to the second objection, it sufficiently appears that the party lost the money to the defendant by playing; and if lost to the defendant by playing, it must have been lost by playing with him, for if the party had betted with the defendant, he would have lost by betting, and not by playing.

Judgment affirmed.

*FORSTER, et al., v. LAWSON.

Persons in partnership as bankers may, without showing the proportion of their respective shares, join in an action for a libel against them in respect of their business.

CASE for libel. The declaration stated, that the plaintiffs at the time of the publishing of the libels were bankers in partnership together at Cambridge, and were in good and solvent circumstances, and had never stopped payment, nor, until the time of the publishing the libel, had been suspected to be in bad and insolvent circumstances, or to have stopped payment, but, until that time, were always in good credit: By means of which premises, the plaintiffs, before the publishing the libel, had acquired, and were then daily acquiring great gains and profits from their trade: Yet the defendants, contriving to injure the plaintiffs in their trade, and to cause it to be suspected and believed that the plaintiffs were in bad and insolvent circumstances, and that the plaintiffs as such bankers as aforesaid had stopped payment, and thereby, and otherwise, to injure the plaintiffs in their trade, falsely and maliciously published, and caused and procured to be published, in a certain public newspaper called "The Times," the following false, scandalous, malicious, and defamatory libel of and concerning the plaintiffs in their trade and business: (that is to say,) "Though the accounts from some parts of the country respecting the renewal of confidence in the local banks are favorable, yet the list of failures of such establishments, intelligence of which reached town yesterday, is of fearful extent. The following are the names of some of the sufferers. The Hinckley bank of Sanwome & Co., the bank of Jervis & Co. of the same place, being the only establishments in that town; the Southampton bank of Kellow & Co.; [*453] the Peterborough bank of Simpson & White; the Wisbeach bank of James Hill & Son; the Kingston (Surrey) bank, the only one in the town. At Cambridge, it is said, that four, out of the six, banks in that town have stopped payment, viz., that of Thomas Fisher & Son; that of J. Mortlock, Esq., & Sons; that of Horlock & Co.; and that of R. E. & R. Fosters:" (meaning the said plaintiffs in their said trade and business.) "The letters from Cambridge state that the graduates and heads of colleges, so far from adding to the alarm on this occasion, as is said to have been recently the case among the members of another learned body, interfered in the most prompt manner, and tendered their assistance in a very large sum, provided that by such means the evil could be averted; but the assistance was declined, because there was no prospect of its proving effectual."

And also the false, scandalous, malicious, defamatory, and libellous matter following of and concerning, amongst others, the plaintiffs in their trade and business; (that is to say,) "Since writing the above we understand that an express has arrived from Cambridge, with information that the whole of the banks in that place" (meaning, amongst others, the plaintiffs in their trade and business,) "have suspended their payments, the partners of the respective firms having met together, and mutually adopted a resolution to that effect, but intimating amongst their friends a hope the suspension would only be temporary."

By means of the publishing of which said several false, scandalous, malicious, and defamatory libels by the defendant of and concerning the plaintiffs in their trade and business as aforesaid, the plaintiffs not only have been and are greatly injured in their trade and business, and have been and are suspected and believed *to have been insolvent, and to have stopped payment, [*454] but, also, divers, to wit, ten thousand promissory notes made by the plaintiffs in the way of their trade and business for the payment by the plaintiffs of divers sums of money, amounting in the whole to a large sum, to wit

the sum of 20,000*l.*, which before, and at the time of, the publishing the said several libels were outstanding and in circulation, and which, but for the publishing of the said several libels would have remained and continued outstanding and in circulation, were presented to the plaintiffs for payment thereof, and the plaintiffs were called upon, forced, and obliged to, and did necessarily pay and satisfy to the respective holders of such notes the several sums of money in such notes respectively specified, whereby the plaintiffs not only lost, and were deprived of all the benefit and advantage which might and would have accrued to them from the said notes continuing outstanding and in circulation, but were put to great trouble and expense of their moneys, to wit, to an expense of 2000*l.*, and suffered and sustained great loss, to wit, a loss of 2000*l.*, in and about the raising and procuring sufficient money to pay and satisfy the said several notes, and thereby, and otherwise, by means of the premises, the plaintiffs have been, and are, greatly injured and damaged.

General demurrer and joinder.

Taddy, Serjt., in support of the demurrer. First, The language complained of is not actionable: the inducement of the declaration alleges that the plaintiffs have never been in insolvent circumstances, and have never stopped payment. But the defendant has nowhere alleged against their insolvency or stoppage; he only mentions suspension of payment, which is compatible with the highest degree of solvency and mercantile credit.

*Secondly, The plaintiffs cannot join in an action of tort, unless [455] they disclose a joint interest and joint damage: *Coryton v. Lithbye*, and *Serjt. Williams'* note thereto, 2 Wms. Saund. 116, a. But these bankers may each have had very different interests in the firm, and each may have been damaged in a very different degree. A recovery in this joint action would be no bar to a separate action by each of the partners, for his share in the alleged damage. *Cooke v. Batchelor*, 3 B. & P. 150, is the only case in which it has been holden that partners can sue for a libel on the conduct of a firm; and in that case it was abundantly manifest that the plaintiffs had sustained a joint damage: But,

Thirdly, Here it is not clear that the plaintiffs have sustained any damage; the allegation of special damage contains no averment that the plaintiff's notes were payable on demand, and when or to whom payable; and unless it appear that the plaintiffs were under a legal obligation to pay them, they cannot legally be said to have sustained damage by paying them.

BEST, C. J.. An objection has been made to the declaration in this case, namely, that the action has been brought by three persons jointly, and that they could not properly join in such an action.

The general rule of law is, as laid down in the case in *Croke*, Cro. Car. 513. *Smith v. Cooker*, namely, that where several persons are charged with being jointly concerned in a murder, each of them must bring his separate action for it, and the reason is, that they have no joint interest to be affected by the slander. Where, however, two persons have a joint interest affected by the slander, they may sue jointly; and the case of *Cooke v. Batchelor*, is not the first case which has determined this point.

In the note in *Saunders*, to which the court has been referred, the learned editor states, that two joint tenants *or co-parceners might join in an [456] action for slander of the title to their estate, and the form of the declaration in such an action is to be found in *Brownlow*.

This doctrine has also been recently considered and confirmed in the case of *Collins v. Barrett*, in which it was holden that two persons might bring a joint action for a maliciously holding them to bail, if the complaint in the declaration was confined to the expenses which they were jointly put to in procuring their liberty.

It has been said, that notwithstanding the judgment against the defendants

in this action, if either of the plaintiffs has sustained any separate damage, he may still maintain a separate action. I cannot see how there can be any separate damage. The business injured is the joint business, and the libel only affects the plaintiffs through their business. If, however, a copartnership be libelled, and the libel contains something which particularly affects the character of one of that firm, I think a joint action may be maintained against the libeller, who would have less reason to complain of such proceedings, than he would have if each partner brought a separate action for the injury done to the firm. Another objection raised by the defendant's counsel is, that the plaintiffs have not stated the proportion of interest which each respectively had in their joint business. It is not necessary for them to do so; with their several proportions the defendant has nothing to do. Any compensation they may recover will belong to them generally, and it is nothing to the defendant how it may be divided among them. It has also been urged that the words contained in the paragraph are not actionable. I have no hesitation in deciding, that to say of any bankers they have suspended payment, is actionable. For, what can be the meaning of such a statement, except that they are no longer solvent. Saying that a banker has suspended payment is saying that he cannot pay his debts. A temporary inability to pay debts is "insolvency." The charge of suspending payment is a charge of insolvency. Such a statement will instantly bring all the creditors of a banking-house upon it, and completely stop their business by preventing any one from taking their bills.

But here special damage is stated, and I think correctly stated.

It has been objected, that the special damage is not set out with sufficient certainty. Even if that were so, advantage could be taken of it only by a special demurral. In my opinion, however, the special damage is clearly and distinctly set out. The plaintiffs state that they had a number of promissory notes outstanding and in circulation, and that in consequence of these libels they were called upon and forced and obliged to pay those notes; how or when, was not material, it being sufficient that they declare that they have thereby lost all the benefit and advantage which would otherwise have accrued to them in their trade and business, from the notes remaining outstanding and in circulation.

The declaration goes even farther; it states, that the plaintiffs have suffered and sustained a great loss in raising and procuring sufficient money to pay and satisfy their several notes. It appears to me that the declaration is unobjectionable, and that the plaintiffs are entitled to judgment.

PARK, J. I fully concur in the judgment which has just been delivered.

I believe it to be clear law, that wherever slanderous words are spoken of partners in the way of their trade, they may maintain a joint action for them, though they do not state special damage. The case of *Cooke v. Bachelor*, is unimpeached and unimpeachable; but there are other cases of good authority, which also establish the doctrine there laid down.

*The objection that it does not appear whether or not the notes paid by the plaintiffs were due, is answered by the allegation that the plaintiffs were forced and obliged to pay them.

It is not necessary to decide the question, whether a verdict recovered against the defendant in this joint action, by all the partners, could be pleaded in bar to separate actions brought against him by each of the partners; but if the partners have been injured in their separate capacities, they have each a right to maintain his separate action.

Upon all the grounds which have been presented to the court, I am clearly of opinion that this action is maintainable.

BURROUGH, J. The action, in my opinion, is very properly brought and will be productive of considerable benefit to the public, by teaching the conductors of newspapers to act with greater caution than they have recently dis-

played. It has been argued, that separate actions ought to have been brought, because the plaintiffs had not each an equal interest in their business; but how can that be known to the court? The case is precisely similar to that of *Cooke v. Bachelor*, and the declaration is sufficiently certain. No question can be agitated as to whether the special damage has been properly set out in this case; for I agree entirely with the Lord Chief Justice, that as the libel complained of reflected on the plaintiffs in the way of their trade, the action is maintainable, without setting out any special damage.

GASELEE, J. It seems to me that, in a case like the present, there is no distinction in the form of an action, whether it is brought for a firm consisting of many individuals, or of a single individual. I am of opinion [459] that, the demurrer cannot be supported.

Judgment for plaintiff.

The Mayor, Bailiff, and Burgesses of the Borough of BERWICK-UPON-TWEED v. SHANKS.

In covenant against the assignee of the leases of premises described in the declaration as situate within the liberties of Berwick-upon-Tweed, the venue cannot be laid in Northumberland.

Covenant by the lessors against the assignee of the lessee of a term in certain premises, which were alleged in the declaration to be "situate within the liberties of Berwick-upon-Tweed." The venue was laid in Northumberland. General demurrer and joinder.

Wilde, Serjt., in support of the demurrer. The action being brought against the assignee of the term, is local, and the venue should have been laid in Berwick-upon-Tweed.

Peake, Serjt., contra. The venue is well laid, it not distinctly appearing in the declaration that the premises are not in the county of Northumberland.

There is no filacter for Berwick-upon-Tweed, and causes arising in that borough must be tried in Northumberland. *Rex v. Cowle*, 2 Burr. 834. But at any rate it is sufficient upon general demurrer, if it does not appear upon the declaration that the premises are not in the county of Northumberland; and there is nothing on this declaration to show that part of the liberties of Berwick-upon-Tweed, are not in Northumberland. In the case of *Barker v. Damer*, Carth. 182, which first decided that in covenant against [460] the assignee of a term the venue is local, the defendant pleaded to the jurisdiction of the court, that the lands demised lay in Ireland, to which plea the plaintiff demurred. In the *Bailiff of Litchfield v. Slater*, Willes, 431, the defendant pleaded that the lands were situate in the city of Litchfield, and county of the same city; which being traversed, Willes, C. J., said, "If it had stood upon the declaration only, the objection would not have arisen, for the premises there are only said to lie in the city of Litchfield, and we cannot judicially take notice of the boundaries of counties."

In the *Mayor of London v. Cole*, 7 T. R. 583, where the premises were in Middlesex, the venue was laid in London, and it was objected that it ought to have been laid in Middlesex. Lord Kenyon said, in answer, "It does not clearly appear that the land lies in the county of Middlesex."

Wilde. It does appear here that the premises lie within the borough. Within the liberties of the borough is within the borough, or the word "liberties" has no meaning. The decision in the *Mayor of London v. Cole*,

turned upon the statute of *jeofails*, and the defect was cured by verdict. *Barker v. Damer*, and *Bailiffs of Litchfield v. Slater*, show that the venue is local in such an action as the present; and the books of practice furnish a well-known suggestion to be entered on the record in causes arising within the borough of *Berwick-upon-Tweed*.

Best, C. J. This action is undoubtedly local, because it arises on privity of estate, and not on privity of contract. The question, therefore, is, whether it appears on the declaration to have been brought in the wrong *county; [461] and upon examining the case of *Rex v. Cowle*, and the act of Parliament 1 & 2 Jac. 1, c. 28., we think this is the case. *Berwick*, was originally part of *Scotland*, and afterwards brought within the kingdom of *England*. But though it forms part of the kingdom of *England*, it is not within the county of *Northumberland*. The charter of the inhabitants of this town has been confirmed by act of Parliament, and therefore, we are bound to take judicial notice of it. They have courts within the borough; they have the return of all writs out of the courts at *Westminster*; and the sheriff of *Northumberland*, has no jurisdiction in the borough. The case of the *Bailiffs of Litchfield v. Slater*, is materially distinguishable from the present. In that case, *Wilkes*, C. J., said, he could not take notice that the city of *Litchfield*, was co-extensive with the county of the city.

In the present case we must, under the act of Parliament, judicially take notice that the liberties of *Berwick*, are not in the county of *Northumberland*, and that the sheriff of *Northumberland*, cannot enter them. As to the objection, that there is no *filacer*, a writ may issue to the bailiffs of the borough. Our judgment, therefore, must be for the defendant.

Judgment for defendant.

The court afterwards gave the plaintiff leave to amend on payment of costs.



*WALLS v. ATCHESON.

[*462]

Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant: Held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year during which the apartments had been unoccupied: Held, also, that by the admission of another tenant she dispensed with the necessity of a written surrender.

ASSUMPTION for use and occupation.

At the *Middlesex* sittings, before *Best*, C. J., in this term, the case was as follows:

On the 14th of *September*, 1824, the plaintiff let furnished apartments to the defendant at sixty-five guineas for a year.

The defendant paid one quarter's rent to the 14th of *December*, and then quitted the lodgings.

The apartments remained vacant till the 9th of *January*, twenty-six days, when the plaintiff let them to another lodger, at a guinea a week. But in the beginning of *April*, the defendant's attorney paid the plaintiff's attorney the sum of 7*l.* 5*s.*, which had been demanded of the plaintiff in respect of the rent of the apartments.

The plaintiff continued to let the apartments to other lodgers till the beginning of *July*; but failing to procure lodgers from that time till the 14th of

September, she sued the plaintiff for 21*l.* 0*s.* 6*d.*, the sum requisite to complete sixty-five guineas for the year.

There being no evidence to show that the plaintiff had re-let the apartments on behalf of the defendant, the Lord Chief Justice thought, she had rescinded the contract with the defendant, and directed a nonsuit.

Vaughan, Serjt., now moved to set aside this nonsuit, and have a new trial, on the ground that nothing appeared in the facts of this case to discharge the defendant from his original liability. The plaintiff in re-letting the apartments had let solely on his account, and had received the rent to his use. He [463] cited *Redpath v. *Roberts*, 3 Esp. 225, in which it was holden that if a tenant abandon premises without notice, the landlord is not precluded from recovering the subsequent rent by putting up a bill at the window, and endeavoring to procure another tenant: also *Mollett v. Braine*, 2 Camp. 103, in which it was holden that a lease from year to year cannot be surrendered to the lessor by parol, and that a tenant who quits in the middle of a quarter, under an oral license from the landlord, is bound to pay rent to the end of the year.

But the court thought that the plaintiff having precluded the defendant from occupying his apartments by letting them to another person, must be taken to have rescinded the agreement, and to have dispensed with the necessity of a surrender: that she ought to have given the defendant notice, if her intention was to let the apartments solely on his account: and PARK, J., referred to the case of *Lloyd v. Crispie*, where the lessor, having consented to the introduction of another occupier, was holden to have no claim on the lessee, who was under covenant not to assign except with license.

Rule refused.

RADENHURST v. BATES.

Where several persons jointly interested agreed to horse a coach, each of them, one stage, on the road from *L.* to *B.*, and that, in case of default, one of them should sue the defaulter for a penalty which should be divided among the non-defaulters. Held, that an action might be maintained on the agreement, against a defaulter, by the party so appointed to sue, and that the others need not join in the action.

AT the last *Warwick* assizes, before *Best*, C. J., the plaintiff obtained a verdict for 250*l.*, on a declaration which stated that on the 14th of *February*, *1825, at *Birmingham*, in the county of *Warwick*, by a certain agreement in writing, then and there made by and between plaintiff and defendant, together with one *George Cole*, one *Henry Wakefield*, one *John Scott*, and one *Thomas Emery*, it was declared that they whose signatures and places of residence were at the foot of the said agreement, subjoined thereby, mutually and reciprocally bound themselves, each to the other, under the conditions and restrictions hereinafter recited, (that is to say,) they agreed in common accordance to forthwith establish a stage-coach, to be worked or conveyed by them respectively from *Birmingham* aforesaid, in the said county of *Warwick* to *Liverpool*, in the county of *Lancaster*, and to be returned or conveyed over the same line of journey to *Birmingham*, in a manner and time of conveying the same as hereinafter stated, each of them respectively thereby having described in writing against their signatures severally that part of the journey aforesaid which they and each of them agreed to horse and convey the said coach, and the time and manner of so doing, and they thereby mutually and reciprocally agreed each with the other that such state-

ment against their respective signatures should be a part of that memorandum of agreement: then, for the better and more immediately carrying the object of that agreement into effect, they further mutually and reciprocally bound themselves each to the other to the following stipulated forfeitures or penalties, ranged with the specific condition to the said agreement attached, and that such forfeitures or penalties respectively should, and it was thereby severally agreed, be paid as liquidated damages; and that plaintiff should receive all and every of such forfeitures and penalties or penalty that might accrue accordingly, and in default of payment by any of the party or parties to the said agreement, that plaintiff might and was thereby authorized and empowered by them mutually to sue in legal process for the same; and that the amount of such forfeiture, "penalty, or penalties, should be divided [*465 amongst the parties to that agreement who should not have subjected themselves to any such forfeitures, penalty, or penalties, as aforesaid, to the exclusion of any and every defaulter under the circumstances aforesaid, as to sharing in any part thereof. And it was thereby severally and conjointly agreed, first, that every party or person to the said agreement who should not be ready at the stipulated time of commencing to work and convey the stage-coach intended to be established as aforesaid over that part of the journey that he thereby undertook and agreed to horse and convey the said coach, and did not horse and convey the same accordingly, should forfeit the sum of 50*l.*, to be recovered and applied as thereinbefore recited and stipulated. And it was thereby further mutually and reciprocally agreed that such stage-coach or coaches should commence to be conveyed over the said journey on *Monday*, the 21st of *March*, then ensuing, that is, two coaches daily, and every day, the one to leave *Birmingham*, and the other *Liverpool*; and that the said journey should be performed each way in thirteen hours and a half, the proportion of the said time assigned to each, being attached in writing against the signature of each proprietor. And in order to preserve the good faith indispensable to the well-doing of the proprietors of the said coaches, it was mutually and reciprocally agreed by each with or to the other, that neither of them should directly or indirectly be concerned in or promote the interests of any other coach whatever, that might be worked from the two extremities, namely, from or to *Birmingham* and *Liverpool*, but that their interest and best efforts should be applied to the coach then in contemplation, and agreed to be established, and for any and every violation of such good faith, the person or persons respectively should forfeit as a penalty 200*l.*, to be *recovered and applied as in such cases heretofore stipulated. And it [*466 was further mutually and reciprocally agreed by the parties to the said agreement that there should be three coachmen and two guards employed on the said coaches; and it was further agreed by the parties that for officing the coach at each extremity, including stationery, books, lights, porters, and clerks, one guinea should be allowed at the *Birmingham*, and one guinea at the *Liverpool* end weekly, and deducted from the earnings of the coach in accounts in progress; and it was further mutually and reciprocally agreed by the parties aforesaid, each with the other, that no party or person to the said agreement should cease to convey the said coach, or impede it on its journeys by not conveying or causing it to be conveyed over his proportion of the journey, agreeable to his undertaking, under the forfeiture of 100*l.* liquidated damages to be paid by him, to be applied in manner aforesaid; that is, in the understanding of coach phraseology, he should not take off his horses, unless he should give three months' notice in writing previously to the proprietors severally of his intent so to do; and that all the penalties should, and it was severally agreed might be retained by plaintiff out of any money that might come to his hands on account of the person or persons subject to such penalty or penalties. And plaintiff further saith, that the signatures at the foot of the said agreement subjoined, and the several parts of the said journey which the

parties signing the said agreement, and each of them, agreed to horse and convey the said coach, and which were described in writing against the signatures, were as follows, that is to say, *Charles Radenhurst* (the plaintiff) from *Birmingham* to *Wolverhampton*; *George Cole* from *Wolverhampton* to *Stafford*; *Henry Wakefield* from *Stafford* twenty miles further towards *Liverpool*; *John Scott* the ground from *Liverpool* to *Northwick*; *Thomas Emery* *from *Sandwich* to *Northwick*, eleven and half miles, and back; M.
*467] *Bates* (the defendant) fourteen miles from *Hanley* to *Sandback* and back, and two hours to work the same. And the said agreement being so made, afterwards, to wit, on, &c., at, &c., in consideration thereof, and that plaintiff, at the special instance and request of defendant, had then and there undertaken and faithfully promised defendant to perform and fulfil the said agreement in all things in his part and behalf to be performed and fulfilled, defendant undertook, and then and there faithfully promised plaintiff to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled. And plaintiff further saith that afterwards, to wit, on, &c., at, &c., it was stipulated and agreed by and between the said parties to the said agreement, that the time for commencing to work and convey the said coach over that part of the said journey over which defendant so undertook and agreed to horse and convey the said coach, should be the 21st of *March* in the year aforesaid, and that afterwards, to wit, on, &c., the said stage-coach on its said journey from *Birmingham* to *Liverpool* arrived at *Hanley* aforesaid, for the purpose of being then conveyed by defendant to *Sandback* aforesaid, being his proportion of the said journey as in the said agreement mentioned, to wit, at, &c., and that defendant was then and there duly required to convey the said stage-coach from *Hanley* aforesaid to *Sandback* aforesaid accordingly; yet defendant, not regarding the said agreement, nor his aforesaid promise and undertaking, was not ready at such stipulated time to convey, nor did, nor would, when so required, convey the said coach from *Hanley* aforesaid to *Sandback* aforesaid, but then and there wholly refused so to do, contrary to the tenor and effect of the said agreement, and of his aforesaid promise and undertaking; by means of *which said
*468] several premises, defendant afterwards, to wit, on, &c., at, &c., became liable to pay to plaintiff the said forfeiture of 50*l.* liquidated damages to be applied in manner in the said agreement mentioned, when he should be thereto afterwards requested.

There was a further breach charging the defendant with having promoted the interests of another coach.

Vaughan, Serjt., moved for a rule to show cause why the judgment should not be arrested, on the ground that the consideration alleged for the defendant's promise was a promise by the plaintiff, whereas, upon examining the agreement, the consideration appeared to be a promise or engagement of the plaintiff and several others with whom in effect the defendant was a partner under the agreement, and, therefore, not liable to be proceeded against at law; that at all events all the other parties ought to have joined in the action; and also that there was no sufficient allegation of performance of the plaintiff's part of the contract.

A rule nisi having been granted,

Tuddy and *Adams*, Serjts., showed cause. Each of the parties to this instrument agrees to be liable to all the rest, and empowers one to sue; and however necessary it might be that all should join or be joined in a suit as against strangers,—as among themselves, none can object to a proceeding pursuant to his own agreement. Such an agreement constitutes the only mode by which any one of them can be prevented from releasing another from the consequences of a violation of his contract. Each agrees with the other, (not the others,) respectively; each has a separate interest, and each is prohibited from doing certain acts in their nature several.

*Such an agreement is clearly valid; *Davies v. Hawkins*, 3 M. & S. 488, *Owston v. Ogle*, 13 East, 538, *Barton v. Hanson*, 2 Taunt. 49; and performance on the part of the plaintiff is sufficiently alleged in the averment of the arrival of the coach at the place at which the defendant was to horse it.

Vaughan, in support of the rule, urged in addition to the objections started on obtaining the rule *nisi*, the want of reciprocity in the agreement. If the plaintiff were a defaulter, how were the other parties to sue him?

Cur. adv. vult.

BEST, C. J., who gave the judgment of the court, (after stating the declaration,) said,

Several objections have been made to this declaration in arrest of judgment. First, it has been insisted that this agreement makes the parties to it partners, and, therefore, if any of them have any claims against the others, they must go into a court of equity. What is sought to be recovered by this action is not partnership property; the plaintiff and the defendant are not tenants in common of it; the defendant has no interest in it. It is a penalty to be paid by the defendant to the plaintiff for the use of the other contracting parties, the defendant himself being by the agreement expressly excluded from any share of it. There are no accounts to be settled before this claim can be decided, and, therefore, no one reason why this case may not be disposed of in a court of law, or why the parties should be subjected to the expense and delay that must attend a suit in equity. The courts of law should be careful not to narrow their jurisdiction. Wherever complete justice can be attained in a court of law, a suit should be entertained if the thing claimed be a legal and not an equitable right. [*470]

The second objection is, that all the contracting parties amongst whom the penalties are to be divided, should have joined in the action.

We think that the members of a firm cannot, by agreement, give an authority to any one of them to bring an action in his name against persons not members of the firm; but where several parties create by agreement penalties to be paid by one of them to the others, we see no objection to their empowering one to sue for the others. Such an agreement is in effect an undertaking not to object on account of all who ought otherwise to have been joined in the action not being joined.

If there had been any thing in this objection, it might have been taken in *Davies v. Hawkins*, but it was not started either by the bench or bar. Corporations often make bye-laws, and by those laws direct that penalties shall be recovered against their members in actions brought by the head of the corporation for the use of the corporation. Such actions are properly brought in the name of the head of the corporation only, 1 Bos. & Pul. 98, and the cases there cited. The right to maintain actions by corporations, is founded on agreement between the members, as in the present case.

The third objection is, that there is no mutuality in the agreement, because if the plaintiff incurred a penalty he could not sue himself. That would be a case not provided for by the agreement, and, therefore, all the other contracting parties who had incurred no penalty, must join in the action against him; they would thus obtain equal redress, although not in precisely the same manner.

*Where an act of parliament directs that a company shall sue and be sued in the name of their clerk, and he has a claim against them for wages, he cannot sue himself, but must, notwithstanding the provision in the act, sue the company. [*471]

The next objection is, that the consideration of the defendant's promise is not correctly set out in the declaration. It is insisted that it should have been stated, that he made his promise to fulfil the agreement in consideration of all the other contracting parties having promised him to fulfil the agreement on

their parts, and not as it is stated in the declaration, in consideration of the plaintiff's having promised to fulfil his part of the agreement.

But the agreement is set out, and it is stated, that, in consideration of the premises, the defendant undertook. This, we think, is sufficient, and that the other allegation is surplusage.

The last objection is, that it is not averred that the plaintiff or the other contracting parties performed their parts of the agreement. It does appear on the declaration that the coach was brought to the defendant's house, from whence he was to convey it on. This is the only thing that looks like a condition precedent to the performance of the defendant's duty. Although this may not be set out with perfect precision, we think it cannot be objected to after verdict. The plaintiff, therefore, may recover the 5*l.*

With respect to the 200*l.* for supporting another coach, there was no condition precedent to be performed by the plaintiff before he could recover that penalty; and, therefore, we think that after verdict no objection can prevail against the plaintiff recovering that penalty on account of want of averment of the performance of any duty.

Rule discharged.

*472] *BLYTH v. BAMPTON.

Plaintiff purchased a horse for 55*l.*, the defendant warranting him sound, and agreeing to give 1*l.*, back if the horse did not bring plaintiff 4*l.* or 5*l.*
The averment in the declaration was, that in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound:
Held, a variance, *Gaselee J. dissentiente.*

THE declaration stated, that in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound. Breach; want of soundness.

At the trial before *Best*, C. J., last *Warwick* assizes, it was proved that plaintiff was to have the horse for 55*l.*, but defendant was to give a pound back if the horse did bring the plaintiff 4 or 5 pounds.

The Chief Justice held this a fatal variance and directed a nonsuit.

Wilde, Serjt., moved for a rule *nisi* to set aside the nonsuit, and have a new trial. He contended that the substance of the declaration, was, that the plaintiff had agreed to buy the defendant's horse. That this was the true consideration on which the defendant had been induced to warrant him sound. The price was immaterial, and laid under a *viz.*; and the defendant's agreement to return 1*l.* on a contingency, might have been the subject of a cross action, but was no part of the consideration for the warranty of soundness. In *Gladstone v. Neale*, 13 East, 410, a contract for the purchase of about eight tons of hemp was stated under a *viz.* in the declaration as a contract for eight tons; and this was held no variance. And in *Crispin v. Williamson*, 8 *Taunt.* 107, a contract for oranges, without any specification of price, was held to be well described, as a contract for oranges at a price laid under a *viz.* A rule having been granted,

**Bosanquet*, Serjt., showed cause. This was a conditional contract, *473] and is improperly described as having been absolute.

The consideration for the defendant's warranty was the sum of 55*l.*, subject to a reduction of 1*l.* upon a contingency; and the declaration alleges, that it was absolutely the sum of 55*l.* The cases cited do not apply, because the contract in them was not conditional.

Wilde, was heard in support of his rule.

BEST, C. J. After regretting the state of the law with respect to variances and pointing out the expediency of adhering to the decisions on the subject, in order that the inconvenience might be generally felt, and the law altered, held, that this was clearly a conditional agreement; that it had been stated in the declaration as an unqualified agreement; and that, therefore, according to all the principles and decisions on the subject, the allegation could not be sustained. In the two cases referred to, a variation in respect of amount and price had been helden not material; but there was no case which went the length of deciding that a conditional contract could be declared on as absolute.

PARK, J., and BURROUGH, J., expressed opinions to the same effect.

GASELEE, J., differed: he thought the price immaterial, especially when laid under a *videlicet*; and further, that the price agreed on had been correctly stated in the declaration. But the price being settled at 55*l.*, the defendant had entered into two engagements, one, that the horse was sound, the other, to return 1*l.* if the plaintiff did not get 4*l.* or 5*l.* by him. It was sufficient in the first instance for the plaintiff to sue upon the "breach of [474 one of these engagements, and he might afterwards have demanded the 1*l.* in case the horse were not, upon offering him to sale within a reasonable time, sold for 4*l.* more than 55*l.*

Rule discharged



GREGORY v. DOIDGE, et al.

The plaintiff, who had occupied lands under A., upon A.'s death entered into an agreement to pay rent to the defendant, and paid 1*s.* as an acknowledgment of his title, being ignorant that it was disputed.

It turning out afterwards that the defendant had no claim to the property.

Held, that the plaintiff might dispute the defendant's title in a plea of *non tenit* in replevin.

REPLEVIN.

Avowry for rent arrear, with the usual allegation that the plaintiff held the close in which, &c., as tenant thereof to the defendant *Doidge*, by virtue of a demise thereof to the plaintiff theretofore made.

Plea, *non tenit*, and issue thereon.

At the trial before *Gaselee*, J., last Cornwall assizes, it appeared that one *Beare*, died seised of the close in which, &c., as heir *ex parte materna*, and that the defendant *Doidge*, who was heir *ex parte paterna*, had disputed with another claimant the possession of the property; but that after the death of *Beare*, *Doidge*'s brother went to the plaintiff, who had occupied as lessee of *Beare*, and induced him to pay 1*s.* as an acknowledgment of *Doidge*'s title. The plaintiff stated at the same time that his annual rent was 7*l.*, and it was agreed that the price of depasturing some cattle of the defendant's should be deducted from the amount of the rent. This agreement was made by the plaintiff in ignorance of the defect in *Doidge*'s title. Notwithstanding some conflicting testimony about the agreement, a verdict was found for the defendant, the learned Judge reserving to the plaintiff the liberty of moving to enter a verdict for himself, if this court should be of opinion he could "after [475 the acknowledgment above stated, dispute the defendant's title in a plea of *non tenit*.

Wilde, Serjt., having obtained a rule *nisi* accordingly,

Peake, Serjt., who showed cause, argued that the plaintiff having acknowledged the defendant's title, and having agreed to the amount of rent he should pay, could not afterwards dispute the title: *Alchorne v. Gomme*, 2 Bingh. 54, and though a distinction had been made where a tenant did not originally receive possession of the land from the avowants, *Rogers v. Pitcher*, 6 Taunt. 202, yet the plaintiff in the present case was concluded by having accepted a new demise from the defendant. But

The court, was clearly of opinion that the plaintiff having come into possession under a former owner, and having entered into this agreement in ignorance of the defect in the defendant's title, might now show that the defendant was not his landlord. They considered the principle to have been clearly established by *Rogers v. Pitcher*, and the language of *Buller*, J., in *Williams v. Bartholomew*, 1 B. & P. 326. "If the tenant could have proved that his attornment proceeded on the misrepresentation of him who claimed as remainder-man, he might have proved that another was still alive and entitled;" and they mentioned as precisely in point the case of *Fenner v. Duplock*, 2 Bingh. 10, in which it was holden that payment of rent by a lessee to a lessor, after the lessor's title had expired, and after the lessee had had notice of an adverse claim, did not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at ^{*476]} the time of payment the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired.

Rule absolute.

DE BERGARECHE v. PILLIN.

Where the acceptor of a bill of exchange accepts it payable at a banker's, it is not necessary in an action against the drawer to allege that the bill was presented to the acceptor in person, if there is an averment that it was duly presented at the bankers.

ASSUMPSIT against the drawer of a bill of exchange directed to *W. A. South*, who accepted it according to the usage and custom of merchants payable at *Sykes, Snaith & Co.*

Averment, that when the bill became due, it was duly presented and shown to and at the said *Sykes, Snaith, & Co.* for payment, according to the custom, and payment thereof was then and there required, according to the tenor and effect of the said bill and acceptance, but that the said *Sykes, Snaith, & Co.* did not pay the sum of money in the bill specified, or any part thereof, nor did *South*; of which premises the defendant afterwards had notice.

Demurrer, assigning for cause, that the bill was accepted by *South*, payable at *Sykes, Snaith, & Co.*, and it is not expressed, nor does it appear in the declaration, that the words "not elsewhere" are contained in the acceptance, or any other words denoting that *South*, would not pay the bill elsewhere than at *Sykes, Snaith, & Co.*, whereby, and by force of the statute in that case lately made and provided, the acceptance of the bill was general, and not special, and due presentment to *South* of such bill, when due and payable, ought to have been alleged, whereas no presentment of the bill to *South*, ^{*477]} is alleged: and also, that no due presentment of the bill is alleged in the declaration.

Spankie, Serjt., in support of the demurrer. Whatever might be the case against the acceptor, as against the drawer, presentation must be shown according to the terms of the bill. Now, under the provisions of 1 G. 4,

c. 77, this acceptance is a general acceptance, and under a general acceptance, presentation must be made to the acceptor; but presentation to *Sykes & Co.* is very different from presentation to the acceptor at the house of *Sykes & Co.* which ought to have been averred, or at least that the acceptor could not be found there.

BEST, C. J. By the 1 & 2 G. 4, c. 77., it is enacted, "That if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill, payable at the banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place."

The result of the act is, that though a bill be by the acceptance made payable at a particular place, still the acceptance is to be esteemed a general obligation, and the acceptor may be called on elsewhere, as well as at the place indicated. But though the legislature has provided that the acceptor *may* be called on elsewhere, it has not made it *compulsory* on the holder to go elsewhere. It has been argued, indeed, that at all events, *the acceptor should himself be called on at the place indicated, though the holder is excused by the act from presenting his bill to the persons who carry on business at that place;—or, that at least it should be averred that the acceptor was called on there and could not be found. But such an averment would be absurd; for the acceptor is never expected to be there, but his money. It is sufficient, therefore, to allege, as in the present declaration, that demand was made there for the money.

PARK, J. The construction of the act, which has been contended for, is absurd; for if an acceptor must be always present at his bankers, where would be the convenience of making the bill payable at the bankers. The bill was, according to the averment, "duly presented for payment."

BURROUGH, J. Presentation to the acceptor in person has been dispensed with, by his pointing out the bankers, as the place at which payment of the bill might be obtained.

GASELEE, J., concurred.

Judgment for the plaintiff.



SPROTT v. POWELL, et al.

Vestrymen who signed a resolution, ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were held, not to be responsible for the payment of the attorney employed by the surveyor.

ACTION for the amount of an attorney's bill.

At the last *Maidstone* assizes, before the Lord Chief Baron, the case appeared to be as follows:

*At a special vestry for the parish of *Speldhurst*, holden in April, 1821, the following resolutions were entered into :

"*Speldhurst* parish. At a special vestry, held in the said parish, the 27th of April, 1821, (pursuant to public notice,) for the purpose of taking into con-

sideration the propriety of resisting an indictment instituted against the inhabitants of the said parish, to compel them to repair a certain piece of road;

"Resolved, that the above indictment be opposed.

"2d. That the surveyors be desired to take the necessary steps for carrying the first resolution into effect." Signed by the two defendants and six other parishioners.

The plaintiff at this time was present as vestry clerk, and *Robert Fry*, the then surveyor, gave him instructions to defend the indictment.

The indictment was defended.

In October 1824, the plaintiff delivered his bill to *James Richardson*, the then surveyor, but who had not been surveyor in 1821. The bill was headed, "The surveyors of the parish of Speldhurst, Drs. to *Walter Sprott*." *Richardson* refusing to pay, the plaintiff commenced the present action against the defendants. They resisted payment on the ground that the surveyor for the current year was the person who ought by a rate on the parish to raise the necessary funds, and from time to time to satisfy claims such as that made by the plaintiff. This was expressly provided for by the 13 G. 3, c. 78, s. 56, by which it is enacted, "That if the inhabitants of any parish, township, or place shall agree at a vestry or public meeting to prosecute any person by indictment for not repairing any highways within such parish, township, or place which they apprehend such person is obliged by law to repair, or for committing any nuisance upon such highways, or shall agree at such vestry [480] meeting to defend any indictment or presentment preferred against any such parish, township, or place, it shall and may be lawful for the surveyor of such parish, township, or place, to charge in his account the reasonable expenses incurred in carrying on or defending such prosecution or defence respectively, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by a justice of the peace within the limit where such highway shall be, which expenses when so agreed to or allowed, shall be paid by such parish, township, or place, out of the fines, forfeitures, compositions, payments, and assessments authorized to be collected and raised by virtue of this act."

They also relied on *Lanchester v. Frewer*, 2 Bingh. 361, and *Lanchester v. Tricker*, 1 Bingh. 201.

Under the direction of the learned Chief Baron, who referred to *Higgins v. Livingston*,[†] a case heard on appeal from *Scotland* to the House of Lords, as a decision in favor of the demand, a verdict was taken for the plaintiff, with liberty for the defendants to move to enter a nonsuit.

Taddy, Serjt., having obtained a rule *nisi* accordingly,

Bosunquet and Wilde, Serjts., showed cause. In employing the plaintiff, the surveyor acted only as agent to the defendants, and they were equally liable as if they had named him and employed him themselves. The act of parliament did not take away the plaintiff's common law remedy against those by whom he had been employed. But the act itself gave him no remedy in a case like the present;

The 47th section requires that the accounts of the surveyor should be [481] annually made up and presented fifteen days before the special sessions held in the week after the *Michaelmas* sessions. The plaintiff's bill, from the duration of law proceedings, could not be made out till two or three years after he was first employed, and how could he charge successive sets of surveyors with fractional portions of an incompletely expense? The statute called on the magistrates to allow the surveyor's bill, but how could they judge of it, or allow it, without seeing the whole at once? and if they refused to allow it, as the Court of King's Bench would not grant a *mandamus* against the magistrates in such a case, what remedy had the plaintiff against the surveyor? The only question, therefore, was, whether or not he

[†] Not yet reported.

had been employed by the vestry, for if employed by them, every person attending was individually responsible. In *Horsely v. Bell*, 1 Br. Ch. Cas. 101, which was a bill filed against the commissioners of a certain navigation in *Yorkshire*, *Ashurst* J. said, "I think the defendants are personally liable; it would be hard that the plaintiff, who has done the work at a reasonable price, should have no remedy." And in *Eaton v. Bell*, 5 B. & A. 34, it was holden that commissioners of an inclosure were privately responsible to their bankers for drafts drawn in respect of the inclosure, though the drafts required the bankers to place the sums mentioned in them to the drawers' account as commissioners.

In like manner in *Higgins v. Livingston*, the commissioners of a turnpike between *Edinburgh* and *Glasgow*, were held responsible, in their private capacity, to persons employed by them about the construction and repair of the road. And in *Brook v. Guest*, N. P. Stafford summer assizes, 1825. *Abbott*, C. J., held a churchwarden individually responsible to a person whom he had employed to draw plans of a church *for the inspection of the [482] commissioners for building new churches under 58 G. 3, c. 41.

These decisions were not adverted to in the arguments in *Lanchester v. Frewer*, and *Lanchester v. Tricker*, and those cases are distinguishable from the present on the ground that *Lanchester* was a churchwarden, and instead of commencing an action, might have raised a rate to indemnify himself.

Taddy, contra. So the surveyor in the present case was authorized under 13 G. 3, to raise a rate out of which he might have reimbursed himself, upon presenting annually to a vestry or a magistrate the account of the expenses incurred within the year; and the plaintiff was not employed by the vestry, but by the surveyor. Even if he had been employed by the vestry, vestrymen are not individually responsible for orders given by the vestry as a collective body; the reasons for this are fully given in *Lanchester v. Frewer*. For the performance of such orders a rate is raised on the inhabitants of the parish generally, and no one would attend to the parish business at the risk of being individually responsible. The cases referred to on the other side, are all cases of commissioners or churchwardens who had power to raise a fund for reimbursing themselves, and who suffered from their own neglect.

Best, C. J. The court has no intention of impeaching the decisions which have been referred to by the counsel for the plaintiff, but which have nothing to do with the present case. In the cases referred to the parties voluntarily placed themselves in the responsible situation of commissioners, a situation which bears no resemblance to that of the inhabitants of a parish resorting to a vestry. Commissioners have, in almost every instance, *power to [483] raise tolls, or to impose assessments to indemnify themselves, and they ought, therefore, to avoid entering into an undertaking until they have money in hand, or have ascertained that the tolls will cover the expense. In *Higgins v. Livingston* the parties sought to be charged were commissioners of a turnpike between *Edinburgh* and *Glasgow*, and they had the usual powers of making contracts, raising tolls, and borrowing money. In *Brook v. Guest*, and *Lanchester v. Frewer*, the party charged was a churchwarden, and might have reimbursed himself by a rate for the expense he had incurred on behalf of the parish. *Eaton v. Bell* was decided on the same principle, and it was holden that commissioners under an inclosure act which empowered them to make a rate to defray the expenses of the enclosure, were liable to their bankers for the amount of drafts drawn in respect of the enclosure. *Bayley*, J. says, "The defendants must have known what they had collected, and what means they had of collecting more, and they ought to have taken care, before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts." He puts it expressly on the ground that the defendants had the means of raising rates to reimburse themselves; and the same observation is applicable to the case of *Horsely v. Bell*. The defendants

in the present case have not voluntarily engaged in any commission, nor have they any means of raising tolls to indemnify themselves.

They have merely met in a vestry, and agreed to certain resolutions; they have not, as it has been asserted, employed the plaintiff as an attorney, for the resolutions agreed to, order the surveyor to take measures for defending the indictment, and according to the 13 G. 3, c. 78, s. 56, whatever is done in this respect must be done under the surveyor's authority; he is to carry on the proceedings, to incur the expense in the first instance, to charge it to [484] the parish account after it has been agreed to at a public meeting, or sanctioned by the order of a magistrate, and to be paid out of the fines, payments, and assessments raised by virtue of the act.

The persons who meet in vestry are only to put the surveyor in motion, and control his charges; but they enter into no personal undertaking to pay the parties employed by him. This case was depending three years. The inhabitant of a parish would be in a cruel situation if he were to leave the parish shortly after attending a vestry, and be liable for years to the charges of a surveyor over whom he has ceased to have any control.

The vestry clerk should have presented his bill yearly, that the parish might determine from time to time whether they would sustain the expense of further proceedings, and also that every inhabitant might be assessed in his due proportion; otherwise, as I said in the case of *Lanchester v. Frewer*, a man who had but five pounds a year in the parish might be subjected to the same burthens as men who had a thousand. Therefore, the law wisely considers the resolutions of a vestry, not as the personal undertaking of each vestry man, but as merely intended to put the surveyor in motion, who is afterwards to be reimbursed by a regular rate upon the whole parish.

PARK, J. If the law were as the plaintiff's counsel have contended, no respectable inhabitant would attend a vestry meeting, and the business of a parish would fall into inferior hands, who would render the whole a job. It seems to me that the 58 G. 3, c. 65, has decided this case, and I see no difficulty in it. The resolutions of this vestry were such as the act requires.

The surveyor is the proper person for conducting the business, and he is to charge the parish in his account. [485] The plaintiff had only to deliver his bill to the surveyor *de anno in annum*; the surveyor should have applied to the vestry, and if the vestry refused to make an assessment for his charges, he might resort to a justice of peace.

The cases cited are distinguishable on the ground that the parties in those cases were chiefly commissioners, who had entered upon their functions voluntarily, and were able to raise a fund for their own indemnity.

In *Brook v. Guest*, a churchwarden was held liable for the expense of a plan of a church which he had procured for the approbation of certain commissioners for building new churches. But the churchwarden was the proper person to procure such a plan, and he might have reimbursed himself out of the church rates. That was the ground of decision in *Lanchester v. Frewer*, and much of the reasoning in that case applies to the present. I am of opinion, therefore, that parties meeting in vestry are not personally responsible, and that the rule which has been obtained must be made absolute.

BURNOUGH, J. If the learned Chief Baron had known the course of business in parishes, he would have had no difficulty in this case. The act of 58 G. 3 shows how money is to be raised for parish purposes, and how applied, and the plaintiff who, as vestry clerk, must have known the course of business, might have delivered his bill by parts every year to the surveyor in office, and he would have included it in the charges of the current year, by which means the burthens would have been thrown on those who inhabited the parish at the time, and who ought to sustain it. The cases, therefore, which have been cited do not apply, because the surveyor has the credit and land of all the parish, upon which he may levy assessments distributed in

just proportions ; and for this reason the surveyor himself could not have sued *the defendants, if he had paid the plaintiff; he ought to proceed according to the directions of the act, which are clear, and beneficial to [486 the interests of all.

GASELEE, J. The present decision will not impeach the authority of any of those which have been referred to. The defendant, and others assembled in vestry, directed the proper officer to take proper steps for resisting an indictment for the repair of a road ; they left it to the surveyor to employ an attorney : that, among other circumstances, tends to show that they meant to incur no personal responsibility, and there is not a pretence for saying that they undertook individually to pay the plaintiff.

Rule absolute.



TWISS, Assignee of WRAGG, an Insolvent, v. WHITE.

A. agreed to sell to *C.* a copyhold, the legal title to which had, by mistake, been conveyed to *B.*
A. subsequently was discharged under the insolvent debtor's act.
 After his discharge, *B.* surrendered the copyhold to *A.*, who surrendered it to *C.*, and *C.* paid the purchase money to *D.* on *A.*'s behalf:
 Held, that *A.*'s assignee, under the insolvent debtors' act, might recover this money from *D.*
 Held, also, that *D.* might retain out of it his charges for conducting the sale of the copyhold, and the amount of a bond, which, at the time of the agreement to sell the copyhold, *A.* had given to *D.*, with a promise to pay it out of the proceeds of the sale.

DECLARATION for money had and received by the defendant to the use of the insolvent before his discharge, with a count for money received to the use of his assignee. Pleas, general issue and set-off.

At the last Cambridge assizes before Holroyd, J., the case was as follows :—

*On the 15th of June, 1822, one *Clear* agreed in writing with *Wragg* [487 to purchase of him certain copyhold property. On the 28th of July, 1822, *Wragg* went to prison, and was, after the usual assignment of his property, discharged under the insolvent debtors' act, the 12th of December, 1822.

In the interval it was discovered, that the copyhold which *Wragg* had agreed to sell to *Clear*, had by mistake been included in a conveyance of some other property to Lord Hardwicke's trustees in the year 1807.

On the 30th of December, 1822, these trustees, by a letter of attorney to the defendant who had conducted the business between *Wragg* and *Clear*, surrendered the copyhold to *Wragg*, who, on the same day, surrendered it to *Clear*, in consideration of 220*l.* which was paid to the defendant for *Wragg* on the next day.

The defendant's bill, principally for effecting the transfer of this property, was 111*l.* 18*s.* 10*d.*, and *Wragg* owed him 40*l.* on bond, both which debts he had, before he went to prison, agreed the defendant should deduct out of the proceeds of this copyhold, when received.

The defendant insisted he had a lien on the proceeds, or a set-off against the assignee, to the amount of these two sums, and offered to pay the plaintiff the balance, 68*l.* 1*s.* 2*d.*

It was also objected on the part of the defendant, that the proceeds of this copyhold estate having accrued to the insolvent *Wragg* after his discharge, the plaintiff could not recover them by action, but only by application to the insolvent debtors' court to issue execution on the judgment entered up agains-

the insolvent pursuant to 1 G. 4. c. 119. s. 30. *Hepper v. Marshal*, 2 Bingh. 372, was relied on.

*488] *A verdict was thereupon taken for 68l. 1s. 2d., the balance admitted to be due, with liberty for the defendant to move to enter a nonsuit on the above ground, and for the plaintiff to move to increase the damages by the amount of the defendant's bill and bond; the amount of the bill, supposing him to be entitled to set it off, being referred to an arbitrator. Rules nisi to this effect having been obtained,

Wilde, Serjt., now showed cause against the rule for entering a nonsuit, and supported the rule for increasing the damages. He argued, that though the money due on the sale of the estate to *Clear* was not paid till after *Wragg's* discharge, the title to the estate was vested in *Wragg* at the time of the transfer of his property to the plaintiff, as his assignee under the insolvent debtor's act. Lord *Hardwicke's* trustees being in possession of the legal title by mistake, were, as to that estate, trustees for *Wragg*, and after the assignment trustees for the plaintiff. The trust property having so passed to him, he was entitled to follow the proceeds, *Taylor v. Plumer*, 3 M. & S. 562.

But the defendant had no lien on the proceeds for the amount of his bond, because those proceeds never belonged to *Wragg*, and the engagement by him to pay the amount of the bond out of those proceeds was therefore a nullity.

Taddy, Serjt., contra. *Wragg*, at the time of assignment of his property to the plaintiff, had not a perfect equitable interest in the estate sold to *Clear*, but a mere claim to relief in equity against Lord *Hardwicke's* trustees on the ground of a mistake; and this claim for relief could not be the subject of an assignment under the insolvent debtor's act.

*489] *But if he had a perfect equitable title, he had the power of charging that title with the payment of the bond and expenses, and the plaintiff must take it, if at all, subject to the charges so attached to it.

Best, C. J. I am of opinion the plaintiff is entitled to the sum he has recovered: he is entitled to recover, in respect of the proceeds of the estate which was conveyed by Lord *Hardwicke's* trustees to *Wragg*, after his discharge from prison, and the case of *Hepper v. Marshal* does not apply to the present. That case decided that the assignees of an insolvent cannot recover by action, property which accrues to an insolvent after his discharge, but must, under the statute, apply to the insolvent debtor's court to issue execution on the judgment entered up in their names against the insolvent. But the property in dispute in the present case was vested in the insolvent at the time of the assignment of his effects to the plaintiff. The statute (1 G. 4. c. 119.) transfers to the insolvent's assignee all his equitable as well as legal estate, and he had an equitable interest in the property, the legal title to which had, by mistake, been conveyed to Lord *Hardwicke's* trustees. This property they might at any time have been compelled to reconvey; when they reconveyed, the plaintiff, by demanding the proceeds in the hands of the defendant, ratified the bargain which the insolvent had made with *Clear*, and according to the principles established in the case of *Taylor v. Sir Thomas Plumer*, the plaintiff was entitled to follow the proceeds in the hands of the defendant.

But if the insolvent had an equitable interest in the property sold to *Clear*, he had a right to charge it with an equitable lien, and where a set off has been pleaded in an action of *assumpsit*, the assignee must take the proceeds subject to that charge. It has been urged, "indeed, that he could not create a lien or attach a charge on the proceeds because they never belonged to him; but the charge attached on the estate before it was sold, and on the proceeds. It seems to me that what passed between the insolvent and the defendant before the insolvent went to prison, amounted to an equitable pledge of the proceeds of the estate, whenever they should come into the defendant's hands, for the amount of the defendant's general bill, and for the said sum on bond. Possession of those proceeds could not then be obtained;

the case is therefore not affected by those in which it has been held, that a pledge of personal property, the possession of the property not being delivered to the pawnee, is void. If that agreement amounted to a good equitable mortgage, it may be set up against an action for money had and received, which is an equitable action, and in which the plaintiff can recover no more than he is equitably entitled to. It is admitted that defendant is entitled to a lien for his bill for business done relative to the sale; and I am of opinion, that he is also entitled to retain to the amount of the remainder of his bill and the forty pounds. The rule for a nonsuit, therefore, must be discharged, and the rule for increasing the damages must be suspended till it shall have been ascertained how much the arbitrator allows for the defendant's bill.

PARK, J. This case is very different from that of *Hepper v. Marshal*, in which the property in dispute did not come to the insolvent till after his discharge. The insolvent in the present case, was at the time of the assignment to the plaintiff, under the insolvent debtor's act, equitable owner of the property, the proceeds of which the plaintiff now seeks to recover. Then, at a time when the insolvent was *sui juris* with respect to this equitable property, he borrows on the credit of it *money of the defendant, which he engages to pay out of the proceeds of the sale; he had a right to [*491 charge the property in this way, and the defendant is, therefore, entitled to retain the 40%. This he will retain, with so much of his bill as an arbitrator shall find to be due.

BURROUGH, J. The assignee takes the estate, subject to the bargain which had been made by the insolvent; the defendant, therefore, is clearly entitled to the 40% under the bond.

GASELEE, J. The estate of which the defendant received the proceeds, was property belonging to the insolvent at the time of the insolvency, and consequently passed under the assignment. The money, therefore, which the defendant received in lieu of that property was received to the use of the assignee, subject to such charges as the insolvent was entitled to attach on the property, and the assignee must take it subject to those charges. The rule for a nonsuit, therefore, must be discharged, and the rule for increasing damages be suspended till an arbitrator shall have ascertained what the defendant is entitled to beyond the 40% which he claims on the insolvent's bond.

Rules discharged and suspended accordingly.



*HOLROYD v. DONCASTER.

[*492]

A party who sues another for arresting him on an illegal warrant is not bound to produce the warrant.

THIS was an action of trespass for false imprisonment, tried before *Bailey*, J., last *York* assizes. The declaration was in the usual form. A constable who had made the arrest of which the plaintiff complained, stated that he had arrested plaintiff under a warrant which he received from another person, and that when about to execute it, the defendant desired him to make haste. It was also proved, that the defendant had admitted in conversation, that he had sent the plaintiff to prison. But no warrant was produced in evidence. The plaintiff's counsel, however, having opened the case as an arrest upon an illegal warrant, it was objected on the part of the defendant, that the plaintiff ought to produce the warrant.

A verdict was taken for the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the court should be of opinion that the plaintiff ought to have produced the warrant.

Wilde, Serjt., accordingly moved for a rule to this effect, on the ground that the plaintiff ought to have produced the warrant which was the cause of his action; also, that it sufficiently appeared from the defendant's admission, that the plaintiff had been apprehended under a warrant and that, therefore, the action ought to have been conceived in case and not in trespass. *Morgan v. Hughes*, 2 T. R. 225, *Stonehouse v. Elliott*, 6 T. R. 315.

*⁴⁹³ A rule nisi was granted, and *Wilde*, was this day heard in support of it. But

The court, were clearly of opinion, that the warrant not having been produced, there was no legitimate evidence on which it could be presumed that it had ever issued, or that the action ought, in consequence, to have been case; and that, with respect to the production of the warrant, it was equally clear that a party who took upon himself to imprison another was *prima facie* guilty of a trespass, the *onus* of justifying which rested entirely with himself.

Rule discharged.

TATTLE v. GRIMWOOD.

The 5 G. 4, c. 98., which repealed the former bankrupt acts, enacted that after June, 1824, a bankrupt's certificate should not be received in evidence unless entered of record. The 6 G. 4, c. 16, repealed the 5 G. 4, c. 98, from May 2d, 1825, and the old statutes from September 1st, 1825; it provided also, that its enactments respecting certificates should take effect from May 2d, 1825, and that certificates on commissions issued after the act took effect, should be entered of record. "The present practice in bankruptcy" was, by s. 135., to be continued, unless when alterations were expressly declared. Where a commission was issued in January, 1825, and the certificate obtained in November, 1825: Held, that it need not be entered of record.

THE defence to this action was a commission of bankruptcy sued out against the defendant in January, 1825, and a certificate obtained under it in November, 1825.

The certificate not having been enrolled, it was objected at the trial after last term before *Best*, C. J., that according to the provision of 5 G. 4, c. 98, the defendant could not avail himself of it.

A verdict having been taken for the defendant,

Taddy, Serjt., obtained a rule nisi to set it aside, against which *Wilde*, Serjt., now showed cause.

*⁴⁹⁴ The 5 G. 4, c. 98., which repeals all former acts relating to bankrupts, was passed in June, 1824, but was not to come into operation, except as to certificates (section 133.) till May, 1st, 1825. According to section 92, of that act, certificates are not to be read in evidence unless enrolled. This section came into force on the passing of the act in June, 1824.

By section 136, of 6 G. 4, c. 16., which passed May, 2d, 1825, the 5 G. 4, c. 98, was repealed from that day; the other provisions, however, of the 6 G. 4, c. 16., which also repeals the former acts, were not to be in force till September, 1st, 1825, excepting its enactments respecting certificates, which enactments were also to take effect from the 2d of May, 1825, (section 136.) But the 96th section of this 6 G. 4, c. 16., which also requires that certificates shall be enrolled, applies only to certificates on "commissions issued

after that act shall have taken effect;" and section 135, enacts, that nothing in that act contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared.

The defendant, therefore, not having obtained his certificate till November, 1825, could not have it enrolled under the 5 G. 4. for that was repealed May, 2d, 1825. Nor could he have it enrolled under the 6 G. 4. c. 16., because the commission on which it was founded, issued before the 6 G. 4. c. 16, was even passed; those were circumstances for which no alteration in the practice in bankruptcy had been expressly declared by 6 G. 4. c. 16., consequently by section 135, of that statute, he was authorised to pursue the then present practice, that is, the practice existing upon the passing of that act, and the repeal of 5 G. 4. c. 98. That was the practice under the old statutes.

Taddy, contra, contended, that by the operation of 6 G. 4. c. 16., the old statutes relating to bankruptcy "were only in force on the repeal of 5 G. 4. c. 98., from May 2d, to September 1st, 1825; the practice, therefore, under those statutes, could not apply in a case where the commission issued in January, 1825, and the certificate was signed in November, 1825." [495]

By express provision the 6 G. 4. c. 16, was precluded from applying to a certificate on a commission issued before that act passed. But the defendant's case being one of a certificate, for which no alteration had been expressly declared by the 6 G. 4. c. 16, must, according to section 135, of that act, be regulated according to the then present practice in bankruptcy, and the then present practice, the practice at the time of the passing of the act (May 2d, 1825,) was the practice under 5 G. 4. c. 98., which required enrolment.

Cur. adv. vult.

BEST, C. J., now proceeded to deliver the judgment of the court.

This was an action on a bill of exchange, dated the 5th of October, 1824, which had been indorsed by the defendant to the plaintiff. To this action the defendant pleaded the general issue; and, secondly, a commission of bankrupt of the date of the 29th of January, 1825, and that the causes of action accrued before he became bankrupt. In support of this plea, a certificate duly allowed, dated the 5th of November, 1825, was offered in evidence. It was objected by the counsel for the plaintiff that this certificate could not be received, because it had not been *entered of record*.

When this objection was first presented to me at Nisi Prius, I felt some apprehension that the defendant might be deprived of the protection which the bankrupt laws were made to give to honest but unfortunate debtors, and some alarm least commissions of bankrupt issued after the repeal of the 5 G. 4. c. 98, and "the day when the 6 G. 4. c. 16, was to take effect, [496] might be found to be invalid. I was completely satisfied, however, before the cause was over, that there was nothing in the objection that had been made, and received the certificate in evidence, without reserving any point on it for the consideration of the court. A motion has been made for a new trial, on the ground that the certificate not having been enrolled, was not admissible in evidence. My brothers *Burrough*, and *Gaselee*, both agree with me that there is no pretence for the motion. My brother *Park*, was unfortunately prevented by indisposition from hearing the argument.

It is an undoubted rule of law that if an act of Parliament, which repeals former statutes, be repealed by an act which contains nothing in it that manifests the intention of the legislature that the former laws shall continue repealed, the former laws will, by implication, be revived by the repeal of the repealing statute. This rule is established by the resolutions of the judges in the House of Lords, in the case concerning bishops, 12 Rep. 7, which I mentioned at the trial. By the first section of the 5 G. 4. c. 98, all the bankrupt acts from 34 H. 8, to 3 G. 4., inclusive, are repealed. By the last section of this statute none of the enactments (except such as relate

to certificates of persons becoming bankrupts before the 1st of *May*, 1825,) take effect before the 1st of *May*, 1825. The former bankrupt laws, therefore, are not repealed before the 1st of *May*, 1825, by 5 G. 4.

The statute of the 6 G. 4, c. 16, passed on the 2d of *May*, 1825. On that day by the operation of the 5 G. 4, all the old bankrupt laws were repealed, and 5 G. 4, was the only act in force. The 5 G. 4, was by the 136th section of 6 G. 4, repealed on the 2d of *May*, "having been in force one day only, namely, from the 1st of *May*, to the 2d of *May*. This put an end to the necessity of registering certificates under that act. But the repeal of the 5 G. 4, according to the rule established by the case in 12 Coke, revived all the old statutes, for although all these statutes are again repealed by the first section of 6 G. 4, which would prevent their revival by implication by the repeal of the repealing statute, the 186th section prevents the 1st section from repealing them until the day when the 6 G. 4, is generally to take effect, namely, the 1st of *September*, 1825. From the 2d of *May*, until the 1st of *September*, the old statutes were revived, and by the repeal on the 2d of *May*, of the 5 G. 4, were in force. On the 1st of *September*, 1825, the 6 G. 4, came into full operation, and the 5 G. 4, was completely got rid of.

The certificate in this case is of the date of the 5th of November, 1825; the commission issued on the 29th of January. Now the 96th section of 6 G. 4., which prevents certificates not registered from being received in evidence, applies only to commissions issued after the passing of that act. This commission issued before the passing of that act, and the certificate under it is not affected by the clause relative to certificates.

The 92d section of 5 G. 4. enacts, that no certificates that are not registered under commissions issued after the passing of that act, shall be received in evidence. But although this commission issued after the passing of that act, it issued before the act took effect, and in virtue of the old statutes, which at the time of the issuing this commission were in full force. Besides, before this certificate was allowed or signed, the 5 G. 4. was completely repealed, and therefore the 92d section of that act cannot affect this case. But it has been said that statutes, in all other respects repealed, are sometimes kept in force as to by-gone transactions: but there is no "clause of this sort in the 6 G. 4.; and therefore the 5 G. 4, has no more effect in this case than if it had never existed. It has been also said that the words, "all enactments herein contained relating to certificates of conformity shall take effect after the passing of this act," brings into immediate operation so much of the 96th section, as prevents certificates from being received in evidence which are not duly registered immediately after the 2d of *May*, 1825. This cannot be the true construction, for the 96th section is in terms confined to commissions issued after the first day of *September*, the day on which the act took effect: such a construction would not only make the different sections of the act inconsistent with each other, but would produce this absurd consequence,—that certificates of conformity in commissions issued before the 1st of *September* must be registered, although the act does not require the registration of such commissions, or of any other proceedings under such commissions.

The words quoted from the 136th section, refer to the 121st and 122d sections, which give to bankrupts the benefits of certificates, and direct how they shall be signed and allowed, and not to that which prevents certificates from being given in evidence.

The manner in which the first of these acts dealt with the previous statutes, and the last of them has dealt with the first and with all previous laws relating to bankrupts, has occasioned no small puzzle, but the decision we have come to renders the different parts of these acts consistent.

The rule for a new trial must be discharged.

Rule discharged accordingly.

*DENMAN, Defendant; BULL, Tenant.

Defendant took the record down to the assizes. The cause was made a *remandet*. At the next assizes the tenant appeared, but the defendant did not try. The court refused to allow the tenant to enter judgment as in case of a nonsuit.

THE defendant took the record down for trial at the last summer assizes; but having entered it at the bottom of the list, it became a *remandet* to the last *Lent* assizes. At those assizes the tenant appeared, but the defendant did not proceed to trial.

Tuddy, Serjt., obtained a rule *nisi* to enter judgment as in case of a nonsuit, against which *Lawes*, Serjt., showed cause. He cited *Mewburn v. Langly*. 3 T. R. 1, to show that such a rule could not be made absolute after the defendant had once taken the record down to trial; he also contended, that judgment as in case of a nonsuit could only be entered in those cases where the statute enabled a defendant to take down the cause by proviso, and that that statute did not apply to writs of right.

Per Curiam. It was decided in *Mewburn v. Langly*, that if a plaintiff takes his cause down for trial, and it be made a *remandet*, although he withdraws his record at the assizes at which it remained to be tried, the defendant cannot have judgment as in case of a nonsuit, but must carry his record down by proviso. It is not necessary to decide whether the statute of G. 2. applies to writs of right. If writs of right are within the statute,—according to the case referred to, the tenant is prevented from opposing this rule by the cause having been carried down and made a *remandet*.

Rule discharged

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
TRINITY TERM,
IN THE
SEVENTH YEAR OF THE REIGN OF GEORGE IV., 1826.

HOUSE OF LORDS.

BRICE WILLIAM FLETCHER, Clerk, v. LEWIS RICHARD Lord SONDES Baron SONDES.

(In Error.)

On the 1st and 2d of May, 1826, the Judges (with the exception of Bayley, J., Holroyd, J., and Littledale, J..) delivered, in the House of Lords, their opinions upon this case. The case and arguments upon it are so fully stated in those opinions, that it would be improper to repeat them here.

GASELEE, J. This is an action brought by the defendant in error, in the Court of King's Bench, against [the plaintiff in error, on the bond of \$502] the latter, in the penal sum of 12,000*l.*

The declaration was on the bond in the common form, not setting out the conditions.

The plaintiff in error suffered judgment by default, whereupon, in conse-
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quence of the statute of the 8 & 9 W. 3. c. 11, it became necessary for the defendant in error to make a suggestion setting out the conditions of the bond ; alleging a breach of the condition ; praying a writ of enquiry to ascertain the truth of such suggestion, and to assess the damages sustained by the defendant in error by reason of the breach so suggested.

The record accordingly stated the condition of the bond in the words following :—

“ Whereas the above named *Lewis Richard Lord Sondes* is the true and undoubted patron of the rectory of *Kettering*, in the county of *Northampton*, which rectory is now become vacant by the death of the Rev. *Joseph Knight*, clerk, the late incumbent thereof : And whereas the said *Lewis Richard Lord Sondes*, by writing under his hand and seal, bearing equal date with the above written obligation, has presented the above bounden *Brice William Fletcher* to supply the said vacancy, and to be rector of the said rectory, in order that the said *Brice William Fletcher* may be instituted and inducted thereto by the proper ordinary : And whereas the said *Brice William Fletcher* has agreed to resign the said rectory into the hands of the proper ordinary upon such request or notice as hereinafter mentioned, so as that the said rectory may thereby again become vacant to the intent and for the sole and only purpose that the said *Lewis Richard Lord Sondes*, his heirs or assigns, or other the person or persons who shall for the time being be the owner or owners of the advowson of the said rectory, may be enabled to present thereto anew either the Honorable *Henry Watson*, one of the younger brothers of the said *Lewis Richard Lord Sondes*, or the Honorable *Richard Watson*, [⁵⁰³ the youngest brother of the said *Lewis Richard Lord Sondes*, when such of them as is to be so presented shall be capable of taking an ecclesiastical benefice :] then, my Lords, the penalty sought to be recovered is founded upon the breach of the following condition : ‘That if the above bounden *Brice William Fletcher* shall and do upon the request of the said *Lewis Richard Lord Sondes*, his heirs or assigns, or other the person or persons who for the time being shall be the owner or owners of the said advowson, or upon notice in writing to be left for him the said *Brice William Fletcher* by the said *Lewis Richard Lord Sondes*, his heirs or assigns, or other the person or persons who for the time being shall be the owner or owners of the said advowson, at the rectory or parsonage house of the said rectory, and within one month after such request made or notice left, absolutely and effectually resign and deliver up the said rectory and parish church of *Kettering*, with the appurtenances, into the hands of the proper ordinary or guardian of the spiritualities for the time being, whereby or so as that the said rectory and parish church of *Kettering* shall become and be absolutely vacant : and the said *Lewis Richard Lord Sondes*, his heirs or assigns, or the person or persons who for the time being shall be the owner or owners of the said advowson, be thereby enabled to and may present anew to the said rectory and parish church of *Kettering*, either the said *Henry Watson* or *Richard Watson*, when such of them as is to be so presented shall be capable of taking an ecclesiastical benefice ; and also if the said *Brice William Fletcher* do not or shall not commit or suffer, or cause to be committed or suffered any waste or dilapidations upon all or any of the houses, lands, tenements, or hereditaments belonging to the said rectory or parish church of *Kettering* during the time he the said *Brice William Fletcher* shall be and continue the rector or incumbent of the same [⁵⁰⁴ rectory, then the above written obligation to be void, otherwise to be and remain in full force and virtue.]’ It then assigns as a breach, that *Henry Watson*, one of the younger brothers of the defendant in error, on the 11th of *October*, 1820, became capable of taking an ecclesiastical benefice ; that the defendant in error was desirous that the plaintiff in error should resign the living that he might present the said *Henry Watson*, and requested him so to

de; but that he had refused, and still refuses, to make such resignation, to the damage of the defendant in error of 12,000*l.*

Upon this suggestion, a writ of enquiry was executed before the Chief Justice, and a special jury assessed the damages at 10,000*l.*, for which judgment has been entered up.

Upon this judgment the plaintiff in error brought a writ of error in the Exchequer Chamber, where judgment was affirmed without argument, and has since brought a writ of error before your Lordships, and your Lordships having heard the case argued, have directed the following question to be submitted to the opinion of the judges:

Whether sufficient matter appears upon the record to show, that either by statute or common law the bond upon which the action of the defendant in error was brought in this case, and stated upon the record to bear equal date with the writing of presentation therein mentioned, is void or illegal?

My Lords, the Judges have taken this question into their consideration, and differing in opinion upon it, it is my duty, according to the practice of your Lordships' House, to state my opinion on the question, and such reasons as have occurred to me in support of such opinion.

*It is, my Lords, with the utmost diffidence that I venture to give an opinion which is at variance with that of many of my learned brothers; but, my Lords, after the best consideration I have been enabled to give to the subject, and to the several authorities to be found in the books, I feel myself bound to answer to the question put by your Lordships in the negative.

My Lords, the ground of objection which has been taken to this bond is, that it is simoniacal, and not only contrary to the stat. 31 *Eliz.* c. 6, but also to the common law and public policy.

But another question has been raised at the bar, whether, admitting this objection to be good, it can be taken advantage of in the present state of the record, or whether there should not have been a plea averring that the bond was given in consideration of the presentation.

I apprehend it will not be necessary to consume much of your Lordships' time in the consideration of this question, because it appears to me to be impossible to read the conditions of the bond without coming to the conclusion that the bond was given in consideration of the presentation, and if so, it is unnecessary to introduce any specific averment of that fact.

I shall therefore confine the observations I have to trouble your Lordships with, to the principal question whether special resignation bonds for the purpose of presenting particular persons when capable of taking the benefice, are illegal; and whether persons mentioned in these conditions are such in whose behalf such a stipulation may be made?

Of course I confine myself to special resignation bonds, because since the case of *Efyche* and *The Bishop of London*, which was decided in this House in the year 1783, I am precluded from contending that a general resignation bond can, under any circumstances, be supported.

*The circumstances of that case have been so fully stated to your Lordships in the argument, and I apprehend are so well known to every one of your Lordships, that I shall not waste your time by stating them.

Before the determination of that case by this House, there had been many cases in which it had been decided by the courts below that general resignation bonds were, upon the face of them, good, and were not to be avoided, except by plea showing them to have been originally made upon some corrupt contract not appearing upon the bond itself, or that an ill use was endeavored to be made of them by attempting to put them in force for improper purposes; in which latter case the remedy was an application to a Court of Equity for an injunction to restrain their being put in suit.

It is true, that in some of the cases before that of *Efyche* and *The Bishop*

of *London*, doubts had been thrown out as to the validity of general bonds of resignation; but in most, if not all the cases, special bonds for legitimate purposes, and amongst which the presenting the patron himself, his son, or as one of the cases has it, his friend, were held to be good. And it is surely quite evident that there is a manifest distinction between general and special bonds of resignation, inasmuch, as if the patron wished to sell the advowson, it is made valuable, if by means of a general bond of resignation the purchaser can at any time compel a vacancy. This cannot be in the case of a special bond like the present, but on the contrary, as in general the party intended to be presented is under age when the bond is given, the consequence of his being presented would be the putting in a younger life, which would generally render the advowson less valuable as an object of sale.

*The first case with which I shall trouble your Lordships, is that of *Jones v. Lawrence*, which is thus reported in *Cro. Jac.* 248, in [507 *Trinity* term, 8 *Jac.* 1, twenty-one years only after passing the 31 *E/z.*

"Debt upon an obligation of 1000 marks conditioned, whereas the obligee had procured from Queen *Elizabeth* letters of presentation to the church of *Streatham*, and was to present *Lawrence*, intending when his son *John* should be capable, to procure another presentation of him to the said church, if the said obligor within three months after request, upon his presentation, admission, institution, and induction to the said church should resign his benefice absolutely, that then the obligation shall be void. The defendant pleads that he was not requested; and issue joined thereupon, and found for the plaintiff; and moved in arrest of judgment, first, that it appears by the condition of the bond to be a simoniacal contract, and against law, and therefore the obligation void. *Sed non allocatur*; for there doth not any simony appear upon the condition, and such a condition is good enough, and lawful, wherefore it was adjudged for the plaintiff. Afterwards a writ of error was brought upon this judgment in the Exchequer Chamber, and the principal error insisted upon was, that this condition is against law, for it appears upon the condition entered that it was for simony, which makes the obligation void. But all the Judges of Common Bench and Barons of the Exchequer held that the obligation and condition are good enough, for a man may bind himself to resign, and it is not unlawful, but may be upon good and valuable reasons without any color of simony; as to be obliged to resign if he take another benefice, or if he be non-resident for the space of so many months, or, as this case is, to resign upon request if the patron will present his son thereto when he should be of age *capable to take it. But if it had been averred that it was *per colerem* [508 *simonii*, viz., if he did not suffer the patron to enjoy a lease of the glebe or tithes, or if he did not pay such a sum of money, that had been simony, and it is possible might have made the obligation void. But as this case is, there doth not appear any cause to adjudge it to be void for simony. Wherefore, the judgment was affirmed."

The doctrine in that case was adopted and acted upon in the subsequent case of *Babington and Wood*, in *Cro. Car.* 180.

"Debt upon an obligation conditioned, whereas the plaintiff intended to present the defendant to such a benefice, that if the defendant at any time after his admission, institution, and induction, at the plaintiff's request, resigned the said benefice into the hands of the Bishop of *London*, that then, &c. The defendant upon oyer of the condition, demurred generally, and this was argued by *Grimston* for the petitioner, and by *Calthrop* for the defendant, who showed that the cause of demurrer was for that the condition of the bond being to resign upon request of the patron, it is simony, and against law, so the bond void. But all the court conceived that if the plaintiff had averred that the obligation was made to bind him to pay such a sum, or to make a lease or other act which appears in itself to be simony, then, upon such a plea, per-adventure it might have appeared to the court to be simony, and might have

been a question whether such a bond for simony should be void. But as it is pleaded by way of demurrer upon the oyer of the condition, it doth not appear that there is any simony, for such a bond to cause him to resign may be good, and upon good reason and discretion required by the patron, viz., if he be non-resident or takes a second benefice by a qualification or the like; and a precedent was shown in *octavo Jacobi* betwixt *Jones* and *Lawrence*, where such a bond was made to resign a benefice, upon request, when the son of *Jones* came to be twenty-four years of age, to the intent that he might be presented unto it, and it was adjudged good in the King's Bench, and affirmed in a writ of error in the Exchequer Chamber; and of this opinion was all the court, whereupon judgment was given for the plaintiff. *Hutt.* S. C. accordingly; and says that upon error brought in the Exchequer Chamber the judgment was affirmed. *Jo.* 220, S. C., accordingly; and that it was affirmed in error, upon viewing the precedent of *Jones v. Lawrence*.^{509]}

In an anonymous case, reported in 12 Mod. 504, in which a general bond of resignation was held good, although Mr. Justice *Powell* states his opinion that when first the judges held these bonds good, if they had foreseen the mischief of them, they would have been of another opinion, yet he considers that the patron having a son of his own, who may be capable of a benefice, is an honest intent. And *Blencow*, J. says, "Here is a particular circumstance why it should not be thought simony here, because it is in a sum much above the value of the benefice; if, indeed, it had been for a sum of less value, it might be intended perhaps that the parson would rather pay than resign: and he remembered Justice *Thoresden* said he had known such a bond held good twelve times, so it would be hard to oppose it now, there appearing no simony in the condition, the defendant not averring any."

What proportion the penalty in this bond of 12,000*l.* bears to the value of the living does not appear, but it must be taken for granted the bond was *bona fide* given for the purpose mentioned in the condition.

If it were really colorable, and the real intention was that there should be no resignation, but that the *patron should receive the penalty, it should have been pleaded.^{510]}

There is another case of *Hilliard v. Stapleton*, 1 Eq. Cas. Abr. 86, which is thus reported: "The guardian of an infant presented to a living, and took a bond from the incumbent to resign within two months after request of the patron or his heirs, it being designed that he should have the living himself when capable. The patron afterwards died an infant at the university, leaving two sisters his heirs, who pressed the incumbent to resign, and for not doing it put the bond in suit and recovered judgment, and this bill was brought to be relieved against the bond and judgment, and it was proved in the cause that they had treated with the incumbent to sell him the perpetual advowson, and had said that if he would not give 700*l.* for it they would make him resign. Lord Keeper said the proof in this case lies on the defendant's part, and unless they make out some good reason for removing him, he should certainly decree against the bond. Bonds for resignation have been held good in law. The statute of 31 Eliz. against simony, made the penalty upon the lay patron, and he did not remember any case of resignation bonds before that statute, and they have been allowed since only to preserve the living for the patron himself or for a child, or to restrain the incumbent from non-residence or a vicious course of life, and if any other advantage be made thereof it will avoid the bond, and where it is general for resignation yet some special reason must be shown to require a resignation, or he would not suffer it to be put in suit. If it should not be so, simony will be committed without proof or punishment. A particular agreement must be proved to resign for the benefit of a friend that would be presented, and without such agreement the bond ought not to be sued but for misbehavior of the parson, and here are proofs in this *case [endeavors to get money out of the plaintiff. A perpetual injunction

against the bond was decreed, and satisfaction to be acknowledged upon the judgment, and the plaintiff to give new bond of 200*l.* penalty to resign, but that not to be sued without leave of the court." *Cunningham*, 20. It is difficult to say why there should be a new bond, the party who was intended to be presented being dead; and in *Ambler*, 268, the Lord Chancellor is stated to have said, that the Lord Keeper went too far: but I cite the case, to show that there was then no idea that a bond to resign for a son, or even a friend of the patron to be presented, was illegal, the only ground of applying to the Court of Chancery being the ill use that had been made of it.

So in *Peele v. Capel*, Str. 534, *Cunningham*, 21, "Capel, on presenting *Peele* to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all that *Peele*, should continue to hold the living, paying 30*l.* per annum to the nephew. *Peele* makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit, and then *Peele* comes into this court for an injunction, and to have back his 30*l.* per annum. On the hearing the Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that he had been made upon it; and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it."

These are all the cases respecting special resignation bonds which I have met with before the decision of *Fytche v. The Bishop of London*.

I proceed now to those which have arisen during the succeeding period of forty-three years.

*The first is *Bagshaw v. Bossley*, 4 T. R. 78., which was an action on a bond given by the defendant, on his appointment to the curacy [512] of the free chapel of *Wormhill*, in the county of *Derby*, which,—after reciting that the defendant had agreed to be constantly and duly resident at the curacy-house there, and in default of such residence to resign and deliver up the curacy within one month after request or notice in writing left at the curacy-house, so that the patron might present anew,—was conditioned with such resignation, in default of such constant and due residence, (so that the patron, the obligee, might present anew, discharged of all charges and incumbrances done and suffered by the obligor,) and for the not committing waste or dilapidation upon the houses or lands belonging to the curacy.

To this defendant pleaded several pleas: first, that he had resided on the curacy, and had not committed or suffered waste or dilapidation. Secondly, that after his appointment to the curacy he had a general license from the obligee to reside elsewhere.

Replication, first, that the defendant voluntarily absented himself from the 7th of *April*, 1790, to the 8th of *April* following, and that the patron had given him notice to resign, which he had refused to do. Second, that after the time when the supposed license was granted, viz., on the 7th of *April*, 1790, the plaintiff countermanded, and revoked the license, and that the defendant absented himself, &c., as in the former replication.

To both these replications there was a general demurrer. *Sutton*, in support of the demurrer, contended, first, that the bond was illegal and void; and secondly, that the license was general, and could not be revoked. First, the bond is illegal, because it placed the incumbent under the undue control of the patron after the presentation, and after the relation between them had ceased, and a new relation had sprung up between the incumbent and the ordinary, to whom only he owed obedience. [513]

The right of presentation in the patron is a public trust, and not a mere private interest. The duties of the incumbent are prescribed by the municipal law, and the canons and ordinances of the church; and therefore, it was not competent to the patron to impose any private condition of his own creating,

beyond those which the civil and ecclesiastical law have deemed it necessary to require.

With respect to the residence required by the bond, that is carried much farther than the law requires it; for the statute of H. 8, only imposes certain penalties, much inferior to that imposed by this bond for non-residence; and besides, there may be various defences to an action upon that statute, as, amongst others, residence upon another living by dispensation; whereas there can be no excuse, unless the license of the patron be such; and further, in this case, the living itself is to become vacant.

Again, in this case the penalty is to become due to the patron in case of dilapidations in which he has no sort of interest, that being the sole concern of his successor.

The effect, therefore, of this bond is to raise to the patron a special interest in the exercise of a public trust which by law he was not invested with.

Chambre, contra, was stopped by the court.

Lord Kenyon. I cannot bring myself to entertain a doubt upon this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest, for it is a subject of conveyance for a valuable consideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, [514] he was bound to take upon himself all the *duties of an incumbent, to reside upon the living, to take upon himself the cure of souls, and to keep the house in proper repair. Now this bond was only entered into for the purpose of securing a performance of all these duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of *The Bishop of London v. Fyfche*. When that question comes again before the House of Lords, they will, I have no doubt, review the former decision if it should become necessary. It is sufficient for me in deciding the present case to say, that it cannot be governed by that, for here the plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which in morality, religion, and law he ought to do.

I am, therefore, clearly of opinion, that a bond for the performance of these duties is not illegal.

Buller, J. I cannot find any immorality or illegality in this bond. It is the duty of the incumbent to reside on his living, and to be regular in the discharge of his duties. Now this bond requires nothing more, it only requires him to do what the law would have compelled him to do without it.

Grose, J., was of the same opinion.

Ashurst, J., absent.

Although in this case the bond was not for resignation in favor of the son of the patron, or any relation becoming capable and desirous of taking the living, yet it amounts to a decision of the court that the giving a special bond of resignation is not in all cases illegal.

The next case was precisely in point with the present. It is *Partridge v. Whiston*, 4 T. R. 359.

The condition of the bond, after stating a presentation of the defendant to the rectory of *Cramwick*, and the vicarage of *Methwold*, in *Norfolk*, recites [515] an agreement to be personally resident in one or other of these parishes, or in *Northwold*, which is contiguous to both, without absence for eighty days in any one year, to serve the cure of these two parishes himself, if his health would permit, and not to serve the cure of any other parish while he held those; that as the two livings together were a comfortable provision for one clergyman, though neither of them separately was such, the defendant had agreed never to resign one without the other; that the plaintiff had a son about fourteen years of age, who probably would take

orders, and might be desirous of taking these livings, and therefore, the defendant had agreed in that event to resign both the livings in three months' notice to be given by the plaintiff, in order that the plaintiff's son might be presented thereto.

The bond was conditioned to perform this agreement, and to keep in good repair the rectory-house and chancel of *Cranwick*, and the vicarage-house of *Methwold*.

The court understanding that it was intended to carry this case up to the House of Lords, gave judgment for the plaintiff without hearing any argument. They said, that as this case was not precisely similar to that of *The Bishop of London v. Fyfytche*, they were bound by the established series of precedents to give judgment for the plaintiff.

I do not find that the case was ever carried farther.

The next case is not one on a resignation bond, with respect to an ecclesiastical benefice, but I cite it for the purpose of showing the opinion of Lord *Kenyon*, on the point now in question. It is the case of *Leigh v. Lewis*, 1 East, 391, where the patron of a school had taken a general resignation bond on the appointment of the master. Lord *Kenyon* said, in the instance of ecclesiastical livings every rector has a freehold in his rectory, yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent at least, were binding; though they put an end to the [516] freehold.

Lawrence, J., doubted whether the appointment could be made otherwise than for life. But he says, it is true that a bond may be taken to enforce the observance of those duties which by law are required to be performed by the appointee of an office; but then it should be so expressed in the condition.

In 3 Bos. & Pull. 231, this case is reported in the Exchequer Chamber, and judgment affirmed without argument, it not sufficiently appearing on the record that the office of schoolmaster was such as ought to be deemed a freehold office.

In *Newman v. Newman*, 4 M. & S. 66, upon a bond to pay certain sums of money on the conveyance of an estate to the obligor, and in case a living should become vacant during the life of the son of the obligee, and he should be qualified, to present him, and if he should be under age, and it should be necessary to present another, to procure such other to resign when the son should be of age, it became unnecessary to decide whether the latter part of the condition was good.

Le Blanc, J., says, the reason for making an exception in favor of a condition for presenting a son, might be because it was not for a money consideration.

Dampier, J. If a bond to resign in favor of a particular person were necessarily void, the objection would have been good in *Jones v. Lawrence*. But a stipulation to resign in favor of a specified person does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. I know that since the case of *The Bishop of London v. Fyfytche*, it has been considered that bonds of resignation in favor of specified persons are not illegal.

**Lord Kircudbright v. Lady Kircudbright*, 8 Ves. 51. Bond to pay plaintiff 100*l.* a year until he shall be instituted and placed in possession of a living in the church of *England*; then to pay him so much as with the value of the living shall amount to 150*l.* [517]

Agreement by Lord *K.*, to enter into orders and take the living, and if he did not, bond to be of no avail.

The obligor having died intestate, the obligee filed a bill praying an account, and that the arrears of his annuity might be paid him.

The Lord Chancellor expressed great doubt as to the validity of the bond, observing, that it was void on many accounts. It is, he says, a corrupt agree-

ment for taking holy orders, such as the court ought to decree to be delivered up. The policy of the ecclesiastical constitution of the country requires that a man should take orders without any reference whatever to considerations of that nature. There is no objection to the bond itself, except as connected with this agreement at the same time for a pecuniary consideration to take holy orders. Another objection to the bond is, that the father is put under these circumstances, that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself, the policy of the law supposing the patron to look out for persons the best that can be recommended to him; which excludes pecuniary considerations. The cause stood over, in order that this point might be considered.

It was ultimately decided that the obligee had not performed the conditions, inasmuch as he had only taken deacon's orders, and had not answered whether he meant to enter into priest's orders.

That case contains no decision upon the validity of special resignation bonds, though the Lord Chancellor, speaking of resignation bonds in general, states himself to have no doubt that they were generally against the *518] "policy of the law, and says, that the question of their legality would never have perplexed him if there had not been so many authorities.

In *Dashwood v. Peyton*, 18 Vesey, 27., a bond of resignation had been given in favor of a particular individual and not to accept a bishopric.

The application was for an injunction, principally on the ground that the bond as to the resignation, which had been given in consequence of supposed directions in a will, had been so given by mistake, it having been afterwards discovered that it was intended by the testator, that the party should be presented without any such obligation.

The Lord Chancellor said, it was very difficult upon the pleadings in the *Bishop of London v. Efyche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision:—but he adds,

" It would not, however, become me, having regard to what is the present state of the law on this subject, to interpose in a court of equity, on the ground that this is a particular bond of resignation, although I agree that this court, if it has a concurrent jurisdiction, is not bound to wait for the decision of a court of law. Yet a reasonable caution requires a court of equity not hastily to pronounce bad, a bond *understood* to be good at law; and it would, at least, be proper to leave that question to be reconsidered at law." The injunction was refused.

The last case to be found on the subject is, *Ex parte Rainier; Rowlatt v. Rowlatt*, 1 Jacob and Walker, 280. The father on the marriage of his son gave a bond to trustees *inter alia* for performance of a covenant in the settlement, whereby he covenanted, that until the son should become the actual incumbent of the rectory of *North Renfleet*, or should he be in the enjoyment of some other benefice or ecclesiastical preferment, which *he *519] might hold during his life of the yearly value of 600*l.* at the least, or until his death, he would pay him an annuity of 200*l.*

The father having become a bankrupt, a petition was presented by the son and his trustees to prove in respect of the bond.

It appeared that the son had been presented to a living of 600*l.* a year, but had given a bond to resign in favor of two sons of the patron when either of them should be qualified and willing to be presented to it, and instituted and inducted.

The eldest son took orders, and the living was in consequence resigned within two years after the presentation.

It was contended that the son having been presented, the condition was satisfied.

On the other hand it was said, that having been presented on a condition

to resign, and a bond given to that effect, it was a benefice that could not have been retained for life.

Lord Chancellor. " Still he might have held it for life ; he might, if he chose, have kept the living and forfeited the bond. You may, however, if you like, take a case into the Court of King's Bench."

The reporter says, the matter stood over for the plaintiffs to consider whether they would take a case, which they afterwards accepted ; but it is understood that they have since declined to persevere in it.

I apprehend that such case could only have arisen upon the ground, that the Court of King's Bench would have held the bond legal ; for if it was simoniacal, the party could not have held the living, even if he had paid the penalty, for the presentation would have been absolutely void, and, consequently, not a satisfaction of the condition.

*I have now gone through all the cases I can find respecting special resignation bonds, extending over a period of above two hundred years, in none of which has such a bond been held bad ; in many it has been expressly determined to be good, and admitted to be so in most of those in which the validity of general bonds of resignation has been disputed or denied. In one or two of the latest cases, indeed, in the Court of Chancery, it has been stated to be very difficult upon the pleadings in the case of the *Bishop of London v. Ffytche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords, made that decision. The main principle upon which that decision turned, appears to me, to have been the enabling the patron to have made a greater profit on the sale of the advowson, and the converting the tenure of the incumbent into a tenancy at will to the incumbent.

This I have already stated not to be applicable to the case of a bond to resign in favor of a particular person. The only objection applicable to a special in common with a general resignation bond, appears to be the reducing the tenure from an absolute freehold for life to one for a less period ; but however, that might be available if the objections had been made for the first time, it appears to have been too long acted upon and acquiesced in now to call it in question. Under these circumstances, therefore, can a court of law now adjudge that they are bad, particularly when it is considered that the consequence of holding them to be so must be to submit to severe penalties those who have been acting upon a practice of upwards of two centuries, and which has never yet been declared illegal, and in many instances expressly determined to be legal. Those penalties, if the bond be considered as illegal under the *statute of *Eliz.*, extending to the forfeiture of the present- [*521
tation and two years' value of the benefice.

One word upon the statute, 'The provisions of it apply to any person, &c., who shall present or collate, for *any sum of money, reward, gift, profit, or benefit* whatsoever, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sums of money, reward, gift, profit, or benefit whatsoever.'

It is not contended that this case comes within any of the words of the statute, except the word *benefit* ; and it is said, that a resignation bond in favor of a son is a benefit to the father, inasmuch as it relieves him from making any other provision for him, which he would otherwise be bound to do. To this I answer, that this is not the species of benefit which the statute contemplated ; a general resignation bond may be so, as I have before stated, as it enhances the value of the living if sold during the incumbency, and amounts to a sale with the means of procuring an immediate vacancy ; but if this be so considered, it would be equally a benefit when the father presents the son on a fair vacancy, or even where he presents himself. In either case, it may be said, he makes the presentations a means of providing for an expenditure

he must necessarily incur, and, therefore, circuitously at least, a source of profit to himself.

The statute has never yet been intended to operate to that extent, and the observations made at the bar, that upon looking at the eighth section, the word *benefit* must be taken to mean a pecuniary benefit, and that the two clauses ought to have a similar construction, appear to me to be entitled to considerable weight.

It might perhaps be urged, that in this case it does not appear that the patron was bound to provide for his younger brothers, and, therefore, it can be in no sense a benefit to the patron, which it is but fair to consider the meaning intended by the statute to be applied to the word "benefit."
[522] coupled as it is with the words "sum of money, reward, gift, or profit."

But it seems to me to be sufficient to say, the act has never been held to extend to bonds of this description; that, on the contrary, they have been uniformly held good in *Westminster Hall*, and that it would be contrary to the principle universally acted upon with respect to penal laws, viz., that they are to be strictly construed, now to extend it to them.

But it asked, admitting a resignation bond in favor of a son to be good, to what degree of relationship and to what number of persons does the principle extend? To this I answer, that it must, like many other cases, depend upon what shall be considered reasonable.

With respect to the present case, such a bond in favor of a more remote degree of relationship than a brother has been held good; for in the case of *Peele v. Capel*; before cited, the bond was in favor of a nephew; and in *Rowlatt v. Rowlatt*, where the bond was in favor of two sons, when either of them should be qualified, no objection was taken on that ground; but on the contrary, a presentation accompanied by such a bond was considered as a satisfaction of the condition to pay an annuity until the party should be in the enjoyment of a benefice which he might hold for his life.

It is also to be observed, that the statute of *Eliz.*, is not confined to bonds and securities, but extends to any promise, agreement, grant, bond, covenant, or any other assurance. If, therefore, the bond in this case is illegal and avoids the presentation, the same rule applies to every verbal promise or honorary engagement expressed, or perhaps when only implied.

Surely then it is necessary to pause before a decision is adopted, which may in its consequences involve in the guilt of simony and the penalties of [523] the statutes, parties than whom none would be more abhorrent from such an offence, into whose contemplation it could never for a moment have entered, that they were acting illegally in making or accepting resignations under circumstances sanctioned by the practice of centuries and the current of legal decisions, and who, from their peculiar station in society, would have been the last to have put themselves in the smallest hazard of having it imputed to them for an instant, that they had concurred in, or lent their sanction to any act, of the legality or propriety of which a doubt could be entertained.

Another objection taken to these bonds is, the oath taken upon institution; but this seems to me to be begging the question. The oath is: "I do swear that I have made no *simoniacial* payment, contract, or promise." Now before the giving of such a bond can be considered a breach of the oath, it must be determined that such a bond is a *simoniacial* contract.

Bishop *Gibson* contends, that this oath, whether interpreted by the plain tenor of it, or according to the language of former oaths in the notions of the Catholic church concerning simony, is against all promises whatsoever: (802.) And he states, that in the year 1391, in Archbishop *Courtney's* decree, the oath is. "Quodque obligati non sunt, nec eorum amici pro se, juratoria aut pecuniaria cautione, de ipsis beneficiis resignandis vel permutandis."

But I should conclude, by the omission of this part of the oath in the canons of 1603, it was intended that it should not longer be included, or at least, that it was considered as not being included; for in the *Irish* canons, which were made thirty-one years afterwards, it was provided, that if any clerk, or other person with his consent, should seal any bond, or sell to any person or persons with condition of resignation of his benefice, he should be holden guilty of simony, and proceeded ^{*against according to the severity of the} [^{*524} ancient customs in that behalf.

As another ground of objection to these bonds, it is asked, what power is there after the resignation made to compel the patron to present the person in whose favor it is made, or to compel such person to accept it, or having been instituted to prevent his resigning the benefice to a vendee immediately afterwards; and it is said, that neither the bishop nor the chancellor can compel such presentation to be made.

To this I answer, that the resignation is to be made to the bishop. Upon its being tendered, he has a right to inquire into the reason of it, and upon finding it is in consequence of a resignation bond, or any other engagement to resign, he may say he will not accept the resignation, unless the patron comes at the same time prepared to make the presentation. Where the party to be presented is under age at the time the engagement is entered into, and as soon as he comes of age procures himself to be admitted into priest's orders, it is a pretty strong proof of his readiness to accept the living.

With respect to the second part, the offer to resign the living immediately, or within a very short period after institution, is a pretty strong proof of the resignation being obtained from an interested motive, and would probably induce the bishop not to accept it. But the legality or illegality of the bond cannot depend on what course the bishop would pursue; and the probability is, that he would not refuse to act according to what the courts of law have decided upon the question.

If any real inconvenience should be found, it would be in the power of the legislature to enact that the resignation shall be conditional only, and be void if the persons in whose favor it is made be not presented within a certain period.

*It certainly has been determined that the party does all he can to comply with the condition, by tendering his resignation, yet if the bishop refuses to accept it, the bond is forfeited. [^{*525}

But upon this I would observe, that if where the incumbent has done all he can to perform his obligation, the bond is still put in suit, it can only be for an unlawful purpose; in that case, I apprehend, a court of equity would grant an injunction.

To the observation that it may be difficult or impossible to ascertain the fact, the answer is, that if there is any suspicion respecting it, a bill in equity may be filed for a discovery, and if the discovery does not render the party liable to penalties, it will be ordered.

This was done in the case of *The Bishop of London v. Eftche*, and it is remarkable that the noble and learned Lord, who so ably and so successfully combated the legality of resignation bonds, whilst he was in the profession adopted the doctrine of *Westminster Hall*, and had in that very case overruled a demurrer, which had been pleaded on the ground that a discovery might expose the parties to penalties, and which must have been allowed, had his Lordship then been of opinion that the transaction was illegal. The case as to this point will be found in *1 Brown's Reports in Chancery*, 96.

In the observations with which I have troubled your Lordships, and which have extended to a greater length than I could have wished, I have cautiously abstained from entering into the question how far bonds of this description are or are not consistent with public policy, and I have done so, because, however, if the case were new and doubtful, it might be proper to take this ques-

tion into consideration ; yet if the case is not new, but such bonds have been held good for centuries, as it appears to me they have been, it is now too late [526] to consider that "question in a court of law, and if it is considered right to put a stop to them on the ground of public policy, the legislature are the proper persons to do so.

Were the case new, I am not prepared to say it might not be proper to prevent the giving of these bonds ; but, if so, it seems to me that it would be the proper course to put an end to them altogether, and not make a distinction in favor of those which it has been said are good, because they only enforce the performance of duties which are required by law to be performed.

If the law requires the performance of a duty, why not trust the enforcing such performance to those authorities to which the law of the country has intrusted it, and who have the power of determining how far the rigid performance may or may not be relaxed or dispensed with ? Why is it necessary to call in the assistance of the patron, and give him the power of enforcing it by a more severe punishment than the law would inflict, and the inflicting of which would confer an advantage on the patron which the ordinary process of the law would not give him ?

With respect to one of the instances in which a bond of resignation has been allowed, viz., that of non-residence, I am not sure that the condition does proceed from so pure a motive as has been attributed to it. Take, for instance, the case of *Whiston v. Partridge*, before cited. The condition is, that the party shall reside without absence of *eighty days in any one year*. When it is considered that at the period this bond was entered into, absence of eighty days in the course of any one year put an end to any lease which might have been made of the tithes on any part of the benefice, one is compelled to conjecture there was some other reason for the insertion of that provision than [527] the good of the *church, or the punctual performance by the incumbent of the duties of his situation.

I forbear, however, to say more upon this topic, because as it appears to me the practice of giving these bonds has too long prevailed, and has been too often recognised as legal, to permit it to be altered by any other than legislative authority.

For these reasons, and upon the most attentive and full consideration I have been able to give to the authorities which I have taken the liberty of laying before your Lordships, I feel myself bound to state my humble opinion in answer to the question put by your Lordships : that sufficient matter does not appear upon the record to show that either by the statute or common law the bond upon which the action of the defendant in error was brought, stated upon the record to bear equal date with the writing of presentation therein mentioned, is void and illegal.

HULLOCK, B. I am sorry that, in answering the question propounded by your Lordships for the consideration of the judges, I feel myself, after much reflection and research upon the subject, compelled to state, that I have arrived at a different conclusion from that which is the result of the deliberation of my learned brother who has just addressed your Lordships. I am happy, however, in being able to concur in the opinion which has been stated, and which I have reason to believe is the opinion, also, of all the learned judges now present, that this record discloses sufficient matter to show that the bond in question was given in consideration of, and as and for the price of the presentation of the plaintiff in error to the rectory of *Kettering*. I own, that for a considerable time, I felt much difficulty on this part of the case ; because, although no plain unlettered men can peruse the condition of this bond without, as it seems to me, at once perceiving that such "was the fact, yet [528] still it appeared to me to be doubtful, whether that conclusion was more than inference : which, however well warranted in ordinary cases of construction, was yet insufficient, in the absence of distinct and positive averment, to

warrant a court of law in acting upon it in a case where the question is, Whether the parties to the contract have acted in contravention or violation of the enactment of a penal statute? In all cases in which the charge involves in it a breach or violation of a penal statute, it is essentially necessary that the act charged should be brought by express and positive allegations within the language and letter of the statute. I apprehend, that if the defendant below had in this case been advised to have pleaded specially, instead of suffering judgment to go against him by default, his plea would have shown by precise and positive allegation, that this bond was given in consideration of and for and as the price of the presentation, and that the presentation was made or conferred in consideration of and in return for the bond: a plea so framed would, if established in point of fact, have brought the case directly and unequivocally within the language of the statute of 31 *Eliz.* c. 6, s. 5.

Further reflection, however, and opportunities of conversing upon the subject, have satisfied me that it is abundantly clear, from the language of the condition itself, that this bond was given in consideration of and for the presentation, and that the presentation was made in consideration of the bond. In short, that this instrument was the result of barter and contract between the obligor and obligee, for and in respect of this living.

The condition commences with a recital that the obligee is the patron of the rectory of *Kettering*, which rectory was then vacant by the death of the late incumbent thereof; that the obligee had, by writing under his hand and seal, bearing equal date with the bond, presented the obligor to supply the said vacancy, and to be rector, in order that "he might be instituted and inducted thereto; and that the obligee had agreed to resign the said rectory upon such request or notice, as thereafter mentioned, so as that the said rectory might thereby again become vacant, for the sole purpose that the owner of the advowson of said rectory might be enabled to present thereto anew, either one of two brothers of the obligee therein specifically named, when the party to be presented should be capable of taking an ecclesiastical benefice.

Now can any person, after reading these passages, from the condition of the bond, have a doubt of the nature and character of this contract? Assuming, then, that it is sufficiently evident, by the matter spread on this record, that the bond in question constituted the consideration for this presentation, is it an instrument avoided by the statute of 31 *Eliz.* c. 6.? By the 5th section of that statute, "If any person shall or do, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, or of for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person to any benefice with cure of souls, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation and every admission, institution, and induction thereupon, shall be utterly void and of none effect in law." And the act then proceeds to subject the parties to certain forfeitures and incapacities.

By the word *corrupt*, as used here, and as applied to this subject, it is quite clear, that every presentation which is not *gratuitous* is *corrupt*. By the former part of the clause presentations for money, &c. are prohibited; and by the latter part of the section, presentations made for such *corrupt* cause are avoided, clearly considering such cause, that is, a bond, &c. made for a presentation, to be a *corrupt* cause; and the statute was intended, as [530] appears by the preamble to the 5th section, which is printed incorrectly at the end of the 4th, for the avoiding of simony and corruption in presentations to benefices, &c.

It may be observed, that the statute does not in express words avoid the bond itself, but merely the presentation made in consequence of or under it. But still, upon general principles of law, I conceive it to be quite clear, that a

bond made for the purpose of furthering an object prohibited by a statute is void, and can never be made the foundation of an action. And this doctrine is laid down in the clearest manner by Lord *Holt*, in *Bartlett v. Vinor*, Carth. 251. In that case that learned Judge expresses himself thus : " Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender ; because a penalty implies a prohibition, though there are no prohibitory words in the statute ; as, for instance, in the case of simony, the statute only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the simoniacal contract ; yet it hath always been held that such contracts being against law are void."

The enquiry then will be, whether a bond of this description be a *benefit*, either directly or indirectly to the patron, because if it be, it will fall immediately within the words and operation of the statute, and any presentation made for such a bond will be void.

It is denied that this security is either a profit or a benefit within the true spirit and intendment of this clause of the statute.

If your Lordships should sustain the judgment of the court below, the obligee would be entitled to take out execution upon his judgment for the sum [531] of 10,000*l.*, *with his costs of suit. A right to enforce the payment of such a sum of money looks like a profit, like a benefit. It appears difficult to raise a serious doubt upon the question. Is the possession of a special bond of resignation a benefit to the patron ? The opportunity afforded by this species of bond of providing for a son, or a brother, or relation, must surely be considered a benefit to a patron. If it be a benefit, how has it been acquired ? Why, by means and through a corrupt bargain for the presentation.

But consider this contract in another point of view. It is not compulsory on the obligor to resign ; he has an option either to do so or pay the penalty. And, as has been well observed, [*per Eyre B. Cunn.* 94.] is the chance that the obligor, who *may, will* so elect, worth nothing to the obligee ? The obligor may resign or pay the money ; and the obligee cannot, at all events, compel him to resign. If that be so, what would be easier than the making of this species of contract the means of selling an advowson during an actual vacancy ? The value of the living is calculated, a bond is given for the amount conditioned to be void on request when a certain specified individual has become capable of taking the living. That event happens almost immediately by the insertion of a person who if he lived would within a very few months become capable of holding an ecclesiastical benefice. The incumbent is called on to resign ; he refuses, but prevents a suit on the bond by paying to the obligee the amount of the penalty ; would such a proceeding, legal if this bond be legal, operate a benefit to the patron for and in respect of his presentation ? But whether the money or the resignation of the living is obtained, the obligee acquires to himself a *benefit*, in every sense of that word, for his presentation.

It has been, however, argued, as it was said in *The Bishop of London v. Ffytche*, that the word "benefit" *in the sixth section of the 31 *Eliz.* c. 6. cannot be construed according to its ordinary meaning, inasmuch as such a construction would have the effect of rendering the eighth section of the statute nugatory. The true answer to that sort of reasoning is given by Mr. Baron *Eyre*, in the case of *The Bishop of London v. Ffytche*. It appears to me that the word "benefit" in the eighth section of the act must receive the same meaning as it possesses in the sixth clause of the act. The word *benefit* in the eighth section means something *ultra*, something in addition to the *value of the thing exchanged*. In exchanges neither living can be considered as better or worse in legal intendment, because they are in the estimation of those that make them perfectly equal, however other persons

may differ upon the subject. Mr. Baron *Eyre* puts the case thus: "A living in the air of *Berkshire* may be reckoned an equivalent for the difference of an incumbency in the hundreds of *Essex*. That is a fair argument; each man throws into the scale circumstances which establish a perfect equilibrium in cases of exchange between parties. In a case where there is not a single shilling passing, if there is any other *extrinsic benefit* whatsoever to the smallest amount, it is made a part in the consideration of such exchange: and there is no question upon this act of Parliament such exchange will be void."

Since the decision of your Lordships in *The Bishop of London v. Ffytche*, we are bound to say that a general bond of resignation is bad in point of law. That decision must have proceeded either on the ground that such a bond was a benefit to the patron, and therefore prohibited by the statute, or that such a bond was void on grounds of public policy; viz. that it was contrary to the policy of the law to permit the incumbent of a living to be placed under such a control as must necessarily result from such an instrument. In *Legh v. Lewis*, 1 East, 398, *Le Blanc*, J., says that the decision in *The Bishop of London v. Ffytche* against the validity of general bonds, turned ultimately on the ground of their being simoniacal and against the statute. If the decision alluded to proceeded on that ground, then I would humbly ask on what principle or ground of reason can the effect of the bond now in judgment be distinguished from the effect of a general resignation bond? The benefit or value of the two bonds may differ in amount or degree. A special bond may not be so beneficial, so valuable as a general resignation bond; but that is a mere difference in the degree, not a difference in the nature, or essence, or character of the instrument. I am unable to comprehend any other way in which a difference can be predicated between these two descriptions of bonds; no ingenuity, no subtlety that can be employed on the subject can succeed in establishing any other distinction between general and special bonds of resignation; and if the facts disclosed upon this record are adverted to, the absolute identity of these bonds in principle and operation will be most palpable; one of the nominees in the bond is now competent to hold an ecclesiastical benefice, but the patron cannot be compelled by any mode or way which any lawyer can point out, to make the request, or give the notice mentioned in the bond. That being the case at the commencement of the suit below, the obligor stood precisely in the same situation as an obligor in a general bond would do in the moment after he had executed that description of bond.

If, then, general bonds of resignation were decided to be bad, as being contrary to the statute of *Eliz.*, on the ground of their operating as a benefit to the patron, it seems to me more than difficult to contend with success that a special bond operating in the same way can be supported as an efficient instrument. If both species of "bonds operate as benefits to the patron, though not to the same extent in point of value, they still must operate equally in violation and contravention of the provisions of the statute.

But it has been argued that, admitting the case of *The Bishop of London v. Ffytche* to be law, yet, inasmuch as it was decided, as it has been strenuously alleged, in direct contravention of a long train of decision in the courts below, your Lordships will not be disposed to carry that case beyond the strict letter of the decision, and that therefore your Lordships will restrict it in operation to general bonds of resignation merely.

In confirmation of this view of the subject, it is said that special bonds of resignation have been held valid and unimpeachable at several times, and by several Judges, and in several decisions in the courts below since, and notwithstanding the determination in *The Bishop of London v. Ffytche*. It cannot be dissembled that since the decision so often referred to, resignation bonds with special conditions have been treated on several occasions as legal instruments in the courts below. It may be therefore material to advert to the modern cases in which this question has been agitated, and it will be found,

and it is a most singular fact, that in no case since the determination in *The Bishop of London v. Ffytche* has the construction of the statute of *Elizabeth* ever been the question before the court.

The first case in which I am aware in which *The Bishop of London v. Ffytche* is mentioned is *Bagshaw v. Bossley*, clerk, M. 31 G. 3. 1790. 4 T. R. 78. That was a bond given by the incumbent to the patron on presentation to reside on the living, or to resign it if he did not return to it after notice, and also not to commit waste, &c. in the parsonage house; and it was held good. In giving judgment, Lord *Kenyon* said this bond was only entered [535] *into for the purpose of securing a performance of all those duties which by law, and without the bond, he was bound to discharge. He then proceeded thus: "I avoid saying anything about the case of *The Bishop of London v. Ffytche*; when that question comes again before the House of Lords, they will, I have no doubt, review the former decision if it should become necessary. It is sufficient for me to say that this case cannot be governed by that." Mr. Justice *Buller* said, "I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living and to be regular in the discharge of his duty. Now this bond requires nothing more. It only requires him to do what the law would have compelled him to do without it."

The next case is *Partridge v. Whiston*, clerk, 4 T. R. 359. T. 31, G. 3. That was debt upon a bond conditioned to reside; to resign, for the patron's son to be presented; and to keep the premises on the living in repair. In this case the defendant pleaded two pleas to the bond, and the question now before your Lordships might, as it would seem, have been raised on the first special plea, which set out the condition upon oyer, and then in effect averred that the presentation was given in consideration of the defendant's entering into the bond to resign the living upon the plaintiff's son taking priest's orders. To this plea there was a demurrer and joinder. But the court, understanding that it was intended to carry the case up to this House, gave judgment for the plaintiff without argument. They said, that as this was not precisely similar to *The Bishop of London v. Ffytche*, they were bound by the established series of precedents, to give judgment for the plaintiff. In this case, therefore, the construction of the statute of *Elizabeth*, is never once thought of.

[536] *The next case to which I wish to call the attention of your Lordships, though not in order of time, is that of *Newman v. Newman*, E. 55 G. 3, 1815, 4 Maule & Selwyn, 66. That was debt on bond, conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented, to resign upon notice of the son's being qualified to take it, and to present him. These facts appeared on oyer of the bond, and were alleged to be simoniacal. Demurrer in *re*, and joinder: and the court decided, that as the bond was conditioned for the performance of several things, some of which were good, the bond was valid, although one of them might be void at the common law. After argument, Lord *Ellenborough* said, "What the effect of a bond of resignation in favor of a son might be, was not, I believe, touched upon in *The Bishop of London v. Ffytche*, though, perhaps, it might be argued, that there is no reason for any distinction, because a parent would be more open to prejudice and improper bias in favor of a son, than of any other person." *Le Blanc*, J., said, "that the reason for making an exception in favor of a condition for presenting a son, might be because it was not for a money consideration." *Dum-pier*, J., "A stipulation to resign in favor of a specified person does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent a mere tenant at will to the patron." I

know that since the case of *The Bishop of London v. Fyfche*, it has been considered that bonds of resignation in favor of certain specified persons, are not illegal." In this case the judgment is given on that part of the condition of the bond which was helden good, and no judgment was given on the part of the record applicable to this question. And the opinion of Lord *Ellenborough*, seems rather against the validity of special bonds of resignation, as not distinguishable from general bonds. Mr. Justice *Le Blanc's* opinion proceeds entirely on the ground of a special bond of resignation not being for a *money* consideration, and, therefore, not bad.—The statute law is not confined to *money* considerations.—Mr. Justice *Dumpier*, seems to consider special bonds goods, but his reasoning is equally applicable to both descriptions of bonds; and if his reasoning be correct, this bond is bad, because clearly here the obligor is at this moment tenant at will to the patron.

In *Legh v. Lewis*, 1 East, 391. E. 41 G. 3, 1801, this species of bond was touched upon, though not the point in judgment. That was the case of a bond given by a schoolmaster of an ancient public school, who had, as it was said, a freehold in his office, to resign at the request of his patron. The court held the bond good. The question arose upon a demurrer to a plea, which after oyer stated all the facts on the record. In giving his judgment, Lord *Kenyon* says, "I never can admit, that at *common law*, a general resignation bond of an office is illegal, although the party may have a freehold in the office. In the instance of ecclesiastical livings, that is universally the case; *every rector has a freehold in his rectory, yet it was never doubted but that resignation bonds for certain purposes*, and up to a certain extent at least were binding, though they put an end to the freehold." *Lawrence*, J., expressed great doubts on this question. *Le Blanc*, J., agreed with Lord *Kenyon*, that the bond in that case was good; he thought it fell within the principle of the former determinations, that general bonds of resignation were good at law. I shall, however, have occasion to advert again to this decision.

*I am not aware of any other case upon this subject. From this review of the modern cases, it is quite impossible to say that any question concerning the validity of special bonds of resignation has ever come neatly before any of the courts below, with the exception perhaps of *Partridge v. Whiston*, in which a formal judgment was given in support of such a bond without argument, for the purpose of a writ of error. What became of that case I do not know. It has been seen then, that no well grounded argument in support of a special bond of resignation can be drawn from modern cases; and it will be found, I believe, that the more ancient ones are equally destitute of *general reasoning* on the subject. If any one will take the trouble of toiling through the old cases on this matter, he will not find, I believe, any decision in which the validity of either species of bond has been discussed or argued on *general reasoning*, either on the statute or at common law.

For these reasons, therefore, it appears to me that I ought to answer the question proposed to the Judges, in the affirmative, that sufficient matter appears upon the record to show that by the *statute law* the bond in question is void and illegal. But assuming that the decision in *The Bishop of London v. Fyfche*, proceeded on the ground, that the bond in that case was void, as being contrary to public policy, although it might not be a benefit within or contrary to the provisions of the statute of *Elizabeth*, I am disposed to maintain that the bond in this case operates equally against public policy, and is, therefore, on that ground, equally void and illegal.

Bonds of this description had no existence at the common law, because it was not until a period long subsequent to legal memory, that the right of patronage in the manner in which it now generally obtains, had its origin. But still these bonds, if they operate to the prejudice or detriment of the public interests, are contrary to the common law, inasmuch as

every bond or contract which operates against the public convenience, or to the public prejudice, is, upon the principles of the common law, void, and of no effect. This doctrine is familiar to every one, and is recognised and illustrated in *Collins v. Blantern*, 2 Wils. 347.

If no authorities could be found on the subject, if the question were *res integra*, few persons, I think, would contend that this species of instrument, given in consideration of and for the presentation to an ecclesiastical living, is capable of being supported on sound principles of law.

Before *The Bishop of London v. Ffytche*, numerous cases occur in the books upon the subject, but no one of them, as far as my researches enable me to speak, contain any reasoning or argument in support of these bonds; the authority of these cases seems to depend mainly upon tradition—certainly more upon positive authority than good reasoning. In the latter cases the Judges, whilst they seem to admit, that if the question were new, the validity of these instruments could not be supported, divide upon authority merely, and refuse to hear any arguments upon the subject.

In 12 Mod. 505., Mr. Justice *Powell*, expresses an opinion against resignation bonds, if the authorities had not bound him. He says, that when first the Judges held these bonds good, if they had foreseen the mischief of them, they would have been of a contrary opinion. The same opinion is expressed on this subject by Mr. Justice *Buller*, in *Bishop of London v. Ffytche*. When that case came before the court below, 1 East, 494., and afterwards, when that case was before your Lordships, the same learned Judge says, that he had taken no small pains to find out upon what principle all the [540] *cases had gone, but without much effect; for after all the labor he had bestowed upon the subject, it seemed to him they were destitute of all sense, reason, or principle. And in *Legh v. Lewis*, Mr. Justice *Lawrence* says, speaking of general resignation bonds, it must be admitted, that if it were a new question at this day, it would be very difficult to say upon principle that such bonds would be legal. And an opinion in accordance with those to which I have just adverted, has been oftener than once expressed by the highest living authority; on several occasions, the noble and learned Lord to whom I allude, has expressed himself unfavorable to those bonds upon principle. He has declared, that the only perplexity he has experienced on the question has arisen from the authorities. No one who has taken the trouble of wading through the cases which are to be found in the books upon the subject of bonds of resignation, will, I think, be disposed to question the accuracy of the conclusion at which Mr. Justice *Buller*, states himself to have arrived from a perusal of those cases. That learned Judge declared that the cases appeared to him to be destitute of all sense, reason, or principle; your Lordships are, however, vehemently called upon to form your decision, upon the present occasion, on the authority of cases destitute of *sense*, and *reason*, and *principle*.

With respect, however, to *general* bonds of resignation, the more ancient cases no longer exist as authorities upon the subject; and upon what view of the subject can either the ancient or modern cases be considered as authorities in support of special bonds of resignation? I would ask upon what principle can a *special* bond of resignation be sustained? I mean with reference to public policy. It may be worth while to advert for a moment to the nature [541] and extent of the *estate and interest which a rector has in point of law in his rectory, after institution and induction.

Few lawyers will be disposed to deny, that by institution and induction a rector becomes seised of a freehold estate for his life, in the parsonage-house, the glebe, and the tithes of his rectory. The authorities are numerous and uniform on the point; Wats. 387., Gibs. 661., Cro. Jac. 387., Noy, 104.: so distinctly stated by Lord *Kenyon*, in *Legh v. Lewis*; by Lord *Thurlow*, in *The Bishop of London v. Ffytche*.

In pleading, which is the best evidence of the law, a rector states that he is rector, &c., and as such rector that he was and thence hitherto hath been, and still is seized in his *demeane*, as of freehold in right of his said rectory, of and in the tenements, &c., &c.. If a rector, by virtue of institution and induction derives an estate for life, from whom does he derive it? not from the patron, but from the ordinary. The patron has purely the right of nomination or presentment. That is the whole of the *jus patronatus*. The office is not in any sense conferred by the patron; it proceeds entirely from the act of the bishop. Then upon what principle can it be justified at common law, that the patron shall be permitted to exact a security in derogation of this freehold estate, the effect of which will be the converting a life estate into an estate at will. In *Bishop of London v. Fyfylche*, Lord Thurlow asks, "whether a bond of resignation given by a Judge or a Master in Chancery would be good? He says, a Master in Chancery, is an officer appointed for life. Suppose the Chancellor has the appointment, and suppose such Master gives a bond to resign when called upon, would that bond be good at common law? No; because it is not only contrary to the constitution of his office, but because the public has an interest in the independence of that officer, as being appointed for life, and a public law officer. His place is independent, [542 it being *quoniam se bene gesserit*. If he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to render that officer's situation what the law says it shall not be? He apprehended it would be extremely difficult to justify those bonds." This reasoning is applicable *a fortiori* to bonds like those now under consideration, and the difficulty of supporting a bond of resignation, which in effect reduces a freehold office to a mere estate at will, is adverted to by Mr. Justice Lawrence, in *Legh v. Lewis*. I have already had occasion to observe, that that was the case of a bond of resignation by a schoolmaster. There, Mr. Justice Lawrence, after observing that it did not precisely appear on the pleadings whether the office was a freehold office, says that he had considerable doubts on the question, how far the person who has the power of such appointment could exercise it in a different manner from what the founder intended.

It may be added, that when the case of *Legh v. Lewis*, came on for argument afterwards, on a writ of error in the Exchequer Chamber, the court were clearly of opinion, that it did not sufficiently appear on the record, that the office of schoolmaster was such an office as ought, for the sake of the public, to be deemed a freehold office; and that, therefore, it was impossible to raise the important question, which it was the intention of the parties to litigate; upon which question they declined giving any opinion. Hence it may be collected, that in the clear case of a freehold, (like the present case,) the validity of such a bond was considered by the court of error a question of great difficulty and importance. And the difficulty of establishing a bond to resign a freehold office at the instance of the person making the appointment, is suggested in *Layng v. Paine*, Willes, 571. That case, it is true, arose on the "statute of 5 & 6 Edw. 6, c. 15, against the sale of offices," but still the language of the Lord Chief Justice is extremely applicable to this subject. He says, "I think this is a void condition: (a condition to resign the office of registrar of the archdeaconry of Wells:) For the donor to oblige the officer to surrender whenever he requires it, is to reserve to himself an absolute power over his officer, which he ought not to do; besides, if this were allowed, there would be a plain method chalked out to evade the statute, for any one by this means might sell an office for its full value;" and such, indisputably, would be the consequence of supporting the present bond. In *Newman v. Newman*, 4 Maule & Selwyn, 71., in speaking of a special bond of resignation, Mr. Justice Dampier, observes, that such a bond does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron.

Now, if that reasoning be sound, it applies directly to the facts disclosed on this record. It is averred, that one of the nominees in the bond has become capable of taking an ecclesiastical benefice: of consequence, the time has arrived at which the obligee may call for a resignation according to the condition of the bond. But the obligee is not therefore obliged to take that step, he may do so, or he may let it alone. If that were so at the time of the commencement of the action in the court below, the obligor was a mere tenant at will to the patron. If he be allowed to retain the living, he would do so by the permission of the patron, and he would hold it on the tenure of the patron's mere will and pleasure. Can any one then seriously contend, that the condition of this bond which places the incumbent in such complete thrall, under so absolute a dominion and restraint, can be supported upon any known or recognized principle of law? The inevitable consequences of such a state of things are too "palpable and gross to be dwelt upon for a moment; such a bond must necessarily operate to the prejudice, if not the total subversion of the true and essential interests of religion."

Suppose the clerk should resign in conformity to the condition of a bond of this sort. What obligation is there upon the obligee to present the individual specified in the condition. None. He may give the living to a stranger, and if the patron should present a stranger to the living, would the obligor have any remedy either at law or in equity against the obligee for the non-presentation of the nominee in the bond. I should be curious to learn the precise species of remedy or redress to which an obligor would, under such circumstances, be entitled. Again, there is no obligation upon the nominee to accept the living if it should be offered to him.

How can a clerk, after entering into a bond of this description, honestly take the oath which is administered to him previous to institution, (Gibs. 802, 810.) How can he sign his resignation in the form usually adopted, (Gibs. 1518.) if the ordinary permit him to resign, which by the way he is not bound to do. The words of resignation, according to Gibson, (page 851, 1518.) are "*Ex certa scientia pura sponte simpliciter et absolute resigno.*"

If the acceptance of the ordinary be necessary to give effect to the resignation, the undertaking of a clerk to resign a benefice is an undertaking which he has no power of himself to perform, because it depends on the ordinary whether he will accept the resignation or not.

Another objection arises on the ground of general policy to this species of instrument. The patron becomes thereby precluded from choosing the fittest and most proper individual for supplying the living. If he act in the presentation according to the condition of the bond, his choice is fixed long before the fitness of the object can be ascertained: at the execution of the bond the nominee may be at college, or perhaps at school, or perhaps in his cradle.

Numberless other objections might be pointed out to this species of bond, but having already, I am quite sensible, occupied too much of your Lordships' time, I will conclude by stating it to be my humble opinion, that this bond is void and illegal.

The old cases, as to general bonds of resignation, were overturned by the decision of your Lordships in the case of *The Bishop of London v. Ffylche*, and as there is not, as far as I am able to comprehend the subject, any rational distinction between the two descriptions of bonds in their operation and consequences, I conceive that special bonds of resignation are equally destitute of principle and authority. I, therefore, am bound to say, that in my judgment sufficient matter appears upon the record to show that by the common law this bond is void and illegal.

GARROW. B. My Lords, as the very important question to which your Lordships have been pleased to call the attention of the Judges, must necessarily occupy a considerable portion of your Lordships' valuable time, it is

matter of satisfaction to me that the humble individual who has now the honor of addressing you will not consume any larger portion of it. My position in your Lordships' house is upon the present occasion favorable to me, inasmuch as I not only entirely concur in the conclusion to which my learned brother who has last addressed your Lordships has arrived, but also in all the reasons which he has submitted to your Lordships for the opinion which he has formed. I beg to assure your Lordships, that I feel unaffectedly that if it had become necessary for me to have delivered in detail,* my reasons for the judgment which I have formed, I could not have executed it in any manner to be compared with the luminous statement which your Lordships have just heard, and I hope I may be excused from the risk of weakening the impression which the judgment just delivered cannot fail to have made upon those who have heard it. It appears to me, my Lords, that the case of *The Bishop of London v. Ffylche*, has settled that general resignation bonds are illegal and void; and it appears to me that bonds of the nature of that stated upon the record before your Lordships, differ only from the general bonds of resignation in degree. It appears to me, my Lords, to be essential to the best interests of the community, of which I am a member, to its religion and morals, and to the character of that useful and honorable class of men the parochial clergy, that from the moment of induction to their livings they shall be during their incumbency perfectly free and independent. To place them in any respect or degree under the control of any person whatsoever, except their ecclesiastical head, to whom they are accountable for their conduct, would be, as it appears to me, very much to diminish their usefulness, and to introduce mischiefs only in some degree less than would be occasioned by their absolute dependence upon their patron under general bonds of resignation; to me it appears that if there were any distinction as to the person from whose influence a rector of a parish ought more than any other to be free and independent, it would be that of a patron, to whom he owed his presentation.

For these reasons with which I have already troubled your Lordships, and for those which have been so much more ably stated by my learned brother who has preceded me, I feel myself bound to answer the question propounded by your Lordships to the Judges in the affirmative, and to state my opinion that sufficient *appears upon the present record to render the bond therein stated illegal and void. [547]

BURROUGH, J. briefly expressed his opinion that the bond was valid.

PARK, J. 'The question propounded by your Lordships for the consideration of the judges, having been stated by each of my learned brothers, who have already delivered their opinions upon this case, it is unnecessary to repeat it; I shall very shortly state to this House my reasons why I agree with two of my learned brothers, that this question so proposed to us ought to be answered in the affirmative. It is necessary to clear the way, by considering one branch of the question first, viz., whether the matter complained of sufficiently appears upon the record to show that the bond was given in consideration of the presentation. Now upon this point I believe we are all agreed, however we may differ on others.'

If this statement of the condition of the bond on the face of the record show it to be illegal, it is not necessary to show it again by express averment: but it is sufficient without any allegation in pleading. I agree that you cannot avoid this bond *under the statute*, however it may be at the common law, unless it was given in consideration of the presentation. For the statute, I humbly conceive, does not in terms make the bond void, but it renders the presentation void. The bond is only avoided as a consequence of the other. It was, therefore, necessary to see whether the bond was a consideration for the presentation, and I think, reading these pleadings, it was impossible that the judges should be otherwise than unanimous.

In the first place it is stated, that on the *very same day*, by writing under his hand and seal bearing equal *date with the above written obligation, Lord Sondes had presented. So that manifestly these were concurrent acts, probably both signing and sealing at the same table in the same instant of time. But it does not stop there, for the consideration of the bond states, that the said Brice William Fletcher has agreed to resign (speaking, therefore, in the past time, and prior to the execution of the bond, which only bore equal date with the presentation,) and therefore it cannot be doubted, that the one was given in consideration of the other. Indeed, it is impossible, and common sense revolts at the supposition, that such a bond should be given which is not in consideration of a presentation; for would any man, carrying his reason with him, who has actually gotten a living in his possession, give a bond to resign it? I therefore pass from any further observation on this point.

This brings me to the great question in the case, whether this bond is void or illegal by the statute or by common law. In considering this case, I presume I am to understand myself as bound by the case of *The Bishop of London v. Ffytche*, and to treat that case as the foundation of my argument; if so, I then have no difficulty in stating my humble opinion to your Lordships to be, that the courts below in this case cannot be supported.

That was the case of a *general resignation* bond; this is a case of resignation in favor of one of two individuals. Now I should be glad to ask, where, in principle, is the difference between the one and the other? They vary in degree but not in kind. If a bond to resign in favor of one of two individuals be good, where is the line to be drawn? Why may it not be in favor of one of three, of one of four, of one of five, of one of six, or till it becomes as general as if no name at all were mentioned, but stood simply and generally, as in *Ffytche's* case, *to resign upon request?* If good in favor of two *sons, or two brothers as here, there can be no limitation whether the nominees are to be sons, brothers, cousins, friends, or mere acquaintances. In short, unless I greatly deceive myself,—and I have taken great pains to understand the case,—if evils of great magnitude were likely to flow from general bonds of resignation, I think it requires no great degree of penetration to discover, that all the mischiefs which were apprehended in the one case, if well grounded, will unavoidably result from the other. But it is said, though the case of *Ffytche* must now be taken to be law, yet that proceeded against the strong opinions of *Westminster Hall*, and that decision overturned a great many former decisions, and ought not to be carried further but by legislative enactments. I agree in much of this; I am old enough in *Westminster Hall* to remember that the decision of that case created a great sensation in the profession. Probably, upon a cool and dispassionate consideration of that case, it may not stand so devoid of authority, of sound principles of policy for the interests of the church and of religion, as was supposed at that time; nor must it be taken for granted that the *policy of allowing general bonds of resignation* had never been doubted by very great judges in our courts of common law. For besides some of those authorities, which are to be found in Mr. Cunningham's collection of cases on simony, and in many of which the case had not been argued, and had not been decided upon, I have lately found that Lord Chief Justice Willes certainly thought them bad, and he was no mean authority; for in Mr. Durnford's valuable edition of that learned Chief Justice's Reports, p. 575, where he is giving judgment on the validity of a bond given by the register of an archdeacon to surrender whenever the person appointing chose, his Lordship says: "This case was compared to the case of simoniacal bonds, and to be sure the comparison is a very *just one, for it has been holden, that a bond given by a parson to his patron to resign generally, is void." His Lordship, it is true, excepts this case, "and not to a particular patron." But I have only troubled your Lordships

with this quotation to show, that the doctrine established in *Fyfytche's* case was not so new as was supposed ; and the case of a resignation to *a particular individual* was the only one excepted by Lord Chief Justice *Willis*. However this may be, I am not called on to re-argue *Fyfytche's* case. It is established law, and I do not agree with the conclusion come to by the bar, that that case has gone to its utmost verge, and ought not to be carried further but by statute. To that, my Lords, I do not agree. If the House were now called on to establish a new and an uncertain principle, which had never been known or acted upon before, in that case legislation alone ought to administer the remedy required for the existing evil : but where, as I have presumed to say before, the principle is precisely the same, that all the mischiefs flowing from the one inevitably flow from the other—where they vary in degree but not in kind—I think the case no more requires legislative interference than one half of the cases every day occurring in *Westminster Hall*, where the old principle is applied to new combinations of circumstances, in order to circumvent the machinations of those, who ingeniously are endeavoring by slight alterations to defeat or to evade the decisions of the courts. Is this, then, a case within the statute of *Elizabeth*? The bond is admitted to be the condition of the presentation, and, therefore, the words of the statute being, that “if any person or persons, for any sum of money, *reward, gift, profit, or benefit, directly or indirectly*, or for or by reason of any promise, agreement, grant, *BOND*, covenant, or other assurance, *present*, or collate, &c., such presentation shall be utterly *void, frustrate, and of none effect in law*;” [*551 and, consequently, a bond, the condition of which is illegal, cannot be enforced. But it is said, this is not a *profit or benefit* within the statute. If it be not, I cannot well tell what is or ever will be. This very case shows, that if Lord *Sondes* succeed, he will have an actual *pecuniary profit or benefit* by this presentation, and may be considered as having sold it for 12,000*l.* I am, my Lords, much at a loss myself to apprehend any case of a bond of resignation, general or special, which is not a *profit or benefit*. Even in the case most highly to be favored by a parent, and perhaps the least guilty of all—a bond to resign in favor of a son,—is that not a benefit? Suppose the son twenty-one, and the father allows him 400*l.* per annum till he is of the canonical age of twenty-four, and that the living he intends for him falls vacant, and he fills it up for three years, taking a bond in 12,000*l.*, then to resign in favor of his son. If the incumbent resign, the patron puts his son into a living, perhaps of 800*l.* a year, and derives the benefit from saving his own allowance of 400*l.*; or if the incumbent will not resign, finding the living cheaply purchased for 12,000*l.* and pays the penalty; the patron gets all that money to settle on the son, and thus, in effect, he sold a void presentation ; and depend upon it, my Lords, that if these special bonds, as they are called, be allowed, you will have every device put on foot by artful, designing, and acute men, in the lower departments of the law, to evade and elude the wholesome provisions of this statute, and render it a dead letter on the statute book. Indeed I verily believe, that special bonds of resignation, though known, never came in very general use till after, and were a contrivance to elude, the decision in *Fyfytche's* case. It is too much to be feared that, if encouraged, these special bonds will be given, as if intended for cases of resignation, but will be a mere **device between a needy patron and a monied incumbent to pay* [*552 *a sum of money in two or three years, as the apparent penalty for not resigning, when it never was intended he should, but only in this form he should secure a fortune, when the law clearly would not permit a present payment.*

In short, to my understanding, to say, that where a bond is given under a large pecuniary penalty, by which the clerk engaged to resign the benefice to the patron on a given event, is not a benefit to the patron, as well as where the resignation is to be on request, is a proposition revolting to common sense

and to the common apprehension of mankind. It must then be a *benefit*; why then is it not a *benefit* within the statute? for there are no words of the limitation on the generality of the term.

Your Lordships will observe, I have not troubled you with the long string of cases to be found in *Cunningham's Law of Simony*, and which have been all brought forward and commented upon by the learned counsel at your Lordships' bar. And I have purposely abstained from doing so, because I considered myself as standing upon the last decision in *Ffytche v. Bishop of London*, which had closed all discussion upon general resignation bonds. I have thought it more my duty to state to your Lordships my humble opinion, and the reasons for that opinion, that most of the evils and inconveniences arising from general resignation bonds apply in kind, though perhaps not in specie, to the description of bonds mentioned in this case. And being clearly of opinion that this case falls within the statute of *Elizabeth*, I ought perhaps here to relieve your Lordships from further hearing me, and I shall not trouble the House much longer; but I own it does seem to me that such bonds are against the general policy of the law of *England*. It is amongst the first things we [553] learn in the law, *vide 1 Bl. Comm.* *p. 385, that a parson has, *during his life*, the freehold in himself and of which he can only be deprived in five ways: by death; by cession in accepting another incompatible benefice; by consecration to a bishopric, unless by the favor of the crown he is allowed to hold his benefice in *commendam*; by resignation, if the ordinary will accept; and by deprivation for crime. To the same effect *Littleton*, p. 528, and *Lord Coke's Commentary*, 120 a. 341 b. 300 a. b.

The bishop cannot institute him for a less term; and yet the effect of resignation bonds, general or special, is to convert that office which by presentation, institution, and induction, becomes an office for life, and in which the rector has the freehold, into a term for years of longer or shorter duration, at the pleasure of the owner of the advowson, according to the object he has in view. Therefore any contract, "bond, &c." by which the incumbent undertakes to resign, being inconsistent with his actual intention, as recognized by the law, and with that life estate which as rector he has in the living, must be contrary to law. When your Lordships come to consider the oath of simony, as it is called, which every rector must take when instituted to a benefice, as prescribed by the canons of 1603, canon 40, is it fitting that a patron on one hand should have power to entrap the conscience of a poor needy clergyman, perhaps under the pressure of great poverty, or the cries of a starving family? or such a miserable man be thus tempted to violate his duty to God as his immediate servant by taking God's holy name in vain, and to call upon him to witness a falsehood? Can a man who deliberately swears, "that he has made no simoniacal payment, contract, or promise, directly or indirectly, by himself, or any other to his knowledge or with his consent, for or concerning the procuring and obtaining of this ecclesiastical dignity, place, preferment, [554] office, or 'living, &c., So help him God, through Jesus Christ,'" be fit to serve in the sacred office of the Church of that God and Saviour whom he has dared thus solemnly to adjure and to witness that he has not entered into any contract, when the ink is not dry, nor the wax cold which have been used in the concoction of this unlawful instrument? Your Lordships will find from this observation, that I am in no respect advocating the cause of the plaintiff in error, either in the first instance in giving such a bond, or in the last in refusing to obey the conditions of it. His poverty may have seduced him into the first offence, but his conduct in the last must call down the reprobation of every honest man, who has the cause of pure religion and sound morals at heart. The noble defendant in error may not have known the nature of the oath which his presentee was to take; and I wish and hope that may be his excuse. But these bonds are, in my judgment, my Lords, fraught with still greater evils with respect to society. The moment a man is insti-

tuted and inducted to a rectory, the law assumes, considers, and wishes him to be independant and free from all control, except that of his ordinary, in the exercise of his high and spiritual authority. But these bonds must necessarily often have the effect of placing him under the control of the patron in situations very improper and extremely unbecoming the clerical character. I wish not to enlarge on these points, because I think too highly of the clergy to suppose that many would yield to any very unreasonable requests, but my objection applies to the temptation of doing so being often great where urgent calls may aid that temptation.

But it is said the bishops may be trusted not to accept of resignations under improper circumstances. I am willing to admit this; but will persons who make no scruple of entering into such engagements, and who *scruple not to call the God of Heaven to witness a falsehood, make any difficulty of keeping back from the bishop every fact which would endanger his institution or his mandate for induction? And can a bishop, without some information on which he can act, deal so uncharitably with his brethren as to think it necessary to put such sifting questions to every clergyman who comes to him for institution as implies a belief, or even a suspicion, that he has sworn, or is coming to take a false oath? Or could he, without the same breach of christian charity, suspect that every clergyman who resigns a living into his hands, declaring thus, *ex certa scientia, para sponte, simpliciter, ei absolute resigno*, has, notwithstanding, entered into a simoniacal bond to do so, when at the same time it is undoubtedly true that he who would take such an oath as the oath of simony contrary to the truth, would feel no difficulty in asserting that his resignation was *pure et simpliciter*?

The case of *Bossley v. Bagshaw*, 4 T. R. 78, has been pressed upon your Lordships, which was the case of a bond to reside on the living, or to resign. The court upheld that bond, because it supported the cause of religion, by insisting on what is so essential to the good of the cause, viz. the residence of the incumbent. I am not called upon to say whether such a bond, thus detracting from the authority, and giving to the obligee of the bond the power of the bishop, would in my opinion be good; but it is different from this case. I believe it was quoted for the opinion of Lord *Kenyon*, on *Fyfytche's* case, but I consider that case not now open to discussion, and after all his Lordship only says, "when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary." *Partridge v. Whiston*, 4 T. R. 359, was a special bond of resignation in favor of a son. But the court heard no argument, gave no *opinion, except that it was not the same as that of *Fyfytche*, and, understanding it was to go to the House of Lords, gave judgment for the plaintiff.

With respect to those cases in equity, in the time of Lord Chancellor *Eldon*, in which his Lordship has been supposed to hold the validity of special bonds of resignation, I take it his Lordship meant no more than this, that there being a general notion that such bonds were good, he would not, as a single Judge, take upon him to decide upon their validity or invalidity; but he would put the question in such a shape as to obtain the judgment of this House upon it, and accordingly his Lordship sent one of the cases to the Court of King's Bench, but I believe it was compromised. This I assume to be the extent of Lord Chancellor *Eldon's* intention in the Court of Chancery, and he, who is now present, best knows whether I have drawn the right conclusion from what his Lordship has expressed. I understand the Lord Chancellor to have assented to my statement. And here a case now has arrived for the opinion of this House.

I beg pardon for having trespassed so long on the attention of the House, but I conclude with stating my clear opinion, that sufficient matter appears upon this record to show, that by the statute law, (and for the reasons above given, I am strongly inclined to think that by the common law also,) the bond

on which the action of debt was brought, and which bears equal date with the writing of presentation, is illegal and void.

GRAHAM, B. The question which your Lordships have submitted to the Judges for their consideration, is: "Whether sufficient matter appears upon the record to show that, either by statute or common law, the bond, upon which the action of debt was brought in this case, and stated upon the record [557] to bear equal date with the writing of presentation therein mentioned, is void or illegal?"

My Lords: This is a bond for the performance of an agreement, and a breach assigned under the 8th and 9th of *W. & M. c. 11. s. 8.* which says that, "in all actions for non-performance of any covenants or agreements in any indenture deed or writing contained, the plaintiff shall assign as many breaches as he shall think fit, and the jury shall assess," &c: the defendant in error has proceeded under this act. Here the breach assigned is of the condition of the bond, and, therefore, the condition is the expression of the agreement of the parties. Your Lordships, therefore, must look to the forms of the agreement as expressed in the condition of the bond, and must put a construction upon it. Looking at the recitals expressive of the transaction, and the occasion of it, I think that it appears by the plain and natural construction of them, that the presentation was acquired solely on the terms of giving this bond; that is, that the bond was the consideration, or the price paid for the presentation; why else are both these instruments of the same date, probably executed on the same day or meeting, the presentation being first executed in the order and course of the transaction, as before the person presented gives a bond to resign, he must have something to resign? It seems to me impossible to consider the presentation as a separate act, independent and unconnected with the bond. Suppose that after Lord Sondes had executed the presentation, Mr. Fletcher had refused to execute the bond, would not Lord Sondes have refused to give validity to the presentation? and he had a power to revoke it: 2 *Roll. Abr.* 349.: "If a man presents his clerk to the bishop, he may present another before the bishop has received his clerk;" a fortiori, Lord Sondes might have cancelled his seal before he sent the presentation to the bishop, if we take the "necessary sense of the language, [558] "whereas Lord Sondes has presented," and "whereas Fletcher has agreed to resign:" what is that but to say, that as Lord Sondes has presented, Fletcher has agreed? The inducement of Lord Sondes to present is the agreement of Fletcher to resign. In other words, the consideration of the presentation was the agreement to resign, as without it, by the terms of the agreement, the presentation would not have been made, nor vice versa. If this be the clear sense of the agreement, the question is, whether this bond is within the 31 *Eliz. c. 4.*, that is, whether it is directly or indirectly a benefit within the true meaning of that statute.

Whether a benefit or not, is best discovered by the use that is made of the bond. This view places the defendant in error in a singular position. His arguments at your Lordships' bar are urged to show that such a bond is not a benefit to the patron within the true and approved meaning of that statute, but the use which he has made of the bond, and the record which is now before your Lordships, prove that it is a benefit to the extent of 10,000*l.* If it be said that this was not a benefit contemplated at the time, but was unexpected and remote, and the effect of the breach of good faith, I answer, it was the object of the bond to secure a presentation, or to secure a compensation in case of disappointment. The bond secures a power to create a vacancy, or an equivalent for withholding that power; the equivalent is, therefore, the exact measure of the value of that power, and that in this instance is ascertained to be 10,000*l.*

It is said with a weight of authority which I feel, that these bonds by contemporaneous decisions long followed, have never been considered as benefits

within the statute, but that weight is much lightened by the discussions which took place in *The Bishop of London v. Fyfche*. That case has authorized us to look to this "without the prejudices of past opinions, however high in estimation, or even past decisions; and I may be allowed to say, that not one of those decisions underwent that full discussion of the effect of those bonds which it received in the case to which I allude, or received that illustration which has been thrown upon the subject by the arguments at your Lordships' bar, and the state of the record in this case. I therefore, my Lords, humbly state it as my opinion, that by the terms of this condition it does appear that this bond was given as the consideration of the presentation, and that it is a substantial benefit, and so within the statute of *Eiz.*" [*559]

It is said that this is not corrupt. Though there may be no moral turpitude in taking an equivalent for a thing given, yet it may be called a corrupt contract; in this case a right of presentation is given which the law forbids; a presentation which the law does not allow, and therefore, corrupt.

But, my Lords, I humbly think that bonds of resignation general, or in favor of a son or other person, are void on the fundamental principles of the common law. A parson has a freehold at law, *Co. Lit.* 341, a. "In whom the fee simple of the glebe is?" is a question in our books. Some hold that it is in the patron; but that cannot be, for two reasons, &c.; some that the fee simple is in the patron and ordinary; but this cannot be, for the causes aforesaid; and therefore, of necessity, the fee simple is in abeyance, as *Littleton* saith, Upon consideration of all our books, I observed this diversity, that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to do any thing to the prejudice of his successor, in many cases the law adjudgeth him to have in effect *but an estate for life: causæ ecclesiæ publicis causis æquiparatur, sed summa ratio est quæ pro religione facit: sed ecclesia fungitur vice minoris; meliorem facere potest conditionem suam, deteriorem nequaquam.*" [*560]

I will not say more on this head: your Lordships are aware of the able manner in which that was urged, as the ground of the opinion of a noble Lord, in the case so frequently alluded to; I, therefore, humbly offer my opinion, that this question ought to be answered in the affirmative.

ALEXANDER, C. B. The question is, whether sufficient matter appears upon the record to show that the bond on which the action is brought is void or illegal, either by the common law or statutes? I am one of those who are of opinion, that enough appears upon the record to show that the bond is void and illegal.

It is not my purpose to enter at great length into this argument. I should be in danger of occupying the important time of your Lordships by a mere repetition of what has been already very clearly and strongly urged. I shall confine myself to a brief exposition of the course of reasoning which has led me to the conclusion I have stated.

I am of opinion, that the condition of the bond, which condition is narrated upon this record, sufficiently shows the nature of this transaction. It shows that the transaction was a stipulation for the bond on one side and the presentation on the other. The bond would not have been given without the presentation, nor the presentation without the bond; the whole is one contract, of which these are the corresponding points. This is, I think, manifest upon the face of the instrument itself. The instrument is upon the record, and we are, therefore, able to reach the merits of the question.

Next, I am of opinion, that the decision in this House, in *The Bishop of London v. Fyfche*, would, if I were otherwise disinclined to it, compel me to answer to "your Lordships' question, that this bond is void and illegal by statute; this conclusion follows necessarily from that resolution. It is, as it seems to me, a strict consequence of it. I cannot distin-

guish, upon any tangible principle, between a general and a special resignation bond. All objections of all descriptions which exist fatal to the one affect the other. Somewhat softened and alleviated, it is true, by the patron's supposed object; softened, not eradicated, they exist still exactly of the same nature and character. These are the general grounds of my opinions; I proceed to explain them somewhat more in detail, yet still, I trust, briefly. Upon the first point, that is, whether the contract which taints this instrument is sufficiently apparent upon the record, I feel it to be the less requisite to detain your Lordships, because the Judges appear to be nearly agreed upon it. I shall only say that legal sense is very remote from the common sense of mankind, if the mutual contract is not manifest upon the face of the document, and the condition of the bond recited in the record. It there appears that the presentation and the bond bear equal date. It is there stated, that the patron *had* made the presentation, and the clerk *had* agreed to resign upon request. Would it not, in the common affairs of the world, be an insult to the understanding, equally of the lettered and the unlettered, to tell them that these contemporary acts and obligations, recited in the same instrument, bearing date on the same day, having from their nature, reference and relation to each other, were not the corresponding parts of one contract, but distinct and independent acts?

I would remind your Lordships of the words of Lord *Mansfield*, in the case of *The Bishop of London*, upon this point, if it had not been done yesterday by my brother, Mr. Justice *Park*. It is sufficient if the contract *562] appears upon the bond. If it had not appeared, it *might have been necessary to plead it. But in all the discussions at which I have been present, upon this point, no reason has been stated, nor valid authority cited to prove that that must be had by averment which is manifest without it.

I shall now proceed to explain why I think the order made by your Lordships' House in *The Bishop of London v. Fyfche*, decides the present question.

In the first place, I do not presume to examine that order further than is necessary to ascertain what it is, what must be inferred from it, what are the principles on which it is founded, and what rule of decision it lays down for future Judges. To that extent I must examine it, because without such examination I cannot apply it. But I ought to go no further. It is not for me to enquire whether that resolution departed from the course of decision which had before prevailed in *Westminster Hall*, nor whether it is supported by those great principles of civil and ecclesiastical policy interwoven with the constitution of the State, as essential to its prosperity.

These were topics properly brought into action when that case was under consideration. Here, in my humble judgment, they are at least unnecessary. That cause is decided, and I am bound by it. There I must look for the law upon this subject. To what source are we to look for what is called the unwritten law of the land, if not to the decisions of the supreme judicature; and upon what principle are you to expect that your decisions shall bind your posterity in the times that are to come, if you yourselves are not bound by what your predecessors have done in the times that are past? I take, therefore, the rules that necessarily flow from that decision to be fixed and settled. My Lords, it follows from that decision that a *general* bond of resignation is void and illegal—I say, general. The issue in that case, it is *true, was not upon the validity of the bond, but it involved that question.

The issue was upon the presentation. If the presentation was illegal because of its connection with the bond, the bond must have been illegal because of its connection with the presentation.

If a contract be void, either as prohibited by positive enactment, or as contravening the policy of the law, the engagements on both sides must be

equally invalid. If the *whole* contract is void, every part must be so. I refer to the case cited by my brother *Hullock*; yet I will take the liberty of adding one *dictum*, on account of the great names from whence it comes—the Earl of *Mansfield*, and Bishop *Stillingfleet*. Lord *Mansfield*, in the case of *The Bishop of London v. Ffytche*, is reported to have expressed himself as follows: “The next objection stated was, that the bond was good, but the presentation void. That is very extraordinary; and Bishop *Stillingfleet*, treats it as a most absurd proposition, that it was a good agreement in respect of the bond, and bad in respect of the presentation; and that that which was corrupt in itself could be good in a bond, and bad in a presentation.” The opinion expressed in these words appears to me to be so clear, that I feel entire confidence that no scepticism can doubt it, and no subtlety confuse it.

I assume, therefore, that a decision against the validity of the presentation in the great cause so often alluded to, was in effect a decision against the bond of resignation which had been there given, or, in other words, against a general bond of resignation.

The case which is my guide having settled that a general bond of resignation is invalid, it remains for me to consider whether upon the same principles, I am to adopt the same conclusion as to a special bond with the provisions contained in that now in question.

*The two points which appear to me to have conducted the House [564 to the reversal of the judgment below in that cause are, first, that the bond was a benefit to the patron within the statute of *Elizabeth*; and,

Secondly, that it was in effect an abridgment of that estate for life in the benefice which the law deemed essential to the independence of the incumbent, to the due administration of the duties of his sacred office, and which was therefore conferred upon him by the admission, institution, and induction, and which for the same reasons it would not permit to be abridged by any contrivance whatever. What it was agreed should not be done directly, it would not permit to be done indirectly.

That these were the chief points in debate in that cause, so far as related to its substance and its merits, I collect partly from the questions put by the House to the Judges, and partly from the opinions reported to have been delivered by such of the members of this House as concurred in the order of reversal ultimately pronounced.

The question is, whether either or both of these objections may not be equally stated against this bond. It appears to me that both may. I think that if a general bond be a benefit to the patron, this is so also. A general bond is an obligation to resign upon request made. It is general, because there is no previous condition necessary to enforce the resignation other than the request. This bond is also an obligation to resign upon request. That is the contract; but there is annexed to it a condition that the request shall not be made until a person named be capable of accepting a benefice. Is that condition wholly destructive of the benefit?

The benefit may be less in degree because many circumstances must concur instead of one, but that does not alter the nature and character of the stipulation.

*It was argued in *The Bishop of London v. Ffytche*, that these bonds, if they were legal, afforded an easy mode of selling the presentation after the vacancy. [565

The argument was this,—let the clerk give the resignation bond. When the request is made, let him refuse, let the action be brought, and let the patron recover. There is a sale of the presentation authorized by the law.

Is not this quite as open to the same contrivance? The obligation is precisely on the same terms, with this addition only, that some person named, you cannot confine it to a son or relation, it may be any body, shall be capable of accepting the benefice. How easy to insert a convenient name! The

person named becomes capable. The request is made, as was intended, it is refused, the action is brought, the money paid, and the living is legally sold.

Is it not obvious, my Lords, that if the argument I have referred to had any weight against general bonds, it ought also to weigh against a special bond.

I have stated that in this bond the stipulation is the same as in a general bond. The contract of the clerk is to resign upon request. The nominee is introduced only to explain why the patron has exacted the bond, and to affirm that his object in requiring the resignation will be to present the nominee.

But when he has obtained the resignation, who can undertake that he will present the nominee, or that the nominee will accept? The capacity to accept is the whole condition. Nothing more is required to authorize the request, and with the request to entitle the plaintiff to recover.

It appears to me obvious that these circumstances do not alter the nature and character of the benefit derived from the bond, but only diminish the [566] amount of the value by converting that which in the general bond is a "certain advantage into a contingent advantage. A man may dispute how far, in what degree the contingency diminishes the benefit, but no man can say that it destroys it.

No such bond as this can be given without putting it upon the cards (if, I may be allowed such an expression on such a subject,) that the patron *may* derive great benefit from it.

In this case, for instance, sustain this bond, affirm this judgment, you decide that this bond is no benefit to the patron, and you prove it by transferring by force of the bond a large sum of money into his pocket.

It were easy for me, my Lords, to multiply hypothetical cases in which the patron might derive advantage from such an obligation on the part of the clerk.

I shall not, however, pursue it, having, as I humbly conceive, said enough to explain the course of reasoning which induces me to think, that if a general bond of resignation be a benefit to the patron within the statute, this also must be a benefit to him, not perhaps so highly valuable, but still a benefit, and exactly of the same character and description.

The other great objection urged against general resignation bonds is, if possible, more manifestly applicable to special bonds, than that which I have just mentioned. It is, that they affect the degree of interest which the wisdom and policy of the law give to a clerk in his benefice. That is an estate for life.

In the argument of *The Bishop of London v. Ffytche*, it is thus put. The whole estate and interest of the clerk is derived from the bishop; no part of it from the patron. He has a bare power of nomination.

The law gives him no authority to diminish or vary the estate or interest conferred. To do so indirectly is in truth a fraud upon the law, adverse to its spirit, and destructive of its views. So it was argued by those [567] Lords whose opinions prevailed in that cause. Does not this bond also quite as evidently vary and diminish the estate conferred by institution and induction? Can any distinction be suggested in this respect between general and special bonds?

I venture confidently to answer none. The incumbent's estate is liable to be determined on the person becoming capable of accepting a benefice. So that that is a limitation upon an estate for life. When the first condition has happened, as in this case, the bond becomes void, and the estate of the incumbent hangs upon the request.

If that circumstance, therefore, is fatal to general bonds, it must be equally so to the bonds referred to in the question put to the judges.

The feeling to which the opinions I have stated are adverse, arises from the effect which these opinions have in diminishing the value of advowsons, and

in somewhat embarrassing patrons in the object of providing by means of church preferment for their friends or relations.

Upon this I shall say only, it certainly has that effect. But, in my humble judgment, that circumstance ought not to affect my opinion on the question put by your Lordships. It would be more material in a question of what the law ought to be, than in a question of what it is. Even there, there are weighty considerations on the other side, but here the topic is misplaced.

The answer, therefore, that I give to the question put, is, that I think the case decided by your Lordships overrules this question, and that I must answer, that this bond is illegal and void.

BEST, C. J. My Lords, I thank your Lordships for allowing me to sit whilst I state my opinion on the questions submitted by this House to the judges, and the grounds on which I have formed that opinion. The question is, "Whether sufficient matter appears upon "the record to show, that, [*568 either by statute or common law, the bond upon which the action of debt was brought in this case, and stated upon the record to bear equal date with the writing of presentation therein mentioned, is void or illegal." I will not detain the House by any technical observations on the point, whether the supposed objection to the bond be raised by the pleadings in this cause, because I humbly submit to your Lordships, that if it had been expressly stated on the record that the plaintiff in error was presented to the living of *Kettering*, on the condition of his giving a bond to resign to the intent and for the sole and only purpose (in the language of the bond) that the defendant in error might be enabled to present one of his younger brothers, when such brother should be capable of being inducted into such living, the bond would not have been void either by the statute of common law. But for the judgment of this House, in the case of *The Bishop of London v. Ffytche*, I will venture to say there never was a lawyer, from the time when tithes were first granted to the church to the present, that would not, without hesitation, have given the same answer. It is now, however, thought by some of my learned brothers, that resignation bonds in favor of particular persons, although sanctioned by judges, bishops, and chancellors, are void; that the condition of resigning benefices is repugnant to the estate which incumbents have in them, and that therefore bonds containing such a condition are void by the common law; that such bonds are benefits to the patron, and subject the givers and takers of them to all the penalties of the statute for the prevention of simony; that they cause the ministers of the gospel to take false oaths, and are therefore not to be endured in a Christian community. My Lords, although I most sensibly feel the weight of the authority to which my humble opinion is opposed, yet, supported by two of my learned brothers, I am vain enough to think we shall satisfy your *Lordships, that such bonds are liable to none of these objections. The judgment in *The Bishop of London v. Ffytche* has not [*569 decided, nor did the House intend in that case to decide this question; but it has been insisted in argument, that the principle which that case establishes governs this. My first duty will be to show that that case establishes no principle that by fair and legal reasoning can be applied to the present. I have not, therefore, to express the hope that Lord *Kenyon* expressed in *4 Term Reports* 81, that your Lordships will review that decision. I have only to request that the principle on which that judgment rests may not be extended further than those who pronounced it intended it ever should be, and that it may not be applied to cases which cannot be productive of the evils which it was their object to remedy. Thus much I might ask, although disposed to admit what has always appeared to me repugnant to reason and authority, namely, that a supreme court of justice cannot undo what it has erroneously done. Although the courts below will not impugn your Lordships' judgments in cases *ad idem*, yet they do not hold that they are bound by them beyond the point actually decided. The courts below truly say, we

cannot know that the House of Lords would carry this determination farther than they have carried it. In the case of *Partridge v. Whiston*, 4 Term Reports 360, the Court of King's Bench said, "That a bond to resign in favor of the son of the patron did not raise a point precisely like that in *The Bishop of London v. Fytche*, and they were bound by the established series of precedents to give judgment for the plaintiff." This decision, although pronounced on a point appearing on the record, and therefore liable to be disputed in this House, was never disturbed.

My Lords, in *The Bishop of London v. Fytche*, the point decided was, that a presentation was void, which was made in consideration of a bond given by [570] the *presentee to the patron, by which the former bound himself to the latter, absolutely to resign the living on request made to him by the patron to make such resignation. The question in this case refers to a bond given by the presentee to the patron to perform an agreement made between them, that the former would resign the living to the latter, to the intent and for the sole and only purpose that the latter might present one of his brothers when such brother shall be capable of taking an ecclesiastical benefice. The question in the case referred to regarded one particular description of bonds, and, in the present case, regards bonds of a very different kind.

If you reason from generals to particulars, the course is easy and safe : but if you rise from particulars to generals, or draw inferences from one particular to another, you must be careful that the particulars in every material respect resemble each other, or your reasoning will be illogical, and the analogy will fail. This is strictly true in every science, and the Bishop of *Llandaff*, who was eminently learned in many sciences, says, in *The Bishop of London v. Fytche*, "A slight variation in circumstances vitiates the validity of a precedent, and the ground on which it vitiates it is, that we cannot tell whether this variation of circumstances, had it been contemplated by the court which first established the precedent, might not have operated so as to produce a different judgment." We are all sensible that when the mind is suspended, as it were in equilibrio, by the equal prevalence of opposite reasoning in cases of intricacy, what a little circumstance would cause it to preponderate, and this little circumstance by which any case differs from an adjudged case, lessens, if it does not annihilate, the weight of a precedent. I will presently show that special bonds in favor of particular persons cannot be used for the same corrupt purposes as general bonds, and that they differ [571] from them more in *substance than they do in form. The House, in *The Bishop of London v. Fytche*, did not go beyond the question raised by the pleadings in the cause. The question put to the judges is not whether all resignation bonds are void, but whether certain specified bonds are void ; the language of the question is, Whether an agreement, whereby the incumbent undertakes to avoid the benefice at the request of such patron, be not an agreement for a benefit to such patron ? The answer of the learned Judge, who was of opinion that the bonds spoken of in the question were illegal, is confined to general bonds, to resign on request. He says, "In this case the patron was presented by reason of an agreement, that the clerk should give him a general bond of resignation, which being a profit and benefit within the statute, his presentation is void : That is the general question on the plea. Again he says, "the form of these bonds facilitates to a great degree that buying and selling of benefices, which, Bishop *Gibson* says, they were introduced for the purpose of effecting : the legal history of those bonds shows how generally they have been used for that purpose." Whether Lord Chief Justice *Eyre*'s reasoning, that because the form of these bonds was calculated to facilitate the buying and selling livings, therefore (without proof that the bond in question was intended to be used for such purpose,) all such bonds are to be helden to be simoniacial, be just, or not, it cannot apply to the bond in the present case : such reasoning cannot apply to bonds, the history

of which does not show that they have been used to facilitate the sale of livings, and which can only be used for such a purpose in one case, namely, where the presentation is sold to a person incapable of being presented whilst the church is void, and a bond is taken from the clerk presented, to resign when the purchaser shall be in full orders. Cases of this sort can scarcely ever occur; they must be so rare *that it is impossible to make them the grounds of a general condemnation of such bonds. It is enough [*572] that the bond may be avoided when such a corrupt use of it is proved. The reverend prelates who favored the House with their opinions in the case of *The Bishop of London v. Ffytche*, although they expressed doubts of the legality of bonds in any form or under any circumstances, confined their judgments to general bonds, and all their reasoning went to prove the im-policy of general bonds only. The Bishop of *Bangor* says, "I am inclined to think that bonds of resignation, whether the condition be special or general, are within the express letter of the statute of *Elizabeth*, because it is impossible to conceive how a presentee can in any instance give a bond of resignation to a patron, from which the patron will not derive some benefit or reward directly or indirectly." This is but the inclination of opinion, not decided judgment. I would beg to observe, that if the principle of some benefit, direct or indirect, be adopted, (a principle altogether inconsistent with the legal construction of penal statutes) many most conscientious patrons, as well as ecclesiastical as lay, have committed the detestable crime of simony. The Bishop of *Bangor* says, "If a bond of any sort can be said to be without exception." Except these expressions of dislike of any bonds of resignations, all the observations of the reverend prelates are directed against general, and general bonds only. The Bishop of *Salisbury* says, "General bonds of resignation have usually been given, and from the instant they are given, the wretched presentee is taken from under the protection of that law which guards every other subject of the state. He ceases to be free, because he holds his living at the absolute will of his patron, subject to his caprice." The Bishop of *Bangor*, speaks always of general bonds. "Suppose," says his Lordship, "that a patron presents a clerk to a benefice *without [*573] receiving any money, bond, or assurance for money, but the clerk enters into a bond to resign on six months' notice: as soon as he is in possession, the patron demands a lease of certain tithes at an under rent." His Lordship sums up his argument by saying, "the worst and most corrupt practices may be carried on under general bonds of resignation." The Bishop of *Llandaff*, speaks of general bonds only. The Bishop of *Gloucester* says, "A bond which conceals the consideration for which it was given, and which may easily be abused to the most oppressive and iniquitous purposes, affords a strong suspicion of a bad design. If the consideration were a good one, why is it not expressed as in special bonds it always is, in plain words?" Although these learned prelates, from a proper regard for the independence of the clergy, and a jealousy of what they thought interfered with the authority of their order, disliked all resignation bonds, yet it is clear, that they only decidedly condemned general bonds. The Bishop of *Gloucester*, distinctly admits not only the legality, but the propriety, of some special bonds of resignation.

The reasoning of Lord *Thurlow*, goes only to impugn general bonds. "Nobody," he says, "contends that the practice is not wicked, destructive, and pernicious to the discipline of the church, and contrary to the spirit of the law under which it was carried on: he could produce evidence of an offer to sell an advowson, upon which the purchase-money was calculated and put on a general bond of resignation (no such arrangement could be made on a special bond); and he knew that instances of it were frequent." (*Cunningham*, 158.) Your Lordships are aware that Lord *Thurlow*, had recently changed his opinion. When *The Bishop of London v. Ffytche*, came before

him in the Court of Chancery, that learned Lord said, "If there were no cases, I should think it 'clear, that a mere bond for resignation could not be criminal, unless it were a profit or benefit to the patron.'" Many cases have determined that these bonds were good; the effect of the determination is, that they are not simoniacal, nor against the policy of the law. ^{574]} *I Brown*, 98. His Lordship's argument in the House of Lords, so far from proving that bonds to resign in favor of a son or a brother, (which no reasonable man could say are wicked and pernicious to the discipline of the church, and could be made use of to enable sales of benefices) are illegal, shows that general bonds of resignation, although under circumstances voidable in Chancery, are not void at common law. He says, "The bond is not capable of being avoided but by averments of bad consideration and use: if you cannot aver upon it in that manner, whatever the common law may do with it, by the common law it cannot be rescinded." (*Cunningham*, 158.) His Lordship then compares them to marriage, brokerage bonds, and says, "Abundant cases may be put, to show that it is impossible to avoid those bonds at law;" and refers to the case of *Hall v. Potter*, Cunn. 25, decided in this House, in confirmation of his opinion. If I understand this argument, it is not that every general bond is void at law, but that it may be avoided if a bad use be made of it. Lord *Mansfield*, says, "The case stands singly on this proposition, whether an agreement by a general bond of resignation, in consideration of a presentation, was, by 31st of *Elizabeth*, simoniacal, corrupt, and void."

I hope I have clearly shown, from the pleadings, the questions put to the Judges, and the opinions of the Judges and Members of this House, that the question now submitted to us by your Lordships, is not touched by the judgment in *The Bishop of London v. Fyfche*. It has been stated, that special bonds differ only in form from general bonds; that the condition to resign ^{575]} may be in favor of "such as are neither the children nor relations of the patron; that if the names of two persons may be introduced into such bonds, the names of any greater number of persons may be inserted. Put into a special bond as many names as you please, you can no more make it in form or substance like a general bond, than by adding equal numbers to an equal number you can make the total equal. You cannot, by a special bond, reduce the incumbent to the same state of dependence on the caprice of the patron as by a general bond; you cannot render it available to accomplish the sale of a benefice, as you can a general bond. If a living be vacant it cannot be sold; but if general bonds were permitted, the patron might present to the vacant benefice. Take a general bond of resignation from the presentee, and when he has got his price for the benefice, call on the incumbent to resign; and thus, as Lord *Thurlow* says, "he may calculate the purchase-money on a general bond of resignation." The patron cannot make this calculation on a special bond, even if he be not obliged to present, on the resignation of the incumbent, the person mentioned in the bond, and on whose behalf the resignation is called for. If a special bond can be made use of to evade the penalties of the statute of *Elizabeth*, the taking it for such a purpose, if properly pleaded and proved, would render it void; and the insertion of an unusual number of names, and those persons not connected with the patron, would be evidence of such an intent.

I am not prepared to say that the persons in whose favor resignations are required must be relations of the patron. He may honestly think, that a person who, from temporary infirmity or absence, or from his not yet being in orders, is incapable of being presented to the living, will, when the disability shall be removed, be the fittest person to fill the church. But I think, my ^{576]} Lords, that a patron may be compelled to present the person, for the purpose of presenting whom he calls on the incumbent to resign, and that he may thus be prevented from making an improper use of the power

given him by the bond. As my Brother *Gaselee*, has said, the Bishop may refuse to accept the resignation, until he has in his hands the presentation of him in whose favor the resignation is required; or the incumbent may make a conditional resignation. Such conditional resignations have been made where livings have been exchanged. Sir *Simon Degge*, gives us the form of such a resignation, in which the Bishop is expressly required not to admit the other clerk, unless the exchange be completed, but to consider that resignation as of no effect. This agrees with the common law. Lord *Coke* says, "If two exchange lands, and one die before the exchange is executed, it is void." There are several instances in which courts of equity have interfered to prevent the making an ill use of these bonds. No case is to be found of an action at law; but as the loss of a benefice is the loss of a temporal advantage, otherwise the Court of Chancery, could not have interfered, I should think that there could be no doubt, that if a patron called on an incumbent to resign his benefice to the intent, and for the sole and only purpose, that he might present *A. B.*, in favor of whom the patron had a right to call on the incumbent to resign, and after having obtained the resignation by such false pretence, he presented *C. D.*, for whom the bond did not authorize the patron to require a resignation, compensation for the injury the incumbent had sustained might be recovered in an action. If such an action be not maintainable, a man may, through fraud, sustain a temporal injury, and yet have no redress, which, I apprehend, would be inconsistent with the first principles of our law.

*Although the validity of general bonds was supported in a great number of decided cases, there were some in which it was doubted, and others in which they were declared to be illegal. [*577]

Lord Keeper *North* said he was not satisfied that such bonds were good in law. In the case of *Graham v. Graham* such bonds were helden to be within the statute of *Elizabeth*, by the Court of Common Pleas, in the 15th of *James* the First. Where authorities clash, a court of error, at the same time that it confirms some judgments, must overrule such as are contrary to them; but where there is a long series of decisions, no authority can be opposed to them. I think a court of law cannot overturn them.

The legality of special bonds is supported by decisions both of common law courts and cours of equity, from the time of *Henry* the Fourth to the present. In *Jones v. Lawrence* it was recited on the bond, that it was the intention of the obligee to preserve the presentation for his son, when he should be capable of taking the living. The obligor bound himself to resign within three months after request. The King's Bench first, and afterwards the Court of Exchequer Chamber, held, that a bond to resign, on request, if the patron will present his son thereto when he should be capable of taking the living, is good. This is the decision of all the Judges of *England* in the eighth of *James* the First. Lord *Coke* was then Chief Justice of the King's Bench; and in his reading in the statute of *Elizabeth*, he says, that he was in parliament when that act passed; that he voted with the proceedings of the House; and he concurred with the other judges that such a bond was valid. Can your Lordships have so safe a guide to lead you to the true meaning of the statute, as one of the most eminent lawyers that ever lived, who took a part in the making the law, knew the *evil that parliament meant to correct, and the exact extent to which it was intended the remedy should be carried? [*578] In *Hilliar v. Stapleton, Michaelmas*, 1707, the Lord Keeper said, "Resignation bonds have been allowed, since the statute, only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence, or a vicious course of life." If the bond be general, his Lordship observes, a particular agreement must be proved to resign for the benefit of a friend that would be presented; and without such agreement the bond ought not to be sued on.

In *Peele v. Capel*, Str. 534, the bond was to resign when the patron's nephew came of age. Instead of the patron's requiring a resignation, an agreement was made that *Peele* should hold the living, paying the nephew 30/. a year. This payment was made for several years, but was afterwards refused, and the bond put in force. The chancellor granted an injunction, but said it was not on account of any defect in the bond, which he held good, but on account of the use that had been made of it.

In an anonymous case in 13 W. 3, *Powell* J., concurred with *Blencow*, the only other judge in court, in supporting a general bond, because, he says, it may be to an honest intent, as that the patron may have a son of his own capable of taking the benefice; but, says he, if this was the real motive, why should it not be expressed in the condition? This very learned judge entertained no doubt of the legality of special bonds, or of the justice or policy of allowing them. In *Partridge v. Whiston*, the Court of King's Bench said they were bound by an established series of precedents to give judgment for the plaintiff in an action on a bond on a condition to resign in favor of a son of the patron. This case might have been carried to the House of Lords, for [579] the question was raised on the record, but "the judgment was never disputed. To these decisions no judgment of any court, no *dictum* of any judge, can be opposed. The over-ruling of so many authorities, by any power but that of the legislature, will destroy entirely the certainty of the law; no man can know what are his rights or duties.

We talk much of national faith; I hope, My Lords, it will ever be kept inviolable. National faith is not, however, confined to any particular compacts; it requires the strict observance of all laws under the sanction of which any of the subjects of this empire have acquired any rights. The contrary of these decisions would be a breach of national faith to those who have been ordered by them to purchase advowsons. Immense sums of money have been expended in buying advowsons and presentations, from the highest assurance next to that of an express declaration by the legislature, that in case of livings becoming vacant before those on whom the purchasers intended to bestow them are capable of taking orders, they might present to such livings, and take the security of a bond from the presentees for the resignation of them when the person for whom they are intended shall be in priest's orders. Many of these purchasers have no other provision for their children, but the living so purchased. Ecclesiastics as well as laymen have dealt in these bonds of resignation. Lord *Mansfield* says, a Bishop of *Salisbury*, before his (*Lord Mansfield's*) time, frequently took them. This is not said of that right reverend prelate by way of reproach, but to show that men of the highest character did not consider that the taking such bonds was improper.

Your Lordships will permit me to remind you that if you decide that these bonds are within the statute of *Eliz.*, you make those who have given, and those who have taken them, criminals. Both the plaintiff and defendant in error, and many other persons, as well clergymen as laymen, have, whilst [580] acting under the sanction of the Courts of *Westminster*, committed the scandalous crime of simony, and subjected themselves to all the penalties of the statute of *Eliz.* I am aware, my Lords, that this argument was answered in *The Bishop of London v. Fytche*, by saying that these consequences of the judgment could be prevented by an act of parliament; your Lordships cannot have forgotten the answer of Lord *Mansfield* to this observation: "What! pass a judgment to do mischief, and then bring in a bill to cure it!" I will add, will you condemn men by a judgment that has all the vice of an *ex post facto* law, and after confiscating their property, save them from further punishment by a statute pardon? But let us forget for a moment that there are any decisions on the subject. The statute of *Eliz.* cannot be held to embrace this case without setting aside rules that since the revolution have been uniformly observed by all judges, and which tempers with mercy the

justice of our criminal law. The statute of *Eliz.* is a penal law. The rule to which I allude requires that all penal laws should be construed strictly, that no case should be holden to be reached by them but such as are withir both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws. If general words follow an enumeration of particular cases, such general words are by another rule of construction holden to apply only to cases of the same kind as those which are expressly mentioned. By the 14 G. 2, c. 1, persons who should steal sheep or any other cattle were deprived of the benefit of clergy. The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, any other cattle; but by the 15 G. 2, c. 34, the legislature declared that it was doubtful to what sorts of cattle the former act extended besides sheep, and enacted and declared *that the act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever. Until the legislature distinctly specified what cattle were meant to be included, the judges felt that they could not apply the statute to any other cattle but sheep. The legislature by the last act says it was not to be extended to horses, pigs, or goats, although all these are cattle. Lord Chief Baron *Comyn* says: "A penal statute shall not be extended by equity, and the general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted."

By the 31 *Eliz.* c. 6, s. 4, for the avoiding simony and corruption in presentations, collations, and donations of and to any benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same, if any person or persons shall for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice, with cure of souls, dignity, preferment, or living ecclesiastical, the presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction, shall be utterly void, frustrate, and of none effect in law, and the person, giving or taking the money, &c., shall forfeit double the value of one year's profit of the benefice, and the person accepting the benefice shall be forever disabled from holding the same. The only words in this statute that can be so far stretched as to reach the bond which is the subject of the present action, are profit or benefit; but these, according to the restrictive rules of construing penal statutes, mean only profits or benefits *eiusdem generis* with money, rewards, or gifts, such as bills of exchange, *instead of money, leases of the tithes or profits of the benefice, or loans of money or other valuable for a long or indefinite period of time, instead of immediate gifts of the same things. If this construction be not put on the words, no patron, either lay or ecclesiastical, can present or collate a son that is dependant on such patron to any preferment in the church, without being guilty of simony. If a bond for the resignation of a living in favor of a son be a benefit, the presentation of a son to a vacant benefice must be a benefit, for the first is only a means of obtaining the second. Indeed, there can be no doubt that if a patron has a son whom he maintains, it is generally a benefit for him to have a living to which he can present such son, for few persons would allow a son as much after he was in possession of a benefice as he received before. But this was not that corrupt benefit which was contemplated by the legislature when this statute was passed. Whatever expressions are to be found in the act, the object of the legislature was only to prevent simony, and such advantages as these were never thought to be simoniacal. Lord Chief Justice *De Grey* says, in 2 *St. Rep.* 1052, the statute has not adopted all the wild

nctions of the canon with regard to simony; but the giving or granting this bond would not amount to simony even by the common law. The words that approach nearest to it are those of the canon of 1229: *Nulli liceat ecclesiastum nomine dotakatis ad aliquem transferre*: all the other canons are confined to the trafficking in presentations, and preventing the granting of leases and pensions by incumbents. One definition of simony by a canonist is, *studiosa voluntas emendi vel vendendi aliquod spirituale vel spirituatile annexum*. This definition can by no construction be extended to special bonds of resignation made to enable a patron to provide for his relation or friend.

*583] Another writer has defined simony to be "*spirituatum acceptio vel donatio non gratuita*". These words *non gratuita* are used as the opposite of *gratuita*, and only apply to a corrupt bargain for money, or other direct property. In exchanges, each party proposes to himself some benefit; the one expects to get more profit, the other a more healthy, or agreeable, or advantageous residence. Yet exchanges are expressly allowed by the statute of *Elizabeth*, because exchanges, though productive of temporal advantages to one or both parties, are not the vile corrupt contracts which were intended to be prohibited by the legislature. But it has been said by one of my learned brothers this is a benefit and profit, because, by means of it, money will be obtained, for if the judgments of the courts below should be confirmed, the defendant in error will get 10,000*l.* The performance of the condition of all bonds is enforced by pecuniary penalties, and which pecuniary penalties may in the event of a breach of the condition be recovered. This is the case when bonds are given for the faithful performance of any office. Yet such bonds have been enforced over and over again, and no such objection was ever made to them. If the intent of the obligee was to obtain the penalty of the bond, and not the resignation of the living, such intent would be corrupt, and the bond made to carry it into execution would be void. That would not be a resignation bond, but a money bond; all that was said about resignation being a mere color to cover the corrupt intent. But this corrupt intent not appearing on the face of the bond must be pleaded. There is no such plea in the present case, nor is there the least reason to suspect that the defendant in error ever contemplated so mercenary and so base an object. He expected that the obligor would perform the condition of the bond, and then no money or other corrupt benefit could have been offered.

*584] Is it consistent with justice or common sense, that a man is to lose his right because his opponent compels him by a breach of his contract to sue for a penalty, which he neither expected or desired? Mr. Justice *Heath* says, in *The Bishop of London v. Fyfche*, "The law construes bonds according to the intent of the parties, and in all bonds with a condition, the penalty is only considered as enforcing the condition. So, my Lords, although a patron can derive no pecuniary advantage from the presentation to a living, yet if his clerk be not admitted, the law permits him to recover damages in a *quare impediu*." It has been insisted, that advowsons are pure trusts, and that patrons in the execution of these trusts, have no right to consider their families, or adopting any means for reserving presentations for any of their children or relations. This opinion is founded on what Lord *Coke* says, that a guardian in socage does not take a presentation to a living, because he can make money of it. This doctrine has led to the ridiculous ceremony of the guardian putting the pen into the hands of an infant in its cradle, and guiding its feeble hand while it signs a presentation. But executors and administrators of lay patrons, present to livings that have become vacant in the lifetimes of their testators or intestates. Presentations are not pure spiritual trusts: if they had been so considered, the bishops could never have allowed them to be disposed of by laymen. Advowsons in gross or next presentations, could never have been permitted to be sold. Archbishops could not leave options to their widows or other lay persons. The

learned *Selden*, calls the right of lay patrons to present to church livings, "The interest of patronage which the lay founders challenged in their new-erected churches." Lord *Kenyon*, calls a right of presentation a trust connected with an interest. The founders of lay patronage, when they endowed the churches, reserved *the right of patronage and the right of taking [*585 resignation bonds in favor of their children and descendants. The bishops, by allowing the dedication of tithes to be made on these conditions, obtained a provision for many churches that would otherwise have remained without endowment. As the bishops were to decide on the fitness of the persons to be presented, they wisely thought, that the allowing patrons the privilege of taking such bonds could not injure the church. On the contrary, from the exercise of this privilege, the younger members of the families of great land-owners were brought into the church, and a connection has been kept up between the landed interest and the church, which greatly contributes to increase the security and influence of the latter: at the same time the members of great families are generally better educated, and, from those family connections, likely to be more respected in their parishes, than any other clergymen that can be found. The practice of taking special resignation bonds, and the sanction that such bonds have uniformly received from the Courts of *Westminster*, are the highest evidence that such bonds were allowed by the original compact made between lords of manors and the bishops, when churches were founded. These were some of the interests which *Selden* says, the patrons challenged in their new-erected churches. It has been said, that a clerk who has given one of these bonds cannot subscribe the proper form of resignation, or take the oath administered on his institution. The unhappy men who have taken this oath, and resigned in consequence of bonds of resignation, have been even charged with perjury. This, my Lords, is a dreadful charge against the thousands of worthy persons who have given such bonds, and honorably performed the conditions of them. The objection as to the form of resignation assumes that the words *sponte pura et simpliciter* are an *essential part of the instrument of resignation. There is no particular settled form of words necessary in a resignation. In *Waland v. Pollard*, Dyer. 293 b., the words are, *anino deliberato, certa scientia et mero motu ex quibusdam causis justis et rationabilibus specialiter moventibus, ultre et sponte dedisse*. Neither these words, nor any thing of the like import, are in the form of resignation given by *Degge*.

But if a resignation in this precise form were required, the only import of the words *sponte pura et simpliciter* is, that the clerk was not driven by unlawful violence or threats, or seduced by any corrupt agreement, to make the resignation; but that he made it willingly, and because he thought it his duty to make it. With regard to the oath, I admit that by Archbishop *Courtney's* decree, persons presented are required to swear that "obligati non sunt nec eorum amici pro se juratoria aut pecuniaria cauzione de ipsis beneficiis resignandis." These words are not in the oath prescribed by the Council of *Westminster*, 1138, or that of the Council of *Oxford*, 1236. The insertion of them by the archbishop into the oath required by his decree, shows that he and those who advised him thought that the oaths previously taken did not reach resignation bonds. The archbishop had no authority to alter the oath, and if any bishop were now to refuse to admit a clerk who declined taking this oath, he would render himself liable to damages and the costs of a *quare impedit*. By altering oaths of office, you may alter the condition, duties, and responsibilities of the officers. Parliament only can do this in civil offices and councils of the clergy, with the approbation of the King. In ecclesiastical, Lord *Coke* says, "a new oath cannot be imposed without the authority of Parliament." In 1603, a canon was made, prescribing a form of oath to be taken by persons presented to benefices, and this canon [*587 was confirmed by the King. The clergy *who assisted at the convo-

cation which made the canon, must have known of Archbishop *Courtney's* decree, and yet they have omitted in the form of oath the words relative to bonds of resignation. How is this omission to be accounted for? Why, either the clergy, or those who advised the crown, thought that bonds of resignation, if not abused, were legal and proper; and therefore, they would not allow any oath to be administered to clerks, which should prevent them from giving such bonds.

I have heard it said, why will not patrons rely on the honor of clergymen? My Lords, if the clergy cannot give bonds, they cannot pledge their honor. If the one is a violation of their duty, inconsistent with the forms of resignation and their oaths, so is the other.

The last objection to the validity of these bonds is, that they convert an estate for the life of the incumbent, into an estate determinable on a particular event, during the life of the incumbent. Supposing that the clergyman's interest in his benefice be exactly the same as that of a lay tenant for life, there is nothing in the objection, for the condition to resign in the case of a benefice forms no part of the instrument that creates the interest in it: it is made by a separate deed. Now, my Lords, if a tenant for life were to give a bond to convey back his estate on the happening of a particular event, such a bond would not be voidable in law.

The objection is to introducing into the instrument conferring the estate a condition that is inconsistent with it, as when a deed conveys to *B.* an absolute indefeasible estate for his life, and contains a proviso on a certain event that the estate shall determine in the lifetime of the party to whom it is given. Your Lordships will perceive there is more of technicality than reason in this distinction. But no two estates are less like each other than that of a clerk [588] in his benefice and that of a lay *tenant for life; they are created with different objects; conditions are annexed to one which are not annexed to the other; the clergyman, to preserve his estate, must perform the duties of his church. If he takes another benefice without a dispensation, he vacates the first. These conditions arise by the original compact between the leaders of the church and the clergy, that I have already referred to,

My Lords, I humbly hope, that I have proved that the judgment of this House in *The Bishop of London v. Ffytche*, does not bear on the question now to be decided by your Lordships; that no principle can by any just legal reasoning be deduced from that case that is applicable to this; that securing a benefit for a brother or friend is not a *profit or benefit* within the meaning of the statute of *Elizabeth*; that these general terms must, according to the true and established rules for construing penal statutes, be restrained by the particular words that precede them and holden to mean any benefits of the same sort as those particularly specified; that the taking these bonds is not an abuse of the right of patronage, as that right stands according to the common law, and that they are not inconsistent with the estate which incumbents have in their benefices; that these bonds appear to have been used from the earliest times both by ecclesiastical and lay patrons, and have been uniformly supported by the judgments of the Courts of *Westminster*; that the consequences of declaring these bonds void will not be confined to the injury done to the long-established rights of patrons; it will let in a laxity in the mode of construing penal statutes, that will deprive persons accused of crimes of the benefit of that humane rule which secures from punishment all whose offences are not clearly within the letter as well as the spirit of the law. The judgments of the Courts of *Westminster Hull*, are the only [589] authority that we have for by far the greatest part of the law of *England*. The overturning the long series of judgments which declares the validity of these bonds, must introduce uncertainty and confusion into every branch of the common law. Can it be said that the law which governs these bonds is unjust? No, my Lords: the injustice is in destroying, with

out compensation, a vested right. Can it be said that they are inconsistent with the policy of our laws? That policy encourages us to provide for our children, relations, and friends, and allows us to bestow on them offices for which they are duly qualified. In ecclesiastical benefices the public have a security for the fitness of the person presented, which does not exist in other cases. The bishops are to take care that neither friendship nor natural affection puts a clerk into a church who is not duly qualified to do the duties of it. If a patron may give a living to his son, or relation, or friend, what objection is there if it becomes vacant when the person for whom it is intended is incapable of taking it, to his permitting some other person to hold it until the incapacity of the first object of his choice be removed? It has been said this can be done in the case of no other office. There are no other offices that have been created by the patrons and endowed out of their estates; and, therefore, there could be no legal origin for the right to take such bonds in any other offices. With respect to other offices, there are no judicial authorities to support such a right. Your Lordships will not suppose, that, by holding these bonds to be void, you will make patrons forget their families, and look out, unbiassed by affection or friendship, for the most worthy clergyman to fill the vacant benefice. Many of them will act as some patrons have done where a living, the presentation to which they are desirous of selling, becomes void before it is sold,—they will present some old man. By whom are the duties *of an incumbent likely to be best performed? A young [*590] man in full health under a bond of resignation, or an old one, who has just enough of life left not to be liable to be objected to by a bishop on account of his imbecility?

Many owners of manors with advowsons annexed, will sell the advowsons from the manors. Those who pay large sums of money to purchase advowsons in gross will not be the most likely persons to hold such advowsons as pure trusts, and in disposing of them to look only to the maxim, *detur digniori*. Such alienations of church patronage will break the connection between the landed interest and the clergy. The young men of family are, from their educations and habits, likely to make the best parish priests. From their connections with the owners of lands in the parishes all the inhabitants feel a respect for them, which must add much to the effect of the instruction they give. Connection with proprietors of the soil gives to the clergyman the greatest interest in the happiness of his parishioners, and stimulates him to promote their spiritual welfare. Such persons will not take orders when the livings which their ancestors founded are severed from their families. I am aware these are rather considerations of policy than law. But, my Lords, if there be any doubts what is the law, Judges solve such doubts by considering what will be the good or bad effects of their decision. I say, nearly in the words of one of the bishops in *The Bishop of London v. Ffytche*, that doctrine cannot be law which injures the rights of individuals, and will be productive of evil to the church and to the community.

ABBOTT C. J. The question, my Lords, which has been proposed to the Judges is, whether sufficient matter appears upon the record to show that, either by statute or common law, the bond upon which the action *of debt was brought in this case, and stated upon the record to bear equal [*591] date with the writing of presentation therein mentioned, is void or illegal?

My Lords, the question appears to me to consist of two parts; first, whether enough appears on the record to show that the bond was given as the price or consideration of the presentation to the benefice? Secondly, supposing this to appear, then whether the bond is void by the statute or the common law?

As to the first part of the question, I am of opinion that enough does appear upon the face of the record to show that the bond was given as the price or consideration of the presentation to the benefice. If the fact be manifest

upon the face of the instrument, it is not necessary to aver it in order to bring it to the notice of the court or within the meaning of a statute; and that the fact does so appear, it is only necessary to advert to the language of the condition.

In this case, my Lords, the statute mentions the act alone, without any epithet or qualification. The section commences with this preamble: "For the avoiding of simony and corruption in presentations, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same, be it enacted, that if any person shall or do at any time," after such a period, "for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, &c. of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person, &c. to any benefice, that then such presentation shall be utterly void." It is to that section to which I would beg to call your Lordships' attention, from which it appears, that the mere taking of any gift, profit, or benefit is in itself an avoidance of the presentation. It is necessary, with respect to any question that may arise upon the statute of *Elizabeth*, or any question that may arise upon the common law, to see what the fact is, the question being whether it is apparent upon the face of the instrument that the bond is given as the price of the presentation. It seems to me impossible for any person to read the condition of this bond as it appears upon the record, without taking it that it was given as the price of the presentation, and that the presentation was given as the consideration of the bond.

*592] It begins with reciting, that *Lewis Richard Lord Sondes* is the patron of the rectory, which rectory had become vacant by the death of the late incumbent. The next recital is, "That my Lord *Sondes*, by writing under his hand and seal, bearing equal date with the above written obligation, presented the above bounden *Brice William Fletcher* to supply the vacancy;" from which it appears that the presentation and bond are connected together; and then it goes on, "and whereas the said *Brice William Fletcher* has agreed to resign the said rectory into the hands of the proper ordinary upon such request or notice as hereinafter mentioned, so as that the said rectory may thereby again become vacant." Can any person read this and not conclude that the presentation and the bond were concurrent acts,—that they were founded upon a prior agreement to resign? This was evidently the opinion of Lord *Mansfield* in *The Bishop of London v. Ffytche*. That being so, my Lords, for the reasons which I have just given to your Lordships, I am of opinion that there is enough upon the face of the record to show that this bond was given as the price of the presentation.

Then, my Lords, the second inquiry which arises is, whether such a bond, given as the price or consideration of the presentation is void in law. Upon this question I conceive the true inquiry to be only whether this bond *593] is within the rule and principle of the decision in the case before mentioned of *The Bishop of London v. Ffytche*. I consider, my Lords, that case to have established a rule and principle binding upon all jurisdictions except that of your Lordships' House. It is true that the question there arose directly upon the presentation, and not upon the bond; but it is treated throughout as being one and the same: and as the presentation and the bond are the price and consideration of each other, it seems impossible to say that the one can be good and valid, and the other bad and void.

That case, my Lords, arose upon a presentation accompanied by a bond to resign upon the request of the patron; a general resignation bond, as it has been called. The present case arises upon a presentation accompanied by a bond to resign upon request, whereby and so as that the patron may be enabled to present one of his two brothers in the condition named, when such of

them as is to be presented shall be capable of taking an ecclesiastical benefice ; the agreement having been that the presentee should so resign to the intent that the patron may present one of those two persons. This, therefore, my Lords, is one of those that have been called special resignation bonds.

The declared object of the resignation is the presentation of one of the two persons named ; but as the resignation of the incumbent must precede the presentation of another clerk, I am at a loss to know how the presentation of the particular clerk is to be secured or enforced, or the incumbent restored to the benefice, if the patron, after having declared his intention to present one of the nominees, shall afterwards think fit to present another person. This would, undoubtedly, be a most dishonorable act, and I beg to be understood as not even surmising that the noble Lord who is a party to this suit would act in this manner. But in deciding *upon a question of law, your Lordships cannot look at the rank and character of particular persons. [*594 It has been said at the bar that a court of equity may prevent an ill use from being made of such a bond. I do not presume to say that this may not be done, if the intention to make an ill use be known and ascertained before resignation ; my difficulty is, to see how this can be known and ascertained, unless a patron should be weak enough to avow it; and this cannot be presumed of a person who could act in the way I have supposed ; and if after resignation the patron should present another person, how could the ordinary refuse institution ? Suppose the presentee to die in the interval between resignation and the new presentation, or that he should obtain a better benefice not tenable with this, and on that or on any other account refuse institution, how is the incumbent to be restored, though the objects of his agreement and of his resignation have failed ? If these difficulties cannot be overcome, then the bond in question will enforce a resignation, whenever one of two persons named shall be capable of taking a benefice, leaving the patron at liberty, in many, if not in all cases, to present whom he will.

But supposing, my Lords, these difficulties can be overcome, or be thought not really to exist, and the bond be considered only as enabling the patron to present one of his two brothers, still I am of opinion, upon the authority of the decision so often mentioned, that this bond is void in law. That decision may be considered as founded principally upon one or other of two reasons, or perhaps upon both ; the reasons being either that the bond there mentioned was within the statute of *Elizabeth*, and so void by that statute, or that the effect of the bond was to convert into an estate at will, an office which the law considers to be a freehold, *and will not allow to be less than a [*595 freehold, and so the bond is void at common law.

I consider, my Lords, the bond now in question to fall within each of those reasons, and to differ from the general bond in degree only, and not in principle or kind. If it be a benefit to a patron to be able to call for a resignation whenever he may choose to present any other person, it must, in my opinion, be a benefit, though perhaps a less benefit, to be able to command a resignation in order to present a relation or friend. And if there be any benefit, the degree of benefit must be immaterial, and the case will be within the statute. If the law will not allow a benefice to be held absolutely at the will of the patron, and voidable whenever he may choose to present any other person, in my opinion, the law cannot allow a benefice to be so held as to be avoidable when a relation or friend of the patron may be capable of taking it, and the patron may think fit to present him ; for in each case the estate or interest of the incumbent will be less than a freehold ; whereas a benefice is spoken of as a freehold in all our books, whatever it may have been in its origin, or first constitution, which are now lost in the obscurity of antiquity.

But further, my Lords, it is not only required that a benefice shall be freely given and freely taken, but if resigned, it must also be freely and voluntarily resigned. *Non metu coactus sed in spontanea voluntate.* And how can a

resignation be voluntary which is made in order to avoid the penalty of a bond, whether the patron has a right to impose the penalty at his pleasure, or only for a particular purpose? And ought the law to sanction an instrument which places a clergyman in a situation, either to subject himself to a demand which he may be unable to pay, or to make a solemn declaration contrary to his conscience and to truth? In my opinion, the law ought not to permit this.

*Again, my Lords, the bond in question enables the patron to command a resignation in favor of one of his two brothers. If such a bond should be held valid, where is the line to be drawn, or what limit is to be fixed? If it be good in favor of brothers, why may it not also be good in favor of cousins, or more remote kindred, or of friends? If it be allowed in favor of two persons, why may it not be allowed in favor of more than two—of twelve, of twenty, or even a greater number? I am unable to discover any rule or principle upon which it may be said, thus far shalt thou go, but no farther; and I infer, therefore, that no step must be taken towards the accomplishment of an object, which may reserve any benefit of this nature to the patron, or make the interest of the incumbent less than that freehold or estate for life, to be forfeited only for misconduct or by a regular judicial proceeding, which the law supposes him to possess, and requires that he shall be permitted to enjoy.

For these reasons, my Lords, I am of opinion that enough appears upon the face of this bond, to show that it is void and illegal.

The LORD CHANCELLOR. Upon the first question, my Lords, which arises in this case, I have no difficulty in saying that I am most clearly of opinion, that enough does appear upon the record to enable your Lordships to say, whether the bond in question is void or illegal either by statute or common law. I feel very great satisfaction that this question is now in the course of determination by the highest court of judicature in this kingdom, because that decision, speaking for myself, will greatly tend to relieve my mind from doubts which I have entertained when applications have been made in the Court of Chancery with reference to these special bonds of resignation, for I could never bring my mind *to that satisfactory conclusion, which perhaps *597] it was my duty to do, before I proceeded to take any step in such a case without the question with respect to these special bonds of resignation having been deliberately argued and deliberately adjudged by a court of common law, for I protest I feel myself obliged to doubt very much whether much attention ought to be paid to those decisions which have passed without argument at the bar, and which passed without a word having been said by the court. Such was the case, my Lords, with respect to this very cause, in the court where it was originally considered, as well as in the court of error, for I do not understand that a word was said upon it, either by counsel or judges. That being so, a writ of error was brought to this House, and the question has been most ably argued at your Lordship's bar, and after having heard that argument, it has been spoken to by the learned judges in such a manner as well satisfies me in saying, that it was a subject which would have borne debate in the court below; and therefore, my Lords, after it has been spoken to with so much ability by the different Judges who have had the opportunity of giving a year's consideration to it, I trust that your Lordships will not think it an unreasonable request to ask that a few days more should be permitted to elapse before a motion is made calling upon the House to proceed with its judgment.^t

On Wednesday, 17th May, 1826, it was moved and ordered, that the further consideration of this case be adjourned to the next session.

^t The final judgment in this cause not having been pronounced when the judges delivered their opinions in Easter term, the publication of them was then deferred. But they are now given with the cases of Trinity term, the earliest opportunity being embraced for the publication of so important a decision.

*A bond for resigning a living in favor of one of two brothers of the patron, is void.

On Monday, April 9th, 1827, the Lord Chancellor delivered the decision of the House of Lords as follows :

Having gone through all the circumstances of the case, he said, the question now for the consideration of their Lordships was, whether this was a bond on which the party was entitled to sue; and in coming to a conclusion on this subject their Lordships should consider themselves as judges in a court of justice, and his duty was not to state the case on any other ground than that which was warranted by law. He had not the slightest hesitation in saying, that before the decision given in the case of *The Bishop of London v. Ffylche*, this bond would have been held legal, but he was of opinion that it came within the principle which governed that decision. It had been argued by counsel at the bar that this bond could not be considered simoniacial, as the condition of the resignation was the presentation of a particular person, and that the obligee might see, and the bishop take care that on the resignation, no other person should be presented but the Rev. *Henry Watson*, the brother of Lord *Sondes*. Now, if the resignation were conditional, it would cease to be a resignation at all, and after an incumbent had resigned, was there any law upon earth which could compel a patron to present any particular person? It had already been decided in several instances, that a resignation, to be good, must be *pura et absque conditione*, otherwise the law said it was no resignation, or it was void. True it was, that two or three eminent persons were adverse to the decision in the case of *The Bishop of London v. Ffylche*, among whom was Lord *Kenyon*, to whose opinion in legal matters he paid the highest respect, and it was consequently urged, that that decision should govern no other case except such as was strictly in point, but his Lordship thought that there was nothing in the present case which should take it out of the rule by which that "decision was governed. *The Bishop of London v. Ffylche* [*599] was a bond of general resignation, and if the incumbent resigned in the present case, could not the patron present whom he pleased? How then did it differ from a bond of general resignation? It had been urged, that if this bond should be judged simoniacial, the incumbent and the patron would be subject to heavy penalties, but it was their Lordships' business not to attend to any thing but to the subject proposed for their consideration. How could they with propriety pronounce against the law to avoid the consequences of an illegal act? When he looked to the cases in the books, which were advanced in support of this judgment, he should say they were not well considered. One of them said, that a bond of resignation might be made in favor of a brother; another said, in favor of a cousin or a near relation. But he would ask, what had the condition or relationship of the person in whose favor the bond was made to do with the question? That ought to be left out of consideration. Could a patron take a bond in favor of himself? If not, he could not take it in favor of any man on account of relationship, for no man is more nearly related to a patron than himself; and, if he could take such a bond, it would in construction of law be the same as a general bond of resignation, for it was evident he could present whom he pleased after. But, again, it was said, that it could not be held simoniacial, unless it appeared that some benefit could be derived from it. Might not such a bond be made covertly in consideration of money, in this manner; when the time for resignation arrived, the patron might say to the clergyman, "If you pay me a certain sum of money, I will allow you to hold your living longer." Could not such a thing be easily effected? He had no doubt but that this decision would come by surprise, and bear harshly on many patrons and clergymen, but he was not one of those who would hesitate to indemnify those who had hitherto committed themselves by such bonds, whether patrons or incumbents, provided [*600]

that were done without touching on the general principles of the ecclesiastical laws of the country, some of which, it should be admitted, were severe. On the grounds before mentioned, he did not see how he could do otherwise than adjudge this a simoniacal contract: now, therefore, after the most profound consideration, he would move their Lordships, that the judgment in the court below be reversed.

Judgment reversed accordingly.

The ARCHBISHOP OF CANTERBURY entirely concurred in the opinion of the Lord Chancellor, which was agreeable to that of the majority of the judges; but he had to implore their Lordships' attention to this circumstance, that a large number, both of patrons and incumbents, had exposed themselves to severe penalties. His Grace trusted, that, however erroneously, they had thus committed themselves, that House would afford them protection. He held in his hands a bill containing such restrictions as would protect bonds of this nature heretofore made, and exempt the parties from the penalties above alluded to; with their Lordships' permission he would move that it should be now read *pro forma*, and on the second reading he would explain its provisions.

The LORD CHANCELLOR put the question, and the bill was accordingly read a first time.

In an action of trover, where the value of the goods converted was not ascertained, the court refused to stay proceedings upon delivery of the goods to the plaintiff or payment of the value thereof.

TADDY, Serjt., had obtained a rule calling on the plaintiff to show cause why the proceedings in an action of trover should not be stayed, upon the delivery to the plaintiff of certain parcels of cloth, (to recover damages for the conversion of which the action had been brought,) or upon payment of the value thereof, and of the value of certain other parcels disposed of by the defendant.

The affidavits on which the motion was made alleged that one Elstone, sold to the wife of the plaintiff certain cloth at 2s. 6d. a yard, which she delivered to the defendant for the purpose of covering some chairs; that the chairs having been covered and returned, he retained eighteen yards remaining, for a debt due to himself and his partner, and afterwards, without legal warrant, entered the plaintiff's premises and took the chairs for another debt due to him from the plaintiff. For this violence the plaintiff had already recovered in an action of trespass, from imprisonment for the damages and costs of which action the defendant had been discharged under the insolvent debtor's act, and the plaintiff now sought to recover damages for the detention of the residue of the cloth which had not been employed in covering the chairs, but which had been sold by the defendant for part of his debt.

Taddy, referred to *Pickering v. Truste*, 7 T. R. 53, in which the Court of King's Bench, acceded to a similar application in trespass; and *602] *Bransden v. Austen*, 1 Tid. Pr. 571, last edit. where a defendant in trover was, upon terms, permitted to surrender a part of a steam engine which he admitted the plaintiff to be entitled to.

Wilde, Serjt., opposed the rule, on the ground that there was a complicated dispute between the parties, and the value of the cloth was not ascertained.

BEST, C. J. Such a motion as this was never made before, and if acceded to, it would in effect convert the officers of this court into a jury.

Where complete justice can be done by the delivery of a specific chattel, the court will sometimes interfere to stay proceedings; but there is no instance in which the court has interfered with the intention of referring it to the officer of the court to ascertain a disputed value, and to place himself in the situation of a jury. In *Pickering v. Truste*, the value of the goods was admitted, and in *Brunsdon v. Austin*, there was no dispute on that head.

The property here has been in the defendant's hands a long time, and may have been materially injured. There is no pretence for the motion.

PARK, J. The case of the steam engine has no bearing on the present, and the rule in the books applies to instances in which trover has been brought for a specific chattel, and there have been no circumstances to enhance damages.

BURROUGH, J. I am clear this never was done, and never will be done.

GASELEE, J., concurring, the rule was

Discharged.



*MOORE v. KENRICK.

[*603]

Practice. Bail.

The defendant having been arrested under an original *capias*, original bail were put in, in *Middlesex*, and added bail, afterwards taken before a commissioner in *Denbighshire*, were then put in before the *halcer* for *Middlesex*.

This was objected to by *Wilde*, Serjt., as irregular; but

The court, observing that the authority to the commissioners was to take "all and every such recognizance as any person shall be willing to enter into before you in your county," determined that there was no ground for the objection.



SELLECK v. SMITH, KEELING, and DRAKE.

Plaintiff being indebted to *J. G.*, shipped goods under a bill of lading addressed to *R. P.*, with directions to him to sell the goods on plaintiff's account, and place the net proceeds to the credit of *J. G.*.

R. P. having pledged the goods. Held, that the plaintiff had a sufficient title to sue in trover, and that the right to the possession of the goods was not in *J. G.*

Gaselee, J., dissentiente.

TROVER for sugars. At the trial before *Best*, C. J., *Middlesex* sitting, after *Easter* term last, it appeared that the plaintiff, a merchant at *Savannah*, in the *United States*, being indebted to *John Griswold*, of *New York*, shipped the sugars in question in *America*, and addressed the bill of lading to *Richard Pettitt*, in *London*, with "directions to him to sell the sugars as soon as practicable after their arrival, and to place the net proceeds to the credit of *John Griswold*, who drew bills on *Pettitt*, to the probable amount.

[*604]

The invoice stated the plaintiff to be the shipper of the sugars, and was accompanied with a letter from the plaintiff to *Pettitt*, instructing *Pettitt* to sell the sugars on plaintiff's account. Before they arrived, *Pettitt*, representing himself as the owner of them, obtained from *Keeling & Drake*, his brokers, an advance, in anticipation of the proceeds, and then endorsed the bills of lading, "Deliver the within contents to the order of Messrs. *Keeling & Drake*." Shortly after this *Pettitt* absconded, and became bankrupt, but he previously handed over to *R. A. King*, the plaintiff's and *Griswold's* letters, and requested him to take charge of the consignments, and provide for the bills drawn by *Griswold*. Upon these instructions from *Pettitt*, *King*, on behalf of the plaintiff, demanded the sugars of the dock company, but they were refused, and the defendants, acting under the bill of lading, proposed to sell the goods still lying in the docks. *King*, then put a stop on them, but the defendants having proceeded to sale after indemnifying the dock company, he demanded the proceeds. The defendants made no objection on the score that he was not authorized by the plaintiff, but refused the proceeds; and the plaintiff then commenced the present action. Orders from the plaintiff to *King*, confirmatory of *Pettitt's* instructions, arrived after the sale of the goods. In an answer in Chancery, put in by the plaintiff in the course of these disputes, it was asserted that the property of these goods was in the plaintiff, and that he had entered into an agreement for securing *Griswold*, the payment of his debt. It appeared also in this answer that *Griswold*, had [605] insured on behalf of plaintiff, and that he had written a letter in which he said, Mr. *Selleck*, wishes the goods to be sold.

On the part of the defendants it was objected that the plaintiff could not have taken the sugars out of *Pettitt's* hands before the bills drawn on him by *Griswold*, had been taken up; and that, therefore, he had not a sufficient constructive possession to maintain trover; that *King*, had no authority to demand the sugars on the part of the plaintiff; and that if he had, the plaintiff by demanding the proceeds had adopted the sale, and could not afterwards proceed against the defendants in *tort*.

The objections, however, having been overruled, and a verdict found for the plaintiff,

Wilde, Serjt., obtained a rule *nisi* on the above grounds to set aside the verdict and enter a nonsuit. Against this,

Vaughan, and *Taddy*, Serjts., now showed cause, contending, that the right to possession of the goods always remained in the plaintiff, the goods never having been assigned to *Griswold*, and he having in fact no more than an equitable claim on the proceeds; that *King*, was sufficiently authorized by *Pettitt*, the agent of the plaintiff, to make a demand on behalf of the plaintiff, and that even if not authorized at the time of the demand, he became so by the plaintiff's subsequent ratification of his conduct: *Hull v. Pickersgill*, 1 B. & B. 282.

They were relieved from arguing the other objection.

Wilde, contra. The effect of the whole transaction was, that *Pettitt* was to be agent for *Griswold*, and to hold the goods for him, without which *Griswold*, would have had no security for the money advanced; and if [606] this were so, the plaintiff could have no right to possession. At any rate, the goods having been disposed of by a party who was intrusted with the management of them, a demand by the plaintiff was necessary before he could sue. But *King*, was only employed by *Pettitt*, to superintend the sale, and had no authority from the plaintiff to make any demand. With regard to the supposed subsequent ratification of the demand, although the principle of ratification might sometimes save the *actor* from the consequence of tortious acts, it could never make a defendant a wrong doer by relation.

But the plaintiff, at all events, by demanding the proceeds, adopted the sale, which he could not afterwards repudiate, and treat as a *tortious* act.

Stierneld v. Holder, 1 Ryan & Moody, 219. 4 B. & C. 5. So that even if he might have sued for money had and received, he could not sue in trover.

ELST, C. J. Three objections have been made to the plaintiff's suit covering in this cause; first, that at the time of the conversion of the goods by the defendants, he had no right of possession; secondly, that the party who demanded the goods had no authority for that purpose; and thirdly, that the plaintiff, by claiming the proceeds of the sale effected by the defendants, waived all right to sue them in trover.

Without speculating on what was intended, but judging by what was done, I think the right of possession was in the plaintiff; but it does not appear that it was even intended to convey the right of possession to *Griswold*, because if it had been so intended, the bill of lading might have been indorsed to him, and he might have indorsed it to *Pettitt*.

The plaintiff was the shipper of the goods, and as such was legal owner, with right of possession; and I *see nothing in what has passed to [*607] divest him of this right.

It appears by the invoice that the plaintiff was the shipper, and *Pettitt* was to sell the goods, subject to an equitable claim in *Griswold*, not to possession, but to be reimbursed out of the proceeds of the sale. *Griswold* was content with a security short of a legal right, and relied on *Pettitt* for the due execution of the trust reposed in him. While the goods were in specie, therefore, they belonged to the plaintiff, whose title was not so infirm even as that of a mortgagor; for the plaintiff's answer in Chancery asserts the property and possession to be in the plaintiff, and only admits an agreement to pay *Griswold* out of the proceeds. But a mortgagor in possession may sue in trover any party except the mortgagee; and admitting *Griswold* to be mortgagee, yet if he permits the mortgagor to remain in possession, as against him a wrong-doer cannot set up *Griswold*'s title.

A mortgagor of real property, though he cannot maintain ejectment, may maintain trespass against any wrong doer, except the mortgagee; and where trespass would lie for the possessor of real property, trover will lie for the possessor of personalty. If it were otherwise, the greatest inconvenience might be incurred, and a mortgagor who resides here might be prevented from suing a wrong-doer, though the mortgagee might be on the other side of the world.

With respect to the alleged insufficiency of the demand which was made on behalf of the plaintiff, I think no demand was necessary. *Pettitt* had no authority to pledge the goods, and the defendant's possession was wrongful:—in *Stierneld v. Holden*, the goods, though delivered to a broker who made advances, were delivered, not as a pledge, but to be sold, and were sold, in the usual course of business:—but if a demand were *necessary, *King* had [*608] abundant authority to make it, even though he had acted under *Pettitt* only.

The demand for the proceeds of the sale not having been complied with, the plaintiff was not prevented by that demand from suing afterwards in trover.

PARK, J. When the facts of this case are clearly understood there can be no difficulty about the law.

The plaintiff was indebted to *Griswold* before the shipment of the sugars in question, but although he was so indebted, it appears by the invoice and the bill of lading that the sugars were shipped in his name, and a letter was written by him at the same time to *Pettitt* to sell the sugars on his (plaintiff's) account.

If *Griswold* meant to take the legal interest in the property, he should have done so at the time of the shipment, and have consigned it in his own name.

It appears, too, from the answer in Chancery, that *Griswold* insured on the behalf of the plaintiff, and that he wrote a letter, in which he says, "Mr. Sel-

leck wishes the sugars to be sold." If the property in them were once vested in him, how was it devested?

With respect to the demand, I am inclined to think that it was unnecessary; or, if necessary, that *King* had sufficient authority to make it.

BURROUON, J. Nothing was ever done to alter the right of the plaintiff on the bill of lading; the right of possession was never out of him, and *Griswold* had no more than an equitable claim.

GASELEE, J. I agree with the opinion of the court in all respects but one: I doubt whether the plaintiff had sufficient interest to maintain trover. Undoubtedly a mortgagor in possession may maintain trover; but I think that the plaintiff was mortgagor *out of possession*, *and *Griswold* mortgagee *in possession*, the bill of lading operating as a conveyance of the goods to *Pettitt* as agent of *Griswold*. If it were otherwise, why should the whole of the proceeds have been made payable to *Griswold*?

The rest of the court, however, entertaining a different opinion, the rule must be

Discharged.

PAGET v. THOMPSON.

Practice. Infant.

CROSS, Serjt., opposed a rule obtained by *Wilde*, Serjt., calling on the defendant to show cause why the defendant's appearance entered on the filer's book should not be struck out, and why, if the defendant should appear by guardian, his plea should not be made conformable thereto, and why the defendant should not pay the plaintiff his costs occasioned by the defendant's attorney having appeared and pleaded for defendant by attorney, knowing him to be an infant, and why the defendant should not be obliged to accept notice for trial for the sittings after this term.

Cross struggled hard against the infant's paying costs, but

The court said he might have redress against his attorney, and made the rule absolute; thinking the proceeding a trick to enable the defendant to take advantage of the objection on error.

Rule absolute.

Defendant, according to one witness, having admitted taking "from his bankers, or at *Doncaster*," and according to another, "from a stranger at *Doncaster* races, for bets won," a 30*l.* bank of *England* note, without inquiring or taking any account of the number of the note, and the jury, in an action by the plaintiffs, who had lost the note, and duly published their loss, having found a verdict for them, the court granted a new trial.

TROVER for a 30*l.* bank of *England* note.

At the trial before *Best*, C. J., London sittings after *Easter* term, it appeared that the note in question had been stolen in *September*, 1824, from the porter of the plaintiffs, who were bankers in the *Strand*, and that after duly proclaiming their loss, they traced it in *October* last to the hands of the defendant.

a livery stable keeper and horse dealer at *Oxford*. Upon being applied to on the part of the plaintiffs, he said, according to one witness, "he had received it from a stranger at *Doncaster* races in payment for bets won, or in change out of payment for bets lost on some of the races;" according to another person, present at the same declaration, "from his bankers at *Oxford*, or at *Doncaster*." The defendant did not call the *Oxford* bankers.

The jury were directed to find for the defendant if they believed the last witness; they found however, for the plaintiffs; and

Wilde, Serjt., obtained a rule nisi for a new trial, against which

Bosanquet, Serjt., showed cause. The defendant did not use sufficient caution; *Gill v. Cubitt*, 3 B. & C. 466. It is well known that parties who bet usually on horse races keep most accurate accounts of their bets, and *Doncaster* being a notorious resort of suspicious characters, the defendant [*611 ought to have done for the public, with respect to the notes received, what he would do for himself in respect of his bets, namely, keep an account. But the defendant received the notes on a bad consideration, for though horse races are legalized to a certain extent by 13 G. 2. c. 19, and 18 G. 2. c. 34, yet bets upon them are void under 9 Ann. c 14.

Wilde, contra. The defendant exercised sufficient caution; at least, as much as circumstances admitted. It is not possible in the hurry of a race to take the numbers of notes. *Gill v. Cubitt* was the case of a tradesman and a check, not a bank note, which is equivalent to money; and a tradesman behind a counter has leisure and means of inquiry which are denied to a party on a race course.

The argument taken from the statute of *Anne*, if tenable, would go to show that the defendant could not have supported an indictment if he had been robbed of the bank note.

The court granted a new trial on payment of costs.

Rule absolute.

SELBY v. EDEN.

The declaration on a bill of exchange stated it to have been drawn payable to the order of the drawer in *London*, and accepted by the defendant at *London*, according to the usage of merchants: Held, that averment and proof of presentment for payment in *London*, or of excuse for non-presentment in *London*, were unnecessary.

The plaintiff declared that one *N. Atcheson*, by his bill of exchange, required the defendant three months after date to pay to the order of *N. Atcheson* in *London*, 498*l.* 15*s.*, which bill the defendant at *London* *accepted [*612 according the usage and custom of merchants; that *Atcheson* endorsed the bill at *London* to the plaintiff, of which endorsement the defendant at *London* had notice, by reason of which the defendant became liable to pay the plaintiff the amount of the bill, according to the tenor of the bill and of his acceptance.

At the trial before *Best*, C. J., London sittings in *Easter* term, it was objected on behalf of the defendant, that as the bill was drawn payable to the drawer's order in *London*, presentment in *London* ought to have been averred and proved. The Chief Justice overruled the objection, and a verdict was found for the plaintiff.

Bosanquet, Serjt., in *Easter* term, moved to arrest the judgment, upon the objection made at the trial.

He contended that the present case did not fall within the provisions of the 1 & 2 G. 4. c. 78, (which enacts that an acceptance made payable at a banker's shall be deemed a general acceptance, unless accompanied with the words, "and not elsewhere,") that act, according to its title, being confined to *acceptances*, and applied only to cases where the bill is by the *acceptance* made payable at a particular place; and not to cases where the *drawer* makes it so payable by the language in the body of the bill. This, then, was a general acceptance of a bill drawn payable in *London*, and the statute not having proposed to alter the effect of a general acceptance, the case must be considered as a case before the statute; but before the statute, on such a bill, presentment to the acceptor in *London* was a condition precedent to the holder having any claim against him; or at all events, an averment that due diligence had been used, without success, to find his place of business. He cited, *Saunderson v. Bowes*, (Bayley on Bills, 96. 3d edition,) *Dickinson v. Bowes*, 16 East, 110, and *Howe v. Bowes*, Id. 112.

*⁶¹³ *Wilde*, Serjt. The object of the statute 1 & 2 G. 4. c. 78, would be defeated, if an acceptance payable at a particular place by reason of the language used by the drawer, were not as much within the operation of the act as an acceptance made payable at a particular place by reason of the language used by the acceptor.

Independently, however, of the act, enough appears on the declaration to show the defendant's liability. In an action against an acceptor an averment of presentment is not necessary; the action is a sufficient demand; and the holder is not limited to *place* in making his demand; 1 *Roll. Abr.* 443, *Condit.* (O.) *Com. Dig. Condit.* (G. 9.) nor to *time*; *Turner v. Hayden*, 4 B. & C. 1. After the bill is due, the amount is payable on demand, and an averment of request is not necessary. *Huffam v. Ellis*, 3 *Taunt.* 415.

Bosanquet, was heard in support of his rule, in this term; and the court having taken time to consider,

Best, C. J., now delivered judgment. In this case it is unnecessary for us to consider, whether, independently of Serjt. *Onslow's* act, 1 & 2 G. 4. c. 78, the declaration ought to have contained an averment that the bill was presented for payment to the acceptor in *London*, or an excuse for non-presentment; because we are all of opinion that the omission is cured by that act. Perhaps the preamble of the act does not apply to such a case as the present, but it is a remedial statute; and the enacting part seems clearly to embrace every instance in which a bill is made payable at a particular place: "If any person shall accept a bill of exchange payable at the house of a banker, or *other place*, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill."

The words of the act embrace any bill payable at a bankers or *other place*; and no distinction is made between the case where the bill is rendered so payable by the language of the drawer, and the case where it is rendered so payable by the language of the acceptor.

If the bill be drawn payable in *London*, and accepted as drawn, that is, a general acceptance, unless the acceptor adds the words provided by the act for limiting the acceptance, "and not elsewhere."

The acceptor has not done this, and we are, therefore, of opinion that judgment ought not to be arrested.

Rule discharged.

GUEST v. WILLASEY, et al

Three codicils of different dates were indorsed on a will duly attested for passing real property. The first referred to lands mentioned in the will, made a disposition of lands purchased subsequently to the will, according to directions in the will as to the devisor's lands in general, gave a legacy to the devisor's wife, and appointed her executrix, in addition to the executors named in the will: it was attested by only two witnesses. The second, which also was attested by only two witnesses, referred to lands mentioned in the will, gave directions touching the sale of a portion of them, revoked a legacy given by the will, and appointed two new executors in the room of those mentioned in the will. The third merely appointed a new executor in the room of the executor named in the second codicil, and was attested by three witnesses:

Held, that the third codicil operated as a republication of the first.

In this case (sent by the Master of the Rolls for the opinion of this court, and reported at length, *ante*, vol. ii. 429.) three codicils of different dates were endorsed on a will, duly attested for passing real property. The first referred to lands mentioned in the will, made a disposition of lands purchased subsequently to the will, according to directions in the will as to the devisor's lands in general, gave a legacy to the devisor's wife, and appointed her executrix, in addition to the executors named in the will: it was attested by only two witnesses. The second, which also was attested by only two witnesses, referred to lands mentioned in the will, gave directions touching the sale of a portion of them, revoked a legacy given by the will, and appointed two new executors in the room of those mentioned in the will. The third merely appointed a new executor in the room of the executors named in the second codicil, and was attested by three witnesses. [^{*615}

The court held that the third codicil was a republication of the second and of the will, and that lands purchased subsequently to the will, and mentioned in the first codicil, passed according to a disposition made in the will as to the devisor's lands in general.

Whether the third codicil operated as a republication of the first, they intimated there might be some doubt; but as the republication of the will passed the subsequently purchased lands on the same trusts as the first codicil if properly executed would have done, they deemed it of no importance to consider the question further. The case, however, was now remitted to the court for their opinion as to the republication of the first codicil.

Cross, Serjt., contended, that the three codicils being not only annexed to the will but written on the same paper, the third was a republication of the first: *Attorney-General v. Downing*, Amb. 571, and the authorities there cited. The doubt might, perhaps, have been occasioned by the circumstance that in *Barnes v. Crow*, 1 Ves. jun. 486, the codicil was not only annexed but contained a reference to the contents to the will. Annexation, however, was, according to the authorities referred to, sufficient of itself.

Spankie, Serjt., contra. A codicil, in order to effect a republication of a will, must clearly refer to it: *Barnes v. Crow*. The third codicil refers to the second only, from which an intention to exclude the first may be presumed. Besides, if the third codicil be a republication of the first, and with that, of the will, it brings the will down to the time of publishing the third codicil; and this would be incompatible with the will, which directs, that the devisor's estate shall be sold by "persons who, under the second codicil, ceased to be trustees or executors." [^{*616}

The only question for the consideration of the court now is, "Whether the third codicil operated as a republication of the first codicil?"

The following certificate was afterwards given :—

We have heard this case argued by counsel, and are of opinion that the third codicil operated as a republication of the first codicil.

W. D. BEST.
J. A. PARK,
J. BURROUGH.
S. GASELEE.

RALEIGH TREVELYAN v. JOHN TREVELYAN, et al.

Settlement of premises to *T. S.* and his heirs, to the use of *W. T.* and his heirs, until a marriage between *R. T.* and *E. G.*; then to the use of *W. T.* for the life of *R. T.*, with several limitations over on the death of *R. T.* in favor of his wife and children, with a term for three hundred years in *T. S.*, to commence on the death of *R. T.*, for securing a rent-charge to the wife of *T. S.*, and to determine on the performance of that trust, and subject to the foregoing, to *W. T.* and his heirs.

W. T. died before the marriage of *R. T.*, who was his heir at law, leaving a will and executors : Held, that the executors did not take any interest in the premises, and that *R. T.* took a fee in them, subject to the term for three hundred years.

The following case was sent by the Vice-Chancellor for the opinion of the Court of Common Pleas :—

Walter Trevelyan, being seised in fee simple of the lands, tenements, and hereditaments hereinafter mentioned,

By indentures of lease and release, bearing date respectively on or about the 1st and 2d days of June, 1819, the release being made or expressed to be made between *Walter Trevelyan*, of the first part, the plaintiff, *Raleigh Trevelyan*, of the second part, *Robert Grey*, therein described, of the third part, *617] *Elizabeth Grey*, *therein also described, of the fourth part, and the Rev. *Thomas Singleton*, and *Henry George Grey*, therein respectively described, of the fifth part,

Reciting, that a marriage was agreed upon and intended shortly to be solemnized between the plaintiff, *Raleigh Trevelyan*, and *Elizabeth Grey*,

It was witnessed, that in consideration of the said marriage, and for other the considerations therein mentioned, *Walter Trevelyan* granted, bargained, sold, and released unto *Thomas Singleton*, and *Henry George Grey*, and to their heirs and assigns, all the capital messuages, lands, &c., (described in the deed.)

To hold the same unto *Thomas Singleton*, and *Henry George Grey*, their heirs and assigns, to the use of *Walter Trevelyan*, and his heirs, until the said marriage between the plaintiff and *Elizabeth Grey*, should be had; and from and after the solemnization thereof to the use of *Walter Trevelyan*, and his assigns for the natural life of the plaintiff, *Raleigh Trevelyan*, without impeachment of waste; and from and after the decease of the plaintiff, *Raleigh Trevelyan*, then to the intent that *Elizabeth Grey*, and her assigns, in case she should survive the plaintiff, might have and enjoy for her natural life, and in lieu of dower and thirds, an annual sum or yearly rent-charge of 400*l.*, to be paid and payable at the time and in manner therein mentioned, with power of distress and entry; and subject thereto, and from and immediately after the decease of the plaintiff, *Raleigh Trevelyan*, and in case *Elizabeth Grey*, should survive him, to the use of *Thomas Singleton*, and *Henry George Grey*, their executors, administrators, and assigns, for the term of

three hundred years, from the death of the plaintiff, *Raleigh Trevelyan*, without impeachment of waste, upon trust, for securing to *Elizabeth Grey*, the payment of the annuity or yearly rent-charge, as therein mentioned; and from and after the expiration or sooner *determination of the term of three hundred years, and subject thereto, in the mean time, to the only proper use and behoof of *Walter Trevelyan*, his heirs and assigns forever; and it was thereby provided, that when the trust thereby declared of the said term of three hundred years should be performed, the term should cease.

The marriage took effect.

Walter Trevelyan, departed this life subsequently to the date of the indenture of settlement, but previously to the solemnization of the intended marriage.

Walter Trevelyan, left the plaintiff, *Raleigh Trevelyan*, his eldest son and heir at law, him surviving. *Walter Trevelyan*, duly made and published his last will and testament in writing, dated 13th of May, 1818, and appointed *John Trevelyan*, *Thomas Singleton*, and *William Orde*, executors thereof, and they duly proved the same in the proper ecclesiastical court.

The question for the opinion of the court was, Whether the executors of *Walter Trevelyan*, under or by virtue of the limitations created by the said settlement, took any and what estate or interest in the lands and hereditaments therein comprised? And also, What estate and interest the plaintiff, *Raleigh Trevelyan*, took in the same lands and hereditaments, under or by virtue of the limitations created by the said settlement, and as the heir at law of *Walter Trevelyan*?

This case was argued twice. By *Lawes*, Serjt., for the plaintiff, and *Bosanquet*, Serjt., for the defendant, in *Easter* term; and by *Vaughan*, Serjt., for the plaintiff, and *Onslow*, Serjt., for the defendant, in this term.

Argument for the plaintiff. *Raleigh Trevelyan*, takes the whole property as heir of *Walter Trevelyan*, till the marriage of *Raleigh*. *Walter*, had an estate to him and his heirs; and having died before the marriage, while that estate was still in him, and before his subsequent *estate pur autre vie took effect, *Raleigh* was entitled as heir.

The executors of *Walter* could not take as special occupants the estate pur autre vie, which was limited to him as a contingent or springing use; for special occupancy can only take place where the testator has been in possession, *Holden v. Smallbrook*, Vaugh. 191, and *Walter's* estate pur autre vie never took effect: and the heir is to be preferred; for a conveyance of an estate pur autre vie to *A.*, his heirs, executors, and assigns, will not pass the freehold to the assigns to the exclusion of the heir. *Atkinson v. Baker*, 4 T. R. 229.

Raleigh then, as the heir of *Walter*, had in him before the marriage the same estate as his ancestor, a fee defeasible by the springing uses to arise on the marriage, with an ultimate reversion after those uses had been satisfied; as the ancestor would have had the first fee defeasible by an estate to himself pur autre vie, the heir took the like estate; and when, on the marriage, the estate pur autre vie arose, it united with the ultimate reversion for every purpose except that of possession; for the purposes of tenure, for the purposes of estate: the whole would be described in pleading as a seisin in fee; *Sherley's* case, 1 Rep. 93; and the intervening term did not prevent this union. *Bates v. Bates*, 1 Ld. Raym. 326: *Lewis Bowles's* case, 11 Rep. 79: *Perkins*, tit. *Dower*, s. 336. *Co. Litt.* 46 b.

Argument for the defendants. The limitation to *Walter Trevelyan* for the life of *Raleigh*, after the marriage had taken place, was a contingent springing use,—a possibility,—which passed to his executors as occupants, when the event occurred which made it vest.

The remainder in fee to *Walter*, after the uses on *the marriage, could not unite with a contingent estate pur autre vie, which never

vested in him. The same person never had at the same time the estate for life and the remainder in fee, so that merger could not take place; and the cases which have been cited are inapplicable, for in all of them the first estate for life was vested in the person who had the remainder in fee.

It is expressly contrary to the object of the settlement, that *Raleigh* should have the estate during his own life.

The following certificate was afterwards sent:—

We have heard this case argued by counsel and have considered it, and we are of opinion, that the executors of *Walter Trevelyan* did not, under or by virtue of the limitations created by the settlement therein mentioned, take any estate or interest in the lands and hereditaments therein comprised.

And we are of opinion that the plaintiff, *Raleigh Trevelyan*, took an estate in fee-simple in the same lands and hereditaments, under and by virtue of the limitations created by the said settlement, and as the heir at law of the said *Walter Trevelyan*, subject to the term of three hundred years, in the event of his dying in the lifetime of his wife, and to the other powers for raising her annuity of 400l.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

Devisor directed that his rents should be applied in paying *M. D.* and *F. D.* the interest of sums charged on his freehold property; and subject thereto in paying *A. D.*, widow of his son *R.*, 10l. a year till death or second marriage; that the remainder of the rents should be applied to the maintenance and education of *J. D.*, his grandson, till he was twenty-one, and if he should die before, to the maintenance and education of his granddaughter, *M. F. D.*. That after *J. D.* and *M. F. D.* should have attained twenty-one, *W. D.*, his son, should have an annuity of 20l. out of the rents for the term of his life, subject as aforesaid: the remainder of the rents were devised to *A. D.* for the life of *W. D.*, or till her second marriage: after the death of *W. D.*, devisor gave all his lands to the use of *J. D.* and his heirs; and if *J. D.* should die before the period aforesaid without lawful issue living at his death, he gave the rents to *W. D.* for his life, subject as aforesaid; and after the death of *W. D.* the premises were to go to his children, share and share alike, and in default of such issue, to *A. D.* and her heirs. Devisor died, leaving *A. D.*, *J. D.*, *M. F. D.*, and *W. D.*—*W. D.* being his heir at law:—*A. D.* next died, intestate and unmarried; *J. D.* afterwards attained twenty-one, and died unmarried, in the lifetime of *W. D.*: Held, that on the death of *J. D.*, *W. D.* became entitled to an estate for life in the lands.

The following case was sent by the Vice-Chancellor for the opinion of the Court of Common Pleas:—*John Dixon*, late of *Richmond*, in the county of *York*, Gent., being seised in fee-simple of certain lands situate at *Lownwith*, in the parish of *Richmond*, in the said county of *York*, did, in such manner as the law requires for the validity of devises of real estates, duly make and publish his last will and testament in writing, dated the 10th of *March*, 1779, and which, so far as relates to the lands at *Lownwith*, is in the words and figures following; that is to say, “I charge all my freehold messuages, lands, and hereditaments, situate at *Lownwith*, in the parish of *Richmond* aforesaid, with the payment of my just debts and funeral expenses; and subject thereto, I direct that the rents and profits thereof may be applied in paying to *Margarite Dixon* and *Faith Dixon*, their respective executors, and administrators, and assigns, the interest of the principal sums of 100l. and 150l., which are charged upon the said premises, and subject thereto in paying unto *Ann* the widow of my son, *Ralph Dixon*, late of the city of *London*,

merchant, deceased, one annuity or clear yearly *sum of 10*l.* till her death [*622 or second marriage, which shall first happen: the said annuity to be payable half yearly, at *Michaelmas* and *Lady-day*; the first payment thereof to begin and be made at such of those days as shall happen next after my decease, clear of all land-tax and other outgoings: and subject as aforesaid, I desire that the remainder of such rents and profits, from time to time as they shall yearly accrue and be received, and all such rents and profits from the death or second marriage of the said *Ann Dixon*, which shall first happen, may be applied for and towards the maintenance and education of my grandson *John Dixon*, son of the said *Ralph Dixon*, until he shall attain his age of twenty-one years; but in case he shall die before he attains that age, then from his death I direct that such remaining rents or profits, or the whole thereof, from the death or second marriage of the said *Ann Dixon* as aforesaid, may be applied for and towards the maintenance and education of my grand-daughter, *Margarite Faith Dixon*, the daughter of the said *Ralph Dixon* deceased, until she shall attain her age of twenty-one years; and my will is, that the receipt of the person or persons who, for the time being, shall have the care of the persons of my said grand-children respectively shall be a sufficient discharge for the money so to be paid: and from and after my said grand-child, *John Dixon*, shall have attained his age of twenty-one years, or my said grand-daughter, *Margarite Faith Dixon*, surviving him as aforesaid shall have attained her said age of twenty-one years, I give unto my son *William Dixon*, out of the rents and profits of the said estate, one annuity or clear yearly sum of 20*l.* during the term of his natural life, payable half-yearly, and tax-free, at *Michaelmas* and *Lady-day*; the first payment thereof to begin and be made at such of those days as shall happen next after my said grandson, *John Dixon*, shall have attained his age of twenty-one years or next after my said grand-daughter, **Margarite Faith Dixon* (surviving her said brother as aforesaid,) shall have attained her said age of [*623 twenty-one years: and subject thereto, I give and devise the remainder of the rents and profits of the said messuages, lands, hereditaments, and premises unto the said *Ann Dixon* yearly, during the natural life of the said *William Dixon*, or until her second marriage, which shall first happen: and from and after the death of my said son *William*, I give all and every the said messuages, lands, hereditaments, and premises (subject and charged as aforesaid) unto and to the use of my said grandson, *John Dixon*, and the heirs of his body lawfully to be begotten: but if my said grandson, *John Dixon*, shall happen to die before the period aforesaid without leaving lawful issue living at his death, then I give the rents and profits of the said premises unto my said son, *William Dixon*, for and during the term of his natural life (first deducting thereout the said annuity of 10*l.* for the said *Ann Dixon*, in case she shall then remain the widow of the said *Ralph Dixon*;) and from and after the death of the said *William* then I give the said premises (subject and charged as aforesaid) unto and amongst all and every child and children of the said *William Dixon* lawfully to be begotten, share and share alike, to take as tenants in common and not as joint-tenants; and in default of such issue, I give the same and every part thereof (subject as aforesaid,) unto and to the use of the said *Ann Dixon*, her heirs and assigns for ever."

The testator died on the 20th of *March*, 1785, without having revoked or altered his will, leaving *Ann Dixon*, *John Dixon*, *Margarite Faith Dixon*, now the wife of *Christopher Clarkson*, and *William Dixon*, surviving him, and leaving *William Dixon* his eldest son and heir at law.

Ann Dixon died in the month of *July* in the year 1792, intestate, without having married a second time; and letters of administration of her goods and effects *have been granted to the defendant, *Margarite Faith Clarkson*, [*624 by the proper ecclesiastical court.

The said *John Dixon*, the son of the said *Ann Dixon*, (who was eighteen years of age at her death, attained his age of twenty-one years, and afterwards died in the year 1803, in the lifetime of *William Dixon*, and without ever having been married.

The question for the opinion of the court was, Whether, on the decease of the last named *John Dixon*, either *Ann Dixon* or *William Dixon* became entitled to any, and if any, to what estate in possession in the lands at *Lownwith*?

Bosanquet, Serjt., on the part of the plaintiff, who claimed under *William Dixon*, contended that on the death of *John Dixon* without issue, *William Dixon* became entitled to an estate for life in the premises under this will.

The effect of the will was to provide for the education of the testator's grand-children till they attained the age of twenty-one; then to give the rent and profits to *Ann* during the joint lives of *William* and *John*, paying 20*l.* per annum to *William*. If *John* survived *William*, *John* was to have the estate in tail, subject to an annuity of 10*l.* per annum to his mother. If *John* died childless, and *William* survived, *William* was to have the estate, subject to the same charge. The devise to *Ann* for the life of *William* being incompatible with the devise of the same property to *William*, no other mode than the above could be pointed out to give effect to the whole of the will.

Wilde, Serjt., contra. *Ann* took an estate for the life of *William*, to which her executors are now entitled. The devise to her is clear, and the ambiguity [625] is only occasioned by the subsequent devise to *William*. But a subsequent ambiguity cannot have the effect of destroying a prior clear devise.†

The following certificate was afterwards sent:—

We have heard this case argued by counsel; and having considered the same, are of opinion, that on the death of the last named *John Dixon*, the said *William Dixon* became entitled to an estate for life in possession in the said lands at *Lownwith*.

W. D. BEST.
J. A. PARK.
J. BURROUGH.
J. GASELEE.

† The court required this fact to be added.

† Butler's Co. Lit. 21 a note (4); 112 b. note (1).

FAIRLEE, et al., v. HERRING, POWLES, et al.

Bills having been drawn on the defendants by their agent and with their authority, in respect of a mine which they afterwards transferred to *A.*, they requested *A.* to place funds in their hands to meet the bills when due, saying, "It would be unpleasant to have bills drawn on them paid by another party." *A.* placed funds accordingly; but when the bills were left with defendants for acceptance, no acceptance was written on them. *A.*'s agent having complained to one of the defendants on the subject, he said, "What! Not accepted? We have had the money, and they ought to be paid; but I do not interfere in this business: you should see my partner." Held, that all this amounted to a parol acceptance of the bills on which the defendants were liable to an indorsee, between whom and *A.* there was no privity, and that the indorsee was not precluded from suing by having made a protest in ignorance of this acceptance.

The declaration was on a bill of exchange for 1000*l.*, which was set forth in the first count as drawn in favor of *Herrera* and *Ritchie*, by *Richard Exter*,

in *Mexico*, dated Jan. 31, 1825, upon, and accepted by the defendants. The second count stated a promissory note signed by the defendants, by means of *Richard Exter*, their agent. There were also the usual counts for money paid, money had and received, &c.

At the trial before *Best*, C. J., London sittings after Easter term, a verdict was found for the plaintiffs, subject to the opinion of the court on a case which stated in substance as follows:—

The defendants had sent out *A. F. Mornay* to *Mexico* as their agent, for the purpose of embarking in the exploitation of and purchasing interests in mines.

They had also sent out *Exter* as an agent to act under *Mornay*.

Payments to the extent of 50,000 dollars had been made on behalf of the defendants, for the purpose of carrying on these mining transactions; and these payments were provided for by bills drawn by *Exter* upon the defendants, under the direction and authority of *Mornay*, and with the consent and approbation of the defendants.

One of these bills, the subject of the present action, was drawn, as above, by *Exter*, in favor of *Herrera* and *Ritche*, by them endorsed to *Scott & Co.*, by *Scott & Co.* to *Fergusson & Co.*, and by *Fergusson & Co.* to the plaintiffs.

Before this bill could be presented for acceptance, the defendants had transferred to the *United Mexican Mining Association* the whole or a part of their interest in the mines in question; and the *Mexican Mining Association*, as the purchasers of these interests, would have provided for the bills drawn, as above, by *Exter* on the defendants, but the defendant *Powles* begged of *Mornay*, who now acted for the *Mexican Mining Association*, that 11,458*l.* 6*s.* 8*d.* might be placed in defendants' hands for the purpose of taking up the bills; saying, "It would be unpleasant to have bills drawn upon their firm paid by a third party;" and adding, "that the Company might surely trust him with 10,000*l.* when he had trusted them with a much larger amount." It was then agreed that he should have the money for the specific purpose of paying the bills.

Notwithstanding this, no acceptance was written on the bills when they were left at the defendant's house for that purpose; but when *Mornay* afterwards told *Herring*, one of the defendants, that the bills were not accepted, he said, "What! not accepted? We have had the money, and they ought to be paid: but I don't interfere in this business: you should see Mr. *Powles*."

The plaintiffs afterwards, in ignorance of these circumstances, protested the bills for non acceptance. It also appeared that the defendants had transmitted to *Exter* goods worth 35,000 dollars, on which goods he had received the proceeds, but refused to pay them over till he learned that his liabilities on these bills had been discharged. But though this seemed to be the reason of the defendants' declining to write their acceptance on the bills, *Exter's* accounting for those goods formed no part of the condition on which the 11,458*l.* 6*s.* 8*d.* was placed in the defendant's hands.

Spanke, Serjt., for the plaintiff, argued the case on three grounds: first, that there had been a parol acceptance of the bill; secondly, that, at all events, the instrument might be esteemed a promissory note; thirdly, that the plaintiffs were entitled to recover on the count for money had and received: but as the court confined their judgment to the first point, it is unnecessary to report the argument on the other two.

In support of the first position he argued, that, independently of words spoken, circumstances and the conduct of parties might amount to a constructive acceptance. *Wynn v. Raikes*, 5 East, 520, *Clarke v. Cock*, 4 East, 57. In neither of those cases were the circumstances and conduct of the parties so expressive as in the present; while the language used by *Herring* was of itself conclusive.

The protest having been made by the plaintiffs in ignorance of what had passed did not affect them.

Wilde, contra, argued that all that had passed, having passed between the defendants and strangers to the plaintiffs no right *inde* accrued to them; and that that circumstance distinguished the present case from those which had been cited. Besides, the plaintiffs having protested the bill for non-acceptance, were now estopped to contend that it had been accepted. *Sproat v. Matthews*, T. R. 182.

BEST, C. J. We are all agreed that there has been a good acceptance of this bill, and therefore have declined entering into the point as to money had and received.

If the facts of this case are understood, it appears to me no man can doubt that both in point of justice and in point of law the plaintiffs are entitled to recover. From *Mornay's* testimony we ascertained that he had been in *America* as the agent of the defendants, for the purpose of exploiting a mine.

He made an arrangement with the *Mexican* company, in the course of which the present defendants had the benefit of the money for which this action is brought. The bill, on which the defendants are sued, was drawn by *Exter*, the sub-agent of *Mornay*, who was the agent of the defendants. The bill, therefore, was created by the defendants for their own benefit; they have had the advantage of it in their dealings with the *Mexican* company, and they are the persons who in point of justice ought to pay. The business on the part ^{*629]} of the *Mexican* company being also under the management of *Mornay*, *Powles*, one of the defendants, applies to *Mornay*, and desires that he will consent to the defendants having the money in question for the express purpose of paying these bills, complaining it would be a hardship if their bills were paid by any other house; that it would bring discredit on their house; that they who had trusted the company ought in turn to be trusted for such a sum of money as this. Here is the most distinct promise to pay that could be made.

My Brother *Wilde* does not deny the promise to pay the bill; but says it is distinguishable from all similar cases in this, that it is not a promise made to one of the parties to the bill. I consider it is a promise made to one of the parties to the bill. Who is the drawer? *Exter*.—*Exter* is the sub-agent of *Mornay*. I consider *Exter* and *Mornay* the same. There is, therefore, a promise to pay to these persons; and as was said by Mr. Justice *Le Blanc*, in a case that was referred to in argument, "If a man promises to pay a bill, he promises to do all the formal part."

It has been determined in a great variety of cases, that if a bill comes into a man's hands with a parol acceptance, though the party who receives the bill does not know of that parol acceptance, he has a right to avail himself of it afterwards. It is impossible for any man to doubt, on principles of common sense, that such ought to be the law; for if I take a bill, I take it with every advantage the holder had before it came into my hands.

This promise being made to *Mornay*, and money being obtained on it, amounted to a promise upon adequate consideration to one of the contracting parties. Is there, then, anything in the case which has prevented the plaintiffs from availing themselves of that promise. It has been supposed that by ^{*630]} protesting the bill for *non-acceptance they have abandoned their claim.

At the trial of this cause I put an end to that by leaving it to the consideration of the jury, whether, at the time that protest was made the plaintiffs were aware that this acceptance had also been made. The jury expressly found that the protest was made in ignorance of what had taken place between *Mornay* and the present defendants. If the plaintiffs were ignorant of this, it is quite impossible that that which they have done in ignorance can prejudice any right which was before vested in them. Therefore I put the case on the principle contained in the language of Lord *Mansfield*: if a man undertakes

for the substance, he undertakes for the formal parts; if he undertakes to pay the acceptance, he undertakes to accept. The plaintiffs in this case have done nothing to waive their right on that acceptance; and it would be an opprobrium to the law of *England*, if, upon a bill drawn by an agent of these gentlemen, and of which they have had the advantage, they could turn round and say, Our agent in *America* is a person not to be trusted; we will not pay the bill, though we have received money for the purpose. I should be exceedingly sorry if the plaintiffs could be so turned round. I am happy to find in this case that which I find in most others where statutes have not interfered, that the common law will enable us to do justice.

PARK, J. Being clearly of opinion, as I believe we all are, that this is an acceptance, it does not seem necessary to discuss the point whether an action for money had and received would lie.

In the case of *Powell v. Monnier*, 1 Atk. 611, which was decided by Lord *Hardwicke*, it was held that much less than this amounted to an acceptance. But the strong case on the subject is *Wynne v. Raikes*: the question [631] in which was, whether the terms of a letter amounted to an acceptance, and the court said a promise to accept amounts to an acceptance.

In *Rees v. Warwick*, 2 B. & A. 113, indeed, a man sent a bill to another who returned it, saying, "Your bill shall have attention;" that was held not to be an acceptance. But when a man undertakes to accept or pay the bill, it is much stronger than saying, "The bill shall have attention." That appears to have been the opinion of Mr. Justice *Bayley*, who tried the cause. Lord C. J. *Abbott*, says, "The phrase 'have attention' is at least ambiguous: it may mean that the defendants would have an examination and enquiry into the state of the account between them, to ascertain if they would accept the bill;" but he says, "I will not break in on the authority of the two cases," which are those I have mentioned of *Powell v. Monnier*, and *Wynne v. Raikes*.

If what passed in the present case be not held to be an acceptance, it is a downright fraud on the plaintiffs. What is the arrangement made? *Mornay* as the defendant's agent, employed *Exter* to draw bills, and afterwards consented to money's being placed in the hands of the defendants by the company, to the amount of 11,400 $\text{l}.$, for the express purpose of paying those bills.

It has been contended, indeed, that the undertaking to accept is not available unless made to a person who has a concern in the bill. But in this transaction *Exter*, the drawer of the bill, and *Mornay*, stand in effect in the same situation. Can it be allowed to the defendants, after they have got 11,000 $\text{l}.$ in their own pockets for the express purpose, to elude paying these bills?

I am clearly of opinion that this is such an acceptance as will bind the parties, and under all the circumstances, I think the plaintiffs are [632] entitled to our judgment.

BURROUGH, J. The argument on the part of the defendants would be very good if this rested merely on a promise; but this promise is an acceptance, and an acceptance for the benefit of every body whose name is on the bill.

It has been decidedly laid down, that a promise to pay a bill is an acceptance. No man can doubt that there was a promise arising out of this transaction, and the fact of this being an acceptance is fortified by what occurred when the bill was left. If the defendants did not mean to accept the bill, why did they not refuse? Their not having done so, is a strong confirmation that they entered into a legal obligation to pay the bill.

GASELZEE, J. This case having been so fully gone into, it is unnecessary for me to say more, than that I concur with my Lord C. J., and brothers, that this is an acceptance of the bill. It is contended that the condition of things is changed by the plaintiff's having protested the bill. If any ill consequences have arisen to the defendants by reason of this protest, it is their own

fault for not having accepted it in form, which they were bound to do when it was presented, in consequence of the undertaking which passed between them and *Mornay*.

Rule discharged.

*WILSON v. POWIS.

Declaration, that in consideration plaintiff had delivered to defendant a watch to repair, defendant undertook to repair and re-deliver it to the plaintiff:
 Breach; non-delivery: Evidence; that defendant repaired and tendered the watch to plaintiff, who said, "Take it to my uncle in *M.*, who will pay for it," when the defendant took it to another uncle, who lost it:
 Held, no variance.

The plaintiff declared, that in consideration of his having delivered the defendant a watch to clean and repair, for certain reward to be therefore paid, the defendant undertook to clean, repair, and take care of the watch, and to deliver it back to the plaintiff on payment of the stipulated reward.

Breach, that the defendant did not take care of, or re-deliver the watch.

At the trial before *Beat*, C. J., *Middlesex* sittings, after *Easter* term, it appeared that the watch was repaired and tendered to the plaintiff, who said, "Take it to my uncle in *Margaret Street*, and he will pay for it."

The defendant not finding the uncle in *Margaret Street*, or acting under some misapprehension upon hearing he had moved, delivered the watch to another uncle of the plaintiff, in *Golden Lane*, who lost it. A verdict having been found for the plaintiff,

Wilde, Serjt., moved for a rule nisi to set it aside and enter a nonsuit, on the ground that the defendant having repaired and offered to re-deliver the watch, and the plaintiff having refused to receive it, the contract to re-deliver to the plaintiff was discharged. That the action ought to have been brought, if at all, on a new contract to deliver to plaintiff's uncle in *Margaret Street*, and that, therefore, there was a variance between the contract declared on and that established in proof. The rule was granted, and now, after hearing *Wilde* in support of it,

*The court expressed their opinion, that there was no variance, the *634] directions giving by the plaintiff for the delivery of the watch to his uncle being in effect directions to deliver it to the plaintiff or his agent at a convenient place, for a mistake in which the defendant was responsible.

Rule discharged.

EDGELL v. DALLIMORE.

Attachment refused, upon an award which found a debt, but contained no order to pay.

Wilde, Serjt., opposed a rule for an attachment for non-payment of money under an award, on the ground that though the award found the party to be indebted, it contained no order for him to pay.

Taddy, Serjt., who supported the rule, maintained that the order o pay

followed as an inference of law, from the finding of the debt; and he likened it to an *assumpsit* on the sale of goods, where the promise to pay is implied from the order and acceptance of the goods. But

The court, distinguishing between a civil and a criminal proceeding, said that the defendant was not in contempt, and therefore, no attachment could issue till he could be shown to have disobeyed some order in the award. There being no order, there could be no disobedience, and the court could not proceed summarily; the plaintiff must be left to his action.

Rule discharged.



*Pleading several Matters.

[*635]

Several pleading. Inconsistent pleas not allowed except under an affidavit of their necessity.

Upon a motion by *Adams, Serjt.*, calling on a defendant to elect which of several inconsistent pleas he would abide by, in an action on an award; the motion being arranged by consent of parties, the court gave out,

That for the future, inconsistent pleas should not be allowed, unless accompanied with an affidavit to show that they were necessary to the justice of the cause.



FLETCHER v. GILLESPIE, et al.

The defendants had executed a charter-party, under which the cargo was to be sent along side the ship at the merchant's expense, the captain rendering the usual and customary assistance with his boats and crew: Some of the cargo lying about thirty yards from the edge of the wharf, the captain applied to the defendant's factor for laborers to remove it into the boats: The factor having refused, saying he would abide by the charter-party, the captain hired laborers for the purpose: Held, that the expense so incurred might, notwithstanding the charter-party, be recovered on counts for money paid, and work and labor.

Action on a charter-party, under which the plaintiff's ship was to proceed to Quebec, or so near thereto as she might safely get, and there load from the factors of the defendants a complete cargo of deals; the cargo to be sent alongside the ship at the merchant's expense; the captain rendering the usual and customary assistance with his boats and crew.

Breach, non-payment of the stipulated freight.

There was also counts for work and labor, money paid, &c.

*At the trial before *Best, C. J., London* sittings, after *Easter* term, [*636] it appeared, among other things, that some part of the cargo lying about twenty or thirty yards from the edge of the wharf at Quebec, the captain of the vessel applied to the defendant's factor for people to get it afloat; the factor refused to provide them, saying he would abide by the charter-party; whereupon the captain employed laborers, to whom he paid 5*l.* 14*s.*, to bring this part of the cargo to the side of the wharf, whence the crew assisted in getting it on board.

It was objected at the trial, that payments of this nature having been pro-

vided for by the charter-party, under the words "the cargo to be sent alongside the ship at the merchant's expense," the plaintiff could not resort to the defendant's general and implied liability under the common counts, for what he had a right to claim of them under their specific contract; and the count on the charter-party containing no breach for the non-payment of the expenses for getting the cargo on board, the defendants were to that extent entitled to a verdict.

It was left to the jury to consider whether, upon the factor's saying he would abide by the charter-party, the money for laborers was not paid to the use of the defendants, under an implied promise from the factor that it should be repaid if the defendants were liable. Whereupon a verdict was given for the plaintiff, this point being reserved for the consideration of the court.

Wilde, Serjt., accordingly obtained a rule *nisi* to set aside the verdict and enter a nonsuit; against which

Vaughn and *Bosanquet*, Serjts., showed cause, contending, that even if the plaintiff might have recovered this sum under the charter-party, he had a concurrent remedy on the new implied promise made by the factor
**White v. Parkin*, 12 East, 578, and on the count for work and labor.

Park, J. This claim does not rest on the charter-party; it is for a sum of money paid *dehors* the contract, in ease and for the benefit of the defendants, and from which they have derived advantage. The words of the factor may fairly be construed into an undertaking to pay what was expended in the labor, if it should turn out that the defendants were liable to pay it; and his undertaking being within the scope of his authority and binding on them, I am of opinion the verdict must stand.

Burrough, C. J. The jury have in effect found what amounts to an express promise by the factor; but I am opinion the demand might have been sustained, on the count for work and labor, the labor having been clearly necessary for and beneficial to the owners.

Gaselee, J. It was properly left to the jury to determine whether the expense of removing these goods was to fall on the defendants: they find that it was; and if so, there is a good consideration for their factor's promise, of which the plaintiff may avail himself, on the count for money paid.

Best, C. J. concurring, the rule was

Discharged

Where, to a plea of the statute of limitations, the plaintiff replies a promise within six years, and proves a promise to pay when of ability, made three years after the original cause of action accrued, and within six years of the commencement of the action: Held, he must also prove the defendant's ability.
Burrough J. and Park J. dissentientibus.

Assumpsit for butcher's meat. Pleas, general issue and the statute of limitations, to which the plaintiff replied a promise within six years.

At the London sittings in Easter term, before *Best*, C. J., it appeared, that the meat was delivered in 1817 or 1818, and that about three years afterwards, the defendant being called on for payment, said, it was not in his power to pay, but as soon as it was, he would.

The plaintiff not proving the defendant to be able to pay, the Chief Justice directed a nonsuit, with leave to move to enter a verdict.

Vaughan, Serjt. having accordingly obtained a rule nisi,

Adams, Serjt., now showed cause. The promise is clearly conditional, and if it had been made more than six years after the debt was due, there can be no doubt that the defendant's ability to pay must have been proved; *Cole v. Saxby*, 3 Esp. N. P. C. 159, *Davis v. Smith*, 4 Esp. N. P. C. 36, *Besford v. Saunders*, 2 H. Bl. 116, *Hyleing v. Hastings*, 1 Ld. Raym. 389. Here, however, the words were spoken within the six years, when, it will be contended, no new promise was necessary to give the plaintiff a right of action; nor was it necessary then; but after the six years, the plaintiff, relying solely on this acknowledgment for the support of his action, must take it as it was made, accompanied with the "condition; for the doctrine that from a mere acknowledgment an absolute promise to pay may be implied is now in effect overruled in *A'Court v. Cross*, 3 Bingh. 329, and rests on a series of cases, *Yeo v. Fourakin*, 2 Burr. 1099, *Truemun v. Fenton*, Cowp. 544, *Brian v. Horseman*, 4 East, 599, which have no foundation on the statute, or the earlier decisions, where, as in *Hyleing v. Hastings*, an acknowledgment of the debt was, at farthest, considered to be no more than evidence from which a jury might perhaps infer a promise, but from which the court would not imply one.

In *Dickson v. Thompson*, 2 Show. 126, and *Bland v. Haselrig*, 2 Ventr. 151, it was thought that even an express promise would not revive the debt, or give a new right of action; and in *Leoper v. Tatton*, 16 East, 420, and *Hellings v. Shaw*, 7 Taunt. 608, it is clear that the judges have wished to return to the strict construction of the statute.

Vaughan, Serjt., in support of the rule. Upon the acknowledgment of the debt, the condition attached to it may be laid out of the question; for a promise in law may be implied from the acknowledgment: *Mountstephen v. Brooke*, 3 B. & A. 141, *Pittam v. Forster*, 1 B. & C. 248, *Frost v. Bengough*, 1 Bingh. 266. But even though an express promise should be deemed necessary to give a cause of action *after* the expiration of the six years, when the original cause of action is at an end, such a promise cannot be necessary upon an acknowledgment *within* the six years, while the original cause is still subsisting.

Within the six years the defendant could attach no conditions to his general liability; and if the plaintiff *had sued the day after the acknowledgment, he might have recovered upon proof of the acknowledgment, [640] in spite of the condition with which it was accompanied. If, then, he could have recovered the day after upon proof of the acknowledgment, why should not the acknowledgment avail him at any time within six years after it was made?

Cur. adv. ruli.

GASELEE, J. I am of opinion that the nonsuit in this case was proper. It is not necessary for me at present to investigate any supposed difference between a promise and an acknowledgment, because it has nowhere been maintained that an acknowledgment of a debt, is, *qua* acknowledgment, sufficient to revive the debt, but only a circumstance from which perhaps a new promise may be implied. In *Hyleing v. Hastings*,^t according to almost all the reports of the case, the court considered the acknowledgment as evidence only of a new promise.

The language of the statute is, "that all actions upon the case, other than for slander, shall be commenced and sued within six years next after the cause of such actions, and not after."

With respect to every species of action except *assumpsit* it has been helden that the plaintiff must show he has commenced his action within the time prescribed by the statute, and that it is not incumbent on the defendant to plead

^t 1 Ld. Raym. 389. Carth. 470. Salk. 29. 12 Mod. 223. Hutt. 427. Com. Rep. 54

that the limited period has elapsed. It is not easy to say why a different rule has obtained in *assumpsit*; but it is now too late to say that a defendant can take advantage of the statute without pleading it. (2 Wms. Saunders, 63 b, c. note.) In *Hylking v. Hastings*, indeed, the court held that the new promise might "be considered a revival of the old one; but upon consideration of that case, and consultation with all the judges, it was holden in *Deane v. Crane*, 6 Mod. 309, upon a plea of *non assumpsit infra sex annos*, that a promise made by defendant after arrest did not support a declaration on a note made by the defendant in favor of the plaintiff's testator above six years before the action brought."

So in *Hickman v. Walker*, Willes, 27, it was decided, that where the defendant pleaded *non assumpsit infra sex annos*, in an action brought by an executor on promises to the testator, and the plaintiff replied a subsequent promise to himself, the replication was a departure, and the Chief Justice said, "We are of opinion that the replication is not good, for the time of limitations must be computed from the time when the action first accrued to the testator, and not from the time of proving the will. The proving of the will gave no new cause of action, and therefore the time of proving the will is perfectly immaterial."

This case, therefore, confirms that of *Deane v. Crane*; and the point seems to have been admitted in the executors of the *Duke of Marlborough v. Widmore*, 2 Str. 890, where the plaintiffs having declared as executors on a promise to their testator, and issue having been joined on the plea of the statute of limitations, the plaintiffs moved to amend by laying the promise to have been made to themselves. In *Sarel v. Wine*, 3 East, 409, also, it was decided, that an acknowledgment made by the defendant, after the death of the plaintiff's intestate, of a debt due above six years to the plaintiff's intestate, would not support a count by the administrator laying the promise to have been made to his intestate. In *Kinder v. Paris*, 2 H. Bl. 561, where [842] the assignees of an insolvent debtor sued the defendant for a debt due to the insolvent more than six years before they sued out their writ, it was holden, that in order to support the action, they must show an express promise to themselves. On the same principle, in *Pittam v. Foster*, (where an action was brought against *Foster*, and *Norris* and wife, upon a joint promissory note made by *Foster* and *Norris*'s wife before marriage, and the promise was laid by *Foster* and *Norris*'s wife before marriage, and issue was joined upon a plea of the statute of limitations,) *Abbott*, C. J., says, "The question is, whether an acknowledgment made within six years operates as a new substantive promise, or draws down the original to the time when the acknowledgment is made. In *Hurst v. Parker*, 1 B. & A. 92, Lord *Ellenborough* says, that in actions of *assumpsit* an acknowledgment of the debt is evidence of a fresh promise. If that be not so, but on the contrary the acknowledgment is to have the effect of drawing down the original promise, then in an action by an executor, upon promises made to the testator, evidence of a promise made to the executor would support the issue. But the reverse of this proposition was decided in *Green v. Crane*, 2 Ld. Raym. 1101. That was an action of *assumpsit* by an executor upon promises to the testator. Defendant pleaded *non assumpsit infra sex annos*; and upon evidence it appeared, that after the death of the testator, and after six years from the time of the contract, defendant acknowledged the debt to the executor, and promised to pay it. *Holt*, C. J., delivered the resolution of the court, and said, that they were all of opinion that the action could not be maintained, the promise being made to the executor, and so out of the issue. That case was followed by several others of the same kind, which it is unnecessary to mention. The last was in the Court [843] of Common Pleas; *Ward v. Hunter*, 6 Taunt. 210; that was an action by an executrix on promises made to the testator; plea, statute of limitations

*kind, which it is unnecessary to mention. The last was in the Court of Common Pleas; *Ward v. Hunter*, 6 Taunt. 210; that was an action by an executrix on promises made to the testator; plea, statute of limitations

Plaintiff relied upon the defendant's having said to her, that the testator always promised not to distress him for the money. The plaintiff having obtained a verdict, a motion was made to enter a nonsuit; and the court said, when the courts determined that an acknowledgment is evidence of a new promise then made, it must be a promise made by a person competent to make it, and to a person who is in existence to receive it; and the rule for a nonsuit was made absolute. That case was determined at a time when Lord C. J. Gibbs presided in the Common Pleas, than whom no judge was ever more perfectly acquainted with the rules of pleading."

It is not necessary to cite more decisions to show, that a promise made under such circumstances as those of the present case is a new promise, and not a revival of the old one, and must be correctly declared on according to fact; for the same reason that a promise made to an executor will not support a declaration on a promise made to the testator. Although the cases to which I have referred are not exactly the same as the present in point of fact, they are the same in principle; a new promise by a debtor to pay when of ability is not the same as a promise to pay when requested, and will not support a declaration stating a promise to pay when requested. There are many cases which show, that such a conditional promise cannot be given in evidence under a count on an absolute promise. In *Cole v. Sazby*, where to a plea of infancy the plaintiff replied a promise after full age, and the evidence was of a promise to pay when of ability, Lord Kenyon said, "This is not an absolute promise 'to pay'; it is, 'when he is able.' I remember a [*844] case before Lord Mansfield, in *Staffordshire*; in which he was of opinion, that it was incumbent on the plaintiff to show that the defendant was of ability to pay at the time of the action brought." In *Davis v. Smith*, Lord Kenyon, ruled the same way again, and added, that it had been so ruled before by Lord C. J. Eyre. So in *Besford v. Saunders*, where a bankrupt after obtaining his certificate promised to pay a prior debt when he should be able, upon a general *indebitatus assumpsit* brought upon that promise, it was holden, that the plaintiff must prove the ability of the defendant to pay.

In *Thompson v. Osborne*, 2 Stark. N. P. C. 98, indeed, where Lord Ellenborough, held that a promise to pay a debt by instalments, if time should be given, took the case out of the statute, and in *Gregory v. Parker*, 1 Camp. 394, where there was a letter of the defendant's wife acknowledging the debt, it was taken for granted, without adverting to any of the decisions, that an acknowledgment of a debt was the same as a promise; but that principle has been expressly denied in *A'Court v. Cross*.

I am of opinion, therefore, that this was a conditional promise, and ought to be proceeded on as such.

As to the distinction which has been attempted to be made between a promise given before the expiration of the six years and a promise after, I think it not tenable.

It has been argued, that before the expiration of the six years, the statute does not apply, and that a defendant has within that time no right to add terms to the original contract. Undoubtedly within the six years the plaintiff may go on his original contract, notwithstanding any subsequent promise; but here the original *cause of action had expired before the action was [*845] brought. The defendant by a subsequent promise has upon certain terms extended the duration of his liability, and if the plaintiff will after six years avail himself of that promise, he must take it as it was given. Though formerly an opinion prevailed that it was unfair to take advantage of the statute, unless where the debt had been paid, the courts have lately been of opinion that the operation of the statute is in all cases extremely salutary; and I shall, therefore, conclude in the words of Serjt. Williams: 2 Wms. Saund. 64 b. note. "After all, it might, perhaps, have been as well if the letter of the statute had been strictly adhered to: it is an extremely beneficial

law, on which, as it has been observed, the security of all men depends, and is, therefore, to be favored. And although it will now and then prevent a man from recovering an honest debt, yet it is his own fault that he postponed his action so long, besides which, the permitting the evidence of promises and acknowledgments within the six years seems to be a dangerous inlet to perjury."

BURROUGH, J. The facts in this case seem to me to remove all doubt. They are, that the defendant being applied to for payment for meat about three years after it was furnished, said that it was not in his power to pay, but that as soon as it was, he would; and within six years after this promise the defendant is sued, though more than six years from the delivery of the meat.

This is said to be a conditional acknowledgment, although made at a time when the debt was still alive, and all the parties in the same situation as when it was originally contracted. Suppose, the day after this promise was made, an action had been brought on an account *stated, would not this acknowledgment have been sufficient evidence to sustain the action? and would not that action have lain to the end of six years after the acknowledgment? What, then, becomes of this as a conditional acknowledgment? In the cases which have been referred to, the old liability had expired, and the new promise was to be taken accompanied with its conditions; but in the present case, at the time of the acknowledgment, the debt was an available claim, and the defendant only says in effect, "I owe the money, but cannot pay."

Even on the issue of *non assumpsit infra sex annos*, I am of opinion this action might be supported. The acknowledgment which has been made within six years keeps the debt alive, according to all the cases, and is very different from an acknowledgment or promise made after the expiration of that time; such a promise creates a new obligation, and must, therefore, be taken, if at all, with all its qualifications.

In *Hyleing v. Hustings*, Ld. Raym. 389, Holt, C. J., said, "There is a difference where the six years are expired before the making of such conditional promise, and where they are not; because the contract not being barred by the statute has no need of so much assistance to continue it, as it must have to revive it if it be once absolutely destroyed." According to this distinction the original contract in *Cole v. Saxby*, being invalidated or destroyed by infancy, the promise made after age was a new contract, and to be taken with all its new qualifications. In *Davis v. Smith*, the new promise was more than six years after the original contract, and being clearly conditional ought to have been treated as such. But there seems to be a solid and recognized distinction between an acknowledgment made before the expiration of the six years, and an acknowledgment after.

*647] As to the supposed necessity for a promise, instead of or as well as a mere acknowledgment, it should seem not to be necessary in this case, from the circumstance that an action of debt would have lain to recover the price of the goods sold and delivered, and that a bare acknowledgment of the contract would have been sufficient to support such an action. In such a form of action a promise is unnecessary, and it is only necessary in *assumpsit* to make a formal allegation of it on the pleadings.

For these reasons I think the plaintiff entitled to a verdict.

PARK, J. It has been truly observed, that the conflicting decisions to be found in our reports upon the statute of limitations reflect no particular credit upon *Westminster Hall*; and I am very glad that the courts of law seem inclined, as far as possible, to retrace their steps, and to get back to the plain construction of the statute. Having that view myself I was happy to concur with the other Judges in this court in *Michaelmas* term, in the case of *A'Court v. Cross*, in endeavoring to assist in so desirable an object.

In what I am about to say very shortly upon the case at bar, I do not con-

sider myself as trenching, at least I am sure I do not mean to trench, upon that decision. Indeed, in delivering my opinion here against the defendant, I do not trouble myself with any of the cases that have heretofore been decided one way or the other, for this case depends upon its own peculiar circumstances, and particularly upon the time when the promise was made. If, however, contrary to my intention, another case is added to the number of inconsistencies already crowding our books upon this subject, it will render the duty more imperious, whenever a case of sufficient value occurs, to have all these matters put upon record, that we may have "one rule of sound judgment from the highest courts of error upon this frequently occurring subject." [648]

The facts of this case are in a few words: to an action for butcher's meat, there is a plea of the general issue, and also one of the statute of limitations. The meat was delivered in 1817 or 1818, and if nothing more could be stated, the statute of limitations had clearly run upon the demand; but within two or three years (and certainly within six years) from the delivery of the meat, the defendant said it was not in his power to pay for it: as soon as it was, he would. Here is a promise, but I admit it is a conditional one; and I admit, also, that if the statute had run, that is, if six years had expired before that promise (being a conditional one) was made, the debt only would have revived upon proof being adduced of the defendant's ability to pay. *Davis v. Smith.* But here the promise to pay was made before the statute had run, at a time when the defendant had no right, as I think, to annex a condition; at least the condition so annexed could be of no avail during the six years; for I take it to be quite clear that, notwithstanding the defendant chose to clog his promise with a condition, the plaintiff might have sued him at any time within six years; and, without going into the original consideration of the goods sold and delivered, might have recovered upon proof of this conditional promise. This I am sure is every day's practice at Nisi Prius in undefended causes, where the proof is, "I wish to pay, and I will if I am ever able," or other words to the same effect; and yet the plaintiff recovers without proving the defendant's ability. For illustration; suppose a man has given a promissory note payable in two months, and has not paid at the end of this time, but in about a year pays interest, which is indorsed upon the note by consent of both parties: I will suppose the same proceeding takes place in the second, "third, fourth, and fifth year: I take it" [649] for granted it will be admitted to me, that an action brought at any time within six years from the last indorsement, though perhaps ten years after the date of the original note, would not be barred. This is also exactly the case of mutual accounts between the parties, where every new item and credit in the account given by the one party to the other is an admission of there being some unsettled account between them, the amount of which is to be afterwards ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take it out of the estate: and in *Cranch v. Kirkman*, Peake, 121, the exception in the statute as to merchant's accounts was held not to be confined to persons of that description.

But the case I have hitherto put as to the indorsement on a note, I admit has been upon a mere payment of interest, without any condition annexed. It does not seem to me, however, that if every year, when these payments were respectively made, there were added to the indorsement the words, "Next year I will pay principal and interest if I am able," any difference in law exists between the cases. There is the promise to pay that, which by law he was at that time bound to pay; and the condition annexed, as it would not prevent the immediate enforcement of the demand within the six years, ought not to affect a clear acknowledgment of the debt, with a promise tacked to it, although clogged with a condition, which at the time the condition was added

the party had no right to impose. Therefore the presumption raised by the statute from lapse of time is here rebutted by a promise to pay before the six years had expired; and though "there was a condition annexed, it is [650] a clear recognition that the debt was not satisfied nor paid when the conditional promise was made.

The nearest case to this that I have found is *Thompson v. Osborne*, where Lord *Ellenborough* held that a promise to pay a debt by instalments, if time should be given, took the case out of the statute, and this even after the statute had run.

Except the last case, it will be observed, that I have not troubled the court with quoting cases; for, having looked at many, I thought it would be an idle parade, and a great waste of time, to run through a bead-roll, when not one of the cases has the distinguishing feature of the present case, upon which I rely, a promise, though burdened with a condition, within that period when the promise might avail the plaintiff, though the condition could work him no injury, nor postpone or delay his immediate remedy. I wish it to be understood fully that I strongly rely upon a promise accompanying the acknowledgment. I am not arrogant or presumptuous enough, especially as my brother *Gaselee* has already expressed his opinion to be in favor of the defendant, and I am also to be encountered by that of the Chief Justice, to suppose that I am right; but under my present conscientious, and not hasty, impression, I think this nonsuit ought to be set aside: however, as the court are equally divided, of course it cannot be disturbed.

Best, C. J. I entirely concur in the judgment which has been delivered by my brother *Gaselee*, and therefore do not think it necessary to go again through all the cases. The two best statutes in our books are the statute of frauds and the statute of limitations; but, unfortunately, the Judges in *Westminster Hall* have taken a different view of the subject; and, until recently, [651] a struggle seems to have been made to avoid the effect of those statutes.

It is curious to observe the progress of opinion on this subject. At first, it seems, the Judges were with the statutes; and in *Dickson v. Thompson*, 2 Show. 126, *Scroggs, J.*, and the Bar on both sides were agreed, that there must be an express promise to take a case out of it. The same point was ruled in *Bass v. Smith*, 12 Vin. Abr. 229.; and in *Lacon v. Briggs*, 3 Atk. 105, it was still held there must be a promise; although the court considered it somewhat hard. Then in *Hyleing v. Hastings*, by the opinions of ten Judges, after much consultation, it was determined, that an acknowledgment of the debt was at the utmost only evidence from which a promise to pay might be inferred by a jury; but that if a jury found only the bare acknowledgment it would not be sufficient. After this, equity lawyers came into the courts of common law. Lord *Mansfield* brought with him into those courts equitable notions of the statute of limitations; and held that a bare acknowledgment of a debt, even after action brought, would be sufficient to support the action, although not commenced till after the expiration of the six years. Lord *Loughborough* entertained the same opinion. The Court of King's Bench adhered to it, till ultimately the principle was carried to such a degree of absurdity, that a declaration of a defendant that he would not pay, *Douthwaite v. Tibbut*, 5 M. & S. 76, was helden a sufficient acknowledgment to take the case out of the statute.

The Court of Common Pleas at length came to a different opinion in *Helling v. Shaw*; and *Gibbs, C. J.*, there puts three cases, it which it had been held that the statute did not protect a defendant. One, where the defendant [652] has admitted that the debt is unpaid, but has stated that it was discharged by lapse of time. Another, where the defendant has stated, that it is discharged by particular means, to which he has with precision referred himself: if the plaintiff can disprove that, he lets himself in to recover.

A third case is, where the defendant challenges the plaintiff to produce a particular mode of proof of his liability. If the plaintiff produces that proof, the Courts have said the defendant shall not be discharged. All the decisions on this subject were under review in the case of *A'Court v. Cross*; and with all the consideration I have given this matter, I am still of opinion, that every word I am reported to have uttered in that case is warranted by prior decisions.

Having disposed of the cases, I come next to the statute. If the language of that is clear, we are especially bound to adhere to it where there is a conflict among the decisions; and the language of this statute is so clear, that if it were not for the decisions a doubt would hardly be raised upon it. It has been argued, that the object of the statute was to protect those who had lost the evidences of their payments. This I deny. The title of the act is proof to the contrary; "An act for limitation of actions, and for avoiding suits in law;" and the preamble is, "For quieting men's estates, and avoiding of suits." After appointing various periods of limitation for other actions, the act provides that all actions upon the case, other than for slander, shall be commenced and sued within six years next after the cause of such actions, *and not after*. But it has been argued, that by an acknowledgment after the six years, a new cause of action is created, from which a promise may be implied. Yet in ejectments and the other forms of action, besides *assumpsit*, enumerated in the statute, no acknowledgment after the allotted time will create a new cause of action, although the statute was passed on the "same [653 principles with respect to those actions as with respect to *assumpsit*. It is not a statute to protect parties against loss of evidence, but to quiet claims. To sue a defendant when he has slept six years over his rights—when time and misfortune may have disabled the debtor from discharging his obligation—is at once iniquitous and anti-christian.

The plaintiff then in this suit has no cause of action after the expiration of the six years. Before the expiration of the six years, it is true a conditional promise was made; but that, if relied on, must be taken subject to the condition.

In none of the cases has any distinction been made as to the time of the promise, whether before or after the six years; but it is clear, that after the six years the plaintiff has no cause of action except on the new promise, and that being conditional, the condition attached to it must be observed. The new promise does not bring down the old cause of action, but creates a new one; the form of the pleadings sufficiently indicates this, for the defendant, by his replication to the plea of *non assumpsit infra sex annos*, admits that the plea is a bar to the original demand, and relies upon a subsequent promise; and there is abundant authority to show, that if the subsequent promise be conditional, it cannot be treated as absolute. *Cole v. Saxby* and *Davis v. Smith* are conclusive on this point; and though I should not be disposed to pay much attention to a single *nisi prius* decision, yet when a series of those decisions show the practice at *nisi prius*, they are entitled to consideration. Lord *Kenyon* has laid down the rule in two cases, that where a party promises to pay when of ability, the plaintiff cannot succeed unless he shows ability. *Eyre*, C. J., ruled the same; and *Heath*, J., was accustomed to rule so within my own recollection.

The decisions of these eminent Judges have remained untouched: [654 and the circumstance that the promise might have been made after the expiration of the six years was never adverted to before them, because it was deemed immaterial. I think it immaterial, for the reasons I have before stated, and that, therefore, the nonsuit in the present case ought not to be set aside.

The court bring equally divided, the nonsuit was allowed to stand, and the rule for setting it aside was

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1. *J.*, *T.*, and *B.* were jointly concerned in the sale of butters. *J.* consigned them to *B.*, who sold them on the joint account.

T., being requested to accept bills for the firm, refused to do so without some security, when *B.* engaged, if *T.* paid the bills, to repay him out of the proceeds received for butters already sold.

T., having accepted and paid the bills: Held, that he might sue *B.* for money had and received to his use. *Coffee v. Brian.* 54

2. Goods were consigned to *L. C. & Co.* or their assigns, "he or they paying freight for the same." *L. C. & Co.* indorsed the bill of lading to *K.*, their broker, and then became bankrupt; the ship-owner, in ignorance of these circumstances, applied to *L. C. & Co.* for the freight, and then sued *K.* for it:

Held, that *K.* was liable. *Dougall v. Kemble and Another.* 393

3. The defendants had executed a charter-party, under which the cargo was to be sent alongside the ship at the merchant's expense, the captain rendering the usual and customary assistance with his boats' crew; some of the cargo lying about thirty yards from the edge of the wharf, the captain applied to the defendants' factor for laborers to remove it into the boats. The factor having refused, saying he would abide by the charter-party, the captain hired laborers for the purpose:

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1. An attorney who stays proceedings upon an undertaking to pay costs, is bound to fulfil his engagement, although his client dies before bail is put in. *Helling v. Jones.* 70

2. Where an attorney, without a regular authority from the plaintiff, commenced an action of replevin, and the plaintiff, knowing of the proceedings, suffered the cause to be carried down to trial, but afterwards, concerting with the defendant, entered up satisfaction on the record, without securing the attorney his costs, the court refused to vacate the entry of satisfaction. *Abbott v. Rice.* 132

3. The attorney for the plaintiff having acted on both sides, deluding the parties, and preventing an interview, the court set aside the proceedings, and made the attorney pay costs. *Berry v. Jenkins.* 423

AUCTION.

The vendor of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to 23*l.* after a bona fide bidder had bid 12*l.*:

Held, that the sale could not be enforced against a subsequent bidder. *Crowder v. Austin.* 368

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See Award, 1. ATTORNEY, 2.

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See ARBITRATION.

1. Declaration, that a cause being depending in Chancery between *M. D.* and divers infants, plaintiffs, and *T. B.* since deceased, and *J. R.* defendants, it was ordered, with the consent of the attorneys of the parties in the suit, that the matters in question in the suit, and all disputes between *M. D.* and *T. B.* should be referred to the arbitrament of *W. C.*, who was to make one or more awards, and in case either of the parties should die, the death was not to abate the reference; that *T. B.* afterwards died before the making of the award; that the arbitrator awarded that the executor of *T. B.* should pay plaintiff 22*l.* out of *T. B.*'s assets, and that being so liable, the defendant, executor as aforesaid, promised to pay:

Held, on demurrer, that the action lay against the executor; that the promise sufficiently appeared to have been made in his representative capacity; that a sufficient authority to refer was shown, and a sufficient award to enable plaintiff to sue; and that the authority was not revoked by the death of *T. B.* *Dowse v. Coxe and Another.* 20

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B.

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See Assumption, 2. EVIDENCE, 5. INSOLVENT, 4.

1. Where a verdict is found for the plaintiff in an action by assignees, on a contract entered into with a bankrupt, before his bankruptcy, it is no ground for setting aside the verdict, that it did not appear that 100*l.* of the petitioning creditor's debt was contracted within six years before the suing out of the commission.

2. A release executed by the bankrupt after an act of bankruptcy, to a lessee who knows of the bankrupt's insolvency, is not valid, although executed more than two months before the suing out of the commission.

3. Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a plaintiff may sue for the numbers actually delivered, although the contract be not reduced into writing, as required by the statute of frauds. *Mavor, Assignee of W. H. Pyne v. Pyne.* 285
4. A was a horse-dealer, and livery-stable keeper: after his death his widow carried on the business of the livery-stable, and bought horses to let, which she occasionally sold to customers: Held, per Abbott, C. J., at Nisi Prius, a sufficient trading to support a commission of bankrupt against the widow. *Martin and Another, Assignees of a Bankrupt, v. Nightingale.* 421
5. The 5 G. 4. c. 98., which repealed the former bankrupt acts, enacted, that after June 1824, a bankrupt's certificate should not be received in evidence unless entered of record.

The 6 G. 4. c. 16, repealed the 5 G. 4. c. 98., from May 2d, 1825, and the old statutes from September 1st, 1825; it provided also, that its enactments respecting certificates should take effect from May 2d, 1825, and that certificates on commissions issued after the act took effect, should be entered of record. "The present practice in bankruptcy," was, by s. 136., to be continued, unless when alterations were expressly declared:

Where a commission was issued in January, 1825, and the certificate obtained in November, 1825,

Held, that it need not be entered of record. *Tuttle v. Grinnanod.* 493

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1. Where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessaries furnished for their support. *Houlestion v. Smith.* 127
2. A wife having carried on business on her own account during the imprisonment of her husband, and he having returned to live with her after his discharge,

Held, on motion for a new trial, after a verdict against him, that he was liable for articles furnished in this business, with his knowledge, after his return, though the invoices and receipts were in the name of the wife, and she was rated

to and paid the poor's and paving rates. *Petty v. Anderson.* 170

BASTARDY.

See Insolvent, 1.

Held, upon motion for a new trial, that the mother of an illegitimate child might recover, in an action for money had and received, money deposited with a parish-officer to meet any charges to which the parish might be liable in respect of the child. *Clarke v. Johnson, and Another.* 424

BILL OF EXCHANGE.

See Trouver, 2. Plamans, 10, 11.

Bills having been drawn on the defendants by their agent and with their authority, in respect of a property which they afterwards transferred to A., they requested A. to place funds in their hands to meet the bills when due, saying, "It would be unpleasant to have bills drawn on them paid by another party." A. placed funds accordingly; but when the bills were left with defendants for acceptance, no acceptance was written on them. A.'s agent having complained to one of the defendants on the subject, he said, "What! Not accepted? We have had the money, and they ought to be paid; but I do not interfere in this business: you should see my partner?"

Held, that all this amounted to a parol acceptance of the bills on which the defendants were liable to an indorsee, between whom and A. there was no privity. *Fairlee and Others v. Herring and Others.* 625

BOND.

See Insolvent, 1.

1. T. having a banking account with plaintiffs, on which he was indebted to them 10,000*l.* in 1822, defendant then executed a bond, conditioned to secure plaintiffs for any sums which for ten years plaintiffs should advance on bills, &c., which T. should from time to time draw on them or make payable at their house, and all checks, &c., not exceeding 5000*l.* in the whole. It was agreed that this bond should not affect a prior security given to plaintiffs by T. 1817; but no notice was given to defendant by plaintiffs that T. was indebted to them 10,000*l.* at the time the defendant executed his bond; T., however, saw the accounts every fortnight, and received the vouchers half yearly.

At the close of his account, T. was indebted to the plaintiffs more than 10,000*l.*, but subsequently to the executing of the defendant's bond, he had paid into the plaintiff's bank more than 5000*l.*:

Held, that the defendant was liable to the extent of 5000*l.*

Held, also, that the defendant's bond did not require a 2*s.* stamp. *Williams and Others v. Roslinson.* 71

2. A bond for resigning a living in favor of one of two brothers of the patron is void. *Fletcher v. Lord Somers.* 591

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The driver of a stage-coach alighted the bank on a moonlight night, and upset the coach. He had passed the spot where the accident happened twelve hours before, but in the interval a land-mark had been removed. In an action for an injury sustained by this accident, the Judge told the jury, that, as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict.

A verdict having been returned accordingly, the court granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence. *Crofts v. Waterhouse.* 819

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A feme covert, entitling to a copyhold, surrendered it after secret examination by the steward, to the use of her husband, with his assent, testified by his immediate

admittance: Held, that this surrend^t was valid. *Scammon and Others v. Abbot.* 378

COSTS.

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1. The circumstance that the plaintiff's cause has been conducted by one who is not an attorney does not deprive the plaintiff of his right of full costs against defendant. *Reeder v. Bloom.* 9
2. The court will not stay the proceedings in a writ of right till the costs of a prior ejectment are paid. *Chadfield and Wife Defendants; Souler, Tenant.* 167
3. Where there were three verdicts; the first in favor of the plaintiff, the second in favor of the defendant by reason of a misdirection, and the third in favor of the defendant upon the merits, and the rule for the first new trial reserved the consideration of costs, the court allowed the defendant to take the costs of the first or second, at his option, and the costs of the third. *Body v. Bedale.* 174
4. A tender and payment into court, by which the plaintiff's claim is reduced below 40*s.* will not entitle the defendant to enter a suggestion on the London court of conscience act, although the issue on the tender is found for the defendant. *Wainstell v. Atkinson.* 289
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COVENANT. (*In restraint of Trade.*)

See VENUE, 2.

Declaration, that the defendant, on the considerations mentioned in a certain deed, (which the plaintiff brought into court,) agreed to submit to certain particular restraints in the carrying on of his trade, which agreement he afterwards violated: Held, on general demurrer, that this was a sufficient statement of the consideration for the restraint agreed to. *Homer v. Ashford, and Another.* 332

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DEED, CONSTRUCTION OF.

1. By deed of 1750, lands were limited to the use of such person as *H.*, *D.*, *M.*, and *C.* should by their joint deed, in the presence of two witnesses, appoint;

And for default of such appointment, to the use of such person as *H.*, *D.*, and *M.*, in case they should all survive *C.*, by their joint deed, in the presence of two witnesses, should appoint:

And in default of, and until such appointment,

Part of the premises to *C.* for life, without impeachment of waste;

And that part after her decease, and the rest of the premises, to the use of such person as *H.* by deed, in the presence of two witnesses, should appoint;

And for default of, and until such appointment, to *H.* and his heirs forever.

By a settlement made in 1751, on the marriage of *M.* with *R.*, and attested by three witnesses, *H.*, *D.*, *M.*, and *C.* granted, sold, released, confirmed, directed, limited, and appointed the premises to *L.* and his heirs, to the uses, trusts, intents, and purposes thereafter expressed, limited, and declared concerning the same; among which was a term of 500 years in trust to the use of *L.*, to raise portions for younger children by sale or mortgage of the premises thereby granted and released, so as that thereby none of the prior estates in the premises should be impeached and encumbered; and

H., *D.*, *M.*, and *C.* covenanted that they (or one of them) were seised of the premises by them thereby granted and released for an absolute estate of inheritance, and that they would make such farther assurance of the premises thereby released, settled, or assured, as should be required:

Held, that the legal fee of the premises did not become vested in *L.* *Wyatt v. Griffith.* 179

2. Settlement of premises to *T. S.* and his heirs, to the use of *W. T.* and his heirs, until a marriage between *R. T.* and *E. G.*, then to the use of *W. T.* for the life of *R. T.*, with several limitations over on the death of *R. T.*, in favor of his wife and children; with a term for 500 years in *T. S.*, to commence on the death of *R. T.*, for securing a rent-charge to the wife of *T. S.*, and to determine on the performance of that trust, and subject to the foregoing, to *W. T.* and his heirs:

W. T. died before the marriage of *R. T.*, who was his heir at law, leaving a will and executors: Held, that the executors did not take any interest in the premises, and that *R. T.* took a fee in them, subject to the term for 500 years. *Thewes v. Threlcyan and Others.* 616

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See FEEFARMER, 1.

1. Devise of lands and personalty, in trust out of the rents to apply £50*l.* a year to the maintenance of devisor's daughter till she should be twenty-one, or marry, and out of the residue as much as should be thought necessary for the maintenance of devisor's son till he should be twenty-one, or his sister marry, and upon his attaining twenty-one, or his sister's marrying, to raise £500*l.*, and pay the interest of it to the daughter after her attaining twenty-one or marrying; and subject thereto that the trustees should stand seised of the residue in trust for the son till he attained twenty-one, and then to the use of the son, his heirs, executors, and administrators forever: But in case the son should die under twenty-one, and the daughter survive, or in case the son should live to twenty-one, and afterwards die without lawful issue,—to the use of the trustees till the daughter attained twenty-one or married, and then to the use of the daughter for life, with divers remainders over:

Held, that the trustees took the legal estate till the £500*l.* was raised, and that but for the intervention of the trustees, the son would have taken a fee with an executory devise over in the event of his dying without issue living at the time of his death. *Gloer v. Moncton.* 13

2. By a will reciting that the devisor was seised of divers freehold and certain copyhold estates in *L.*, under mortgage for a certain sum to *R.*, devisor gave all his said freehold and copyholds to *P.* and *A.* in trust for certain purposes; the residue of his freehold, leasehold, and copyhold estates he gave to *S. P.*

At the time of making his will and of his death, the devisor was also seised of twenty-one acres in *L.*, not under mortgage, and of various leaseholds:

Held, that the twenty-one acres passed to *S. P.* under the residuary clause. *Pullen and Others v. Pullen and Others.* 47

3. Devise of lands to *A.* for life, remainder to *B.* in fee, subject to and charged with the payment of £20*l.* a year to *C. D.* during her life, to be paid by *A.* as long as she should live, and after her decease to be paid by *B.*:

Held, a charge on the land, for which *C. D.* might distrain. *Buttley v. Roberson.* 393

4. Devisor directed that his rents should be applied in paying *M. D.* and *F. D.* the interest of sums charged on his freehold property; and subject thereto in paying *A. D.*, widow of his son *R.*, 10*l.* a year till death or second marriage; that the remainder of the rents should be applied to the maintenance and education of *J. D.*, his grandson, till he was twenty-one, and if he should die before, to the maintenance and education of his grand-

daughter, *M. F. D.* That after *J. D.* and *M. F. D.* should have attained twenty-one, *W. D.*, his son, should have an annuity of 30*s.* out of the rents for the term of his life, subject as aforesaid; the remainder of the rents were devised to *A. D.* for the life of *W. D.*, or till her second marriage: after the death of *W. D.*, devisor gave the premises to the use of *J. D.* and his heirs; and if *J. D.* should die before the period aforesaid without lawful issue living at his death, he gave the rents to *W. D.* for his life, subject as aforesaid; and after the death of *W. D.*, to his children, share and share alike, and in default of such issue, to *A. D.* and her heirs. Devisor died, leaving *A. D.*, *J. D.*, *M. F. D.*, and *W. D.*—*W. D.* being his heir at law:—*A. D.* next died, intestate and unmarried, *J. D.* afterwards attained twenty-one, and died unmarried, in the lifetime of *W. D.*:

Held, that on the death of *J. D.*, *W. D.* became entitled to an estate for life in the lands. *Mason v. Robinson, and Others.*

C. devised lands to a *feme covert* for her life, and then, to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, and attend to repairs; with power to distrain, lease, &c. By a codicil *C.* revoked the devise in the will, the trustees named thereto having died, and devised the land to other trustees, to the same intents, and in the same manner in all respects, as if the new trustees had originally been named trustees in the will:

Held, that the new trustees took the legal estate in the land. *Tennyson, Gibbs and Others v. Moody.*

DISTRESS.

See *LAWLESS AND TENANT.*

1. Plaintiff entered a farm under an oral agreement for a lease for ten years; though the time of paying rent was settled, it did not appear what was the amount to be paid; the lease was never executed; but plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years:

Held, that the lessor might distrain. *Knight v. Bennett.*

2. By agreement, as well as by custom of the country, a tenant was to have the use of the barns and gate-rooms to thresh out his corn and fodder his cattle till the May Day, after the expiration of his term; his term expired at Michaelmas, 1824; he was then restrained by injunction from carrying off the premises cora in straw: in January, 1825, his landlord distrained a

rick of corn on the premises: Held, that the distress was valid. *Knight v. Bennett.*

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See *PLEADING*, 6. *PRACTICE*, 17.

1. The court will not interfere with the allowance of a writ of error. *Jones v. D. Lister.* 125
2. The record stated a verdict for plaintiffs on twelve counts, and that the jury were discharged on eight others.

The issues on these latter counts being immaterial, the court refused to reverse, on error, the judgment for the plaintiff, on the ground that the discharge of the jury was not stated on the record to be with the consent of the parties. *Powell and Others v. Sonnett and Others.* 281

EVIDENCE.

See *ACTION ON THE CASE.*

1. To fix a plaintiff with knowledge of a general notice by which a coach proprietor had limited his responsibility, it was proved that the plaintiff had taken in for three years a newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the court refused a new trial. *Rosday v. Horn.* 2
2. The defendant, after settling a draft of articles of partnership with the plaintiff, having engrossed and executed a deed, differing in some respects from the draft of the articles, the plaintiff refused to execute the deed; but having afterwards commenced an action for breach of agreement to take him into partnership, he moved to be at liberty to inspect and copy the deed. The court refused to order such inspection. *Ratcliffe v. Blaxby.* 148
3. Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff, while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it: Held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents. *Taylor v. Abby.* 164
4. The plaintiff had lost his part of an agreement under seal after it had been duly stamped.

At the trial of an action on the agreement, the defendant, upon notice, produced his part, unstamped, and the plaintiff the draft of the agreement:

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6. Where a petitioning creditor's debt was vacated by his giving the bankrupt a check on the petitioning creditor's banker:

Held, that to establish the debt the payment of the check must be proved. That it was not sufficient (especially where the bankrupt's papers came to the hand of the petitioning creditor,) to show the check to have come to his hands again, and that his bankers, the day after the date of the check, paid on his account to the bankrupt's bankers a sum corresponding with the amount in the check.

Bleasby and Another, Assignees of Byers, a Bankrupt v. Crowley and Others. 430

6. The defendant having published imputations against the plaintiff as envoy of the state of *Chi*, and the plaintiff in a declaration for libel having stated as matter of inducement, that he was envoy of that state: Held, upon motion for a new trial, that the admission of these two facts upon the face of the alleged libel was sufficient proof of them to enable the plaintiff to sustain his action.

Yrisari v. Clement. 432

7. Persons had for some years been in the habit of passing up and down a new unpaved and unfinished street, which terminated in fields, where other houses were built.

A jury having found a dedication to the public, the court refused to grant a new trial, which was moved for on the ground that this was not sufficient evidence of a dedication.

Jarvis v. Dean. 447

8. A party who sues another for arresting him on an illegal warrant is not bound to produce the warrant.

Holroyd v. Doncaster. 493

EXECUTION.

See AWARD, I.

Several crops having been taken under an *habeas facias possessionem* issued on an ejection brought against a tenant for holding over, the court refused a rule for the lessors of the plaintiff to pay over the value of them to the defendant after deducting the amount of rent due.

Doe dem. Upton and Others v. Witherwick. 11

EXECUTOR.

See AWARD, I.

When a rectory falls vacant, the advowson of which belongs to a prebendary in

right of his prebend, and the prebendary dies without having presented, the presentation does not belong to his personal representative.

Rennell v. Bishop of Lincoln. 323

F.

FACTOR.

4. and *B.* having, by their brokers, purchased cottons, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of *A.* Immediately after the purchase, *B.* paid *A.* one-half the value: When considerable purchases had been made, the brokers were informed that *B.* had an interest in the goods purchased; *A.*, after this, directed the brokers to procure him a loan on the security of the warrants, and *C.* advanced money by discounting bills drawn by *A.* upon the brokers; as a security for which, the whole of the warrants were deposited with *C.* by the brokers:

While they were so deposited, the brokers, upon directions from *A.* and *B.*, divided the goods held on their joint account, by appropriating specific warrants to each party, having first obtained them from *C.* for that purpose: Before the bills became due, the brokers were directed by *A.* to get one half renewed: *C.* having discounted fresh bills for this purpose, the brokers left in the hands of *C.*, as a security, the warrants belonging to *B.*; *C.* not knowing that *B.* had any interest in them:

Held, that *B.* might recover from *C.* in respect of the goods thus pledged to him by *A.*

Williams and Others v. Barton and Another. 189

FEME COVERT.

See COPROHOLD, I.

FINE.

By a marriage settlement, an estate was limited to the use of husband and wife for life, with remainders over to the children of the marriage, and in default of issue, to the right heirs of husband and wife: There was a power in husband and wife to charge the estate during their lives, and a power to certain trustees, in whom the legal estate was vested, to sell on the direction of the husband and wife, or the survivor:

The husband and wife borrowed money by way of annuity; created a term of 1000 years, and levied a fine to *G.* in fee, which, by a deed to lead the uses, was

INDEX.

declared to be "in trust to secure the regular payment of the annuity, and to corroborate the said term?"

Held, that this fine did not extinguish the trustees' power to sell under the direction of the wife. *Sir J. Tyrrell v. Marsh.*

31

FOREIGN JUDGMENT.

Unless the contrary be shown, the court will presume that the decision in a foreign judgment is consonant to the justice of the case. *Arnott v. Redfern and Another.*

353

FORFEITURE.

See EXECUTION, 1.

In ejectment to recover premises forfeited for non-payment of rent, a difference between the amount of rent proved to be due and the amount demanded in the lessor of the plaintiff's particular is not material. *Tenny dem. Gibbs and Others v. Moody.*

3

FORMEDON.

See PRACTICE, 1.

FRAUDS, STATUTE OF.

See BANKRUPT, 3.

Messrs. Morley & Co.—We hereby promise that your draft on William Clarke, Son, & Co., due at Messrs. Mastermans' at six months, on the 27th of November next, shall be then paid out of money to be received from St. Philip's church, say amount 174*l.* 18*s.* 5*d.*—W. Clarke, W. Boothby."

Held, that this undertaking was void within the statute of frauds, no consideration appearing for Boothby's promise. *Morley and Others v. Boothby. Same v. Boothby and Clarke.*

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FREIGHT.

See ASSURANCE, 2.

I.

INFANT.

Where liable to costs. *Page v. Thompson.*

609

INSOLVENT.

1. Obligors in a bastardy bond discharged under the insolvent debtor's act subsequently to a judgment on the bond, are liable for expenses incurred in respect of

the bastard subsequently to their discharge. *Davies and Others v. Arnott and Others.*

154

2. Under 1 G. 4, c. 119, the provisional assignee of the insolvent debtor's court may, without application to that court, sue in ejectment for property assigned to him. *Doe d. Clarke and Others v. Spencer.*

203

3. This court will not stay the proceedings in an action brought by the provisional assignee of the insolvent debtor's court, on an objection that it was not proved at the trial of the cause that the assignee had, pursuant to 1 G. 4, c. 112, s. 11, the authority of the insolvent's debtor's court to proceed. *Doe d. Spencer v. Clarke.*

370

4. A agreed to sell to C. a copyhold, the legal title to which had, by mistake, been conveyed to B.

A subsequently was discharged under the insolvent debtors' act:

After his discharge, B. surrendered the copyhold to A., who surrendered it to C., and C. paid the purchase money to D. on A.'s behalf:

Held that A.'s assignee, under the insolvent debtor's act, might recover this money from D.

Held, also, that D. might retain out of it his charges for conducting the sale of the copyhold, and the amount of a bond, which, at the time of the agreement to sell the copyhold, A. had given to D., with a promise to pay it out of the proceeds of the sale. *Twiss, assignee of Wragg, an Insolvent v. White.*

488

INSURANCE.

See PLEADING, 4.

1. An association of shipowners for the mutual insurance of each other's ships, in which each member is only liable to the extent of his subscription, is not illegal under the 6 G. 1, c. 18.

2. Where, by the terms of a policy, losses were to be paid in three months after an adjustment by a committee of the insurers, and the committee refused to adjust upon the request of the insured: Held, he might sue on the policy, notwithstanding there had been no adjustment. *Strong v. Harvey.*

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INTEREST.

- The rate of interest for loans advanced within the dominions of native and independent Indian sovereigns, by British subjects domiciliated and residing within such dominions, is not limited to 12 per cent. *House of Lords.*
- Where, after the creditor has endeavored to obtain payment, there has been a wrongful withholding of a debt arising

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out of a contract which does not carry interest, the jury may allow interest in the shape of damages for the unjust detention of the money. *Arnott v. Redfern and Another.* 353

J.

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, 15.

JOINDER IN ACTION.

1. Persons in partnership as bankers may, without showing the proportion of their respective shares, join in an action for a libel against them in respect of their business. *Forster and two Others v. Lasson.* 452

2. Where several persons jointly interested, agreed to horse a coach, each of them one stage, on the road from *A.* to *B.*, and that in case of default one of them should sue the defaulter for a penalty which should be divided among the non-defaulters: Held, that an action might be maintained on the agreement against a defaulter, by the party so appointed to sue, and that the others need not join in the action. *Radenhurst v. Bates.* 463

LANDLORD AND TENANT.

See DISTRESS, 1, 2. USE AND OCCUPATION. EXECUTION.

1. The plaintiff who had occupied lands under *A.*, upon *A.*'s death, entered into an agreement to pay rent to the defendant, and paid 1s. as an acknowledgment of his title, being ignorant that it was disputed:

It turning out afterwards that the defendant had no claim to the property:

Held, that the plaintiff might dispute the defendant's title in a plea of *non tenet in replevin*. *Gregory v. Dodge, and Another.* 474

LIBEL.

See EVIDENCE, 6. JOURNAL IN ACTION.

1. Plaintiff, a surgeon, petitioned Parliament against quacks:

Defendant, a journalist, commented severely on the contents of the petition, and charged the defendant with ignorance of his profession, pointing out ignorance of

chemistry, which, he said, appeared on the face of the petition:

Plaintiff then sued defendant for libelling him in his profession of a surgeon:—the Judge directed the jury, that if they considered the defendant's attack a fair comment on the plaintiff's petition,—if the charge of ignorance was collected from the petition alone, and was not the spontaneous effusion of malice in the defendant,—the writing in question was no libel; he also directed them to consider whether the defendant had imputed to the plaintiff ignorance in his profession of a surgeon, or ignorance of chemistry, for if they thought the latter, the declaration was not adapted to the plaintiff's case.

The jury having found a verdict for the defendant, the court granted a new trial, costs to abide the event.

Query, Whether a petition to Parliament on matters of general importance is such a publication as renders the petitioner an object of fair criticism and comment. *Dunne v. Anderson.* 88

2. To say of one who carries on the business of a corn vendor, " You are a rogue and a swindling rascal; you delivered me 180 bushels of oats worse by 8d. a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage. *Thomas v. Jackson.* 104

3. An action of libel does not lie for anything written against a party touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter independent of the illegal transaction, though arising out of it, an action lies.

4. Held, that the following passage, "The plaintiff lost no time in transferring himself, together with 200,000*l.* sterling of John Bull's money, to Paris, where he now out-tops princes in his style of living," did not impute to the plaintiff having committed a fraud on the English nation. *Yrisarri v. Clement.* 432

LIMITATIONS, STATUTE OF.

1. The following letter from the defendant to plaintiff's attorney, was given in evidence by a plaintiff in answer to a plea of the statute of limitations:—"I have received yours respecting plaintiff's demand; it is not a just one; I am ready to settle the account whenever plaintiff thinks proper to meet on the business; I am not in his debt 90*l.*, nor any thing like that sum; shall be happy to settle the difference by his meeting me."

Held, that the Judge was justified in directing the jury, "that after this letter the statute of limitations was out of the question."

Per Burrough, J. A statement made by a counsel upon his address to the

- jury, but in the hearing of his client, is binding on the client if he makes no objection. *Colledge v. Horn.* 119
2. Defendant being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill that I gave is on a three-penny receipt stamp, and I will never pay it." Held, not such an acknowledgment as would revive the debt against a plea of the statute of limitations. *A'Court v. Cross.* 329
3. Where, to a plea of the statute of limitations, the plaintiff replies a promise within six years, and proves a promise to pay *wages of ability*, made three years after the original cause of action accrued, and within six years of the commencement of the action: Held, he must also prove the defendant's ability. *Burrough, J., and Park, J., dissentient. Scales v. Jacob.* 638
- M.
- MAGISTRATE.**
See *TRESPASS*, 1.
- MONEY HAD AND RECEIVED.**
See *ASSUMPSIT*, 1. *BASTARDY*, 1.
- P.
- PARTIES.**
See *JOINDER IN ACTION*. *AWARD*, 1. *ASSUMPSIT*, 2. *VESTRYMAN*.
- PARTNER.**
See *ARBITRATION*, 1.
- PAYMENT.**
See *BOND*, 1.
- PLEADING.**
- See *JOINDER IN ACTION*, 1, 2. *VENUE*, 2.
4. In replevin, avowry was made in respect of a right of common claimed by the corporation of *Adwick*, under a grant from the *De Vere*. The plaintiff pleaded that the corporation had been accustomed to appoint a reasonable number of herds for, among other things, superintending the common and beasts on it, and also to appoint, for the pains of each herd, a reasonable and proper number of stints of each such herd, to be depastured upon the common: Held, sufficient after verdict. *Elliott v. Hardy.* 61
2. Declaration for assault, battery, and tearing clothes. Plea, that defendant was not guilty of the said supposed assaults in manner and form as the plaintiff complained: Held, that the *modo et forma* included a denial of the battery and *laceravit*, as well as the assault. *Weathrell v. Howard.* 135
3. The declaration stated a rule of court, by which it was ordered, that the proceedings in this action should be stayed; that the defendant should be discharged out of custody; and that plaintiff should deliver up the bill of exchange on which the action was brought: Held, a sufficient allegation of the termination of the first suit to support an action for a malicious suit. *Brost v. Carpenter.* 203
4. Where the regulations of an association of ship-owners, combined for the mutual assurance of each other's ships, were indorsed on the back, and were declared to form part of a policy of insurance, to which they were subscribers: Held, that the declaration in an action for a loss under the policy ought to set out the regulations as well as the policy. *Strong v. Rule.* 315
5. The plaintiff prescribed for a right of sole pasture "from the feast of St. Thomas until the 18th of April," and proved the exercise of the right between those periods: Held, on motion to set aside a nonsuit, that it was not necessary to allege the right in the pleadings from *Old St. Thomas's day*. *Smith v. Flower.* 401
6. Averment in a declaration on the gaming act, that the party lost to the defendant by playing at *rouge et noir*: Held, sufficient on error, without alleging the money to have been lost by playing with him.
2. The plaintiff having sued *qui tam*, alleged the loss at the parish of *St. James*, in the county of *Middlesex*. Held, sufficient in error, although in *Middlesex*, there are the parishes of *St. James, Clerkenwell*, and *St. James, in the liberty of Westminster*. *Taylor v. J. Williams.* 449
7. Plaintiff purchased a horse for 5*£*., the defendant warranting him sound, and agreeing to give 1*£*. back if the horse did not bring plaintiff 4*£*. or 5*£*. The averment in the declaration was, that in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 5*£*., the defendant undertook the horse was sound:
- Held, a variance, *Gaselee, J., dissentient. Blyth v. Bampton.* 473
8. Declaration, that in consideration plaintiff had delivered to defendant a watch

to repair, defendant undertook to repair and re-deliver it to the plaintiff.

Breach, non-delivery; evidence; that defendant repaired and tendered the watch to plaintiff, who said: "Take it to my uncle in *M.*, who will pay for it," when the defendant took it to another uncle, who lost it:

Held, no variance. *Wilson v. Poens.* 633

2. Several pleading. Inconsistent pleas not allowed, except under an affidavit of their necessity. 685

10. The declaration on a bill of exchange stated it to have been drawn payable to the order of the drawer in *London*, and accepted by the defendant at *London*, according to the usage of merchants;

Held, that averment and proof of presentation for payment in *London*, or of excuse for non-presentation in *London*, were unnecessary. *Selby v. Eden.* 611

11. Where the acceptor of a bill of exchange accepts it payable at a banker's, it is not necessary in an action against the drawer to allege that the bill was presented to the acceptor in person, if there is an averment that it was duly presented at the bankers. *De Bergache v. Pillin.* 476

POWER.

See FINN.

A trustee having a power to sell an estate of which the *cestui que* trust was tenant for life without impeachment of waste, sold and conveyed the land only, received the money for it, and applied it to the purposes of the trust; the *cestui que* trust, by the same conveyance, sold and conveyed the timber, and received the money for it:

Held, that the power was not well executed. *Cholmeley v. Paxton.* 207

PRACTICE.

See AWARD, 3. EVIDENCE, 2. TROVER, 3. INFANT. VENUE, 1. ATTORNEY, 3.

1. Demandant allowed to withdraw demur-
rer, and reply *de novo* in a writ of forme-
don, upon showing good ground by affi-
davit. *Cholmeley v. Paxton.* 1

2. Where a first *capias* is issued on an affi-
davit of debt filed with the filer of one
county, if, instead of a *testatum*, a second
capias is issued into another county, a
new affidavit of debt must be filed with
the filer of the second county. *Dorville
v. Whomwell.* 39

3. Where in a special case, judgment was
given for the defendant on a point not
mentioned in the case or argument, and
on a supposed state of facts, collected by
the court from a document appended to
the case, but the reverse of those which

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really took place,—the court refused to stay proceedings or reconsider the case without the defendant's consent,—al-
though a statement of the real facts as to this point, contained in the case when agreed on by the defendant's junior coun-
sel, engrossed, and signed by the plain-
tiff's leading counsel, had been after-
wards struck out by the defendant's coun-
sel, because not enumerated in a collec-
tion of facts agreed on at the trial of the
cause with a view to the special case;
but the statement was never disputed;
and the defendant's counsel had been in-
structed to direct, and had directed, the
argument exclusively to another point.
Pike v. Carter. 85

4. Affidavit to hold to bail on the ground
that defendant was indebted to plaintiff in
trust for deposent, under a deed by which
the defendant had covenanted to pay "at
certain times and on certain events now
passed and happened." Held, sufficient.
Barnard v. Neville. 126

5. In C. B., provided there be fifteen days
between the teste of the first and the re-
turn of the second, a second writ of *scire
facias* may be tested and issued before
the *quarto die post* of the return of the
first.

Sunday, may be reckoned as a day in
one of the four days which must elapse
between the return of the second writ and
signing judgment. *Combe and Others v.
Cutill.* 162

6. *Subpoena Thorpe v. Graham.* 233

7. Where a plaintiff does not appear, a ver-
dict cannot be taken against him, though
the defendant pleads a tender. *Anderson
v. Shaw.* 390

8. Arrest under the name of *Stephen T. Silk.*
Bail-bond executed in the name of *Step-
hen Thomas Silk*: Held, ill. *Lake v.
Silk.* 296

9. Where, upon the day appointed for the
trial of a writ of right, only three of the
Knights appeared, and the sheriff re-
turned, that the fourth was too ill to ap-
pear in that or the ensuing term, which
return was confirmed by the affidavit of
a medical man, the court granted a sum-
mons for another knight. *Tooth v. Bag-
well.* 373

10. In a writ of right, the sheriff having re-
turned, that he had summoned four law-
ful knights, to wit, *A. B.*, Esq.; *C. D.*,
Esq.; *E. F.*, Esq.; and *G. H.*, Esq.: Held,
on demurrer, that this return could not be
traversed. *Angell v. Angell.* 393

11. Trial at bar; what circumstances in-
sufficient to support an application for.
Angell v. Angell. 397

12. Sending process by the post in a letter
which the defendant refuses to receive, is
not good service, although the refusal
may have been wilful, and accompanied

- with a long avoidance of service. *Redpath v. Williams.* 443
 13. At the trial of a writ of right the tenant must begin. *Tooth v. Bagwell.* 446
 14. Defendant took the record down to the assizes. The cause was made a *remand.* At the next assizes the tenant appeared, but the defendant did not try. The court refused to allow the tenant to enter judgment as in case of a nonsuit. *Denman, Demandant; Bell, Tenant.* 499
 15. Bail. Commissioner's authority. *Moore v. Kenrick.* 603
 16. Where, in ejectment, the tenants in possession,—having undertaken to appear, enter into the common consent rule, plead *instante*, and take short notice of trial,—made no defence at the trial, but sued out a writ of error when judgment was signed, the court allowed the lessor of the plaintiff to take his judgment against the casual ejector. *Dog dem. Morgan v. Roe.* 169

PRESENTATION.*See EXECUTOR,* 2.**PROVISIONAL ASSIGNEE.***See INSOLVENT,* 2.**PUFFERS.***See AUCTION,* 1.**Q.****QUARE IMPEDIT.***See COSTS,* 5.**R.****RECOVERY.**

1. Recovery. Affidavit of presentation necessary to admit the word "advowson" in an amendment. *Holmes, Demandant; Sedon, Tenant; Foreman, Vouchee.* 176
2. Where the vouchee became insane between the time of executing the warrant of attorney and the passing of the recovery, the court refused to pass the recovery. *Walcott, Vouchee.* 423
3. A part of the premises named in the deed to lead the uses had been omitted in the copy of the *præcipe*, which precedes the warrant of attorney: the court said, they could not apply the warrant of attorney to premises not named in the *præcipe*, and refused the amendment. *Oddie, Demandant; Foster, Tenant; Earl of Plymouth, Vouchee.* 445

REHEARING.*See PRACTICE,* 3.**RENT-CHARGE.***See DEIVISE,* 8.**REPLEVIN.****See PLEADING,** 1. **LANDLORD AND TENANT.**

In an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin-bond cannot recover as special damage (beyond the penalty of the replevin-bond) the expenses of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them. *Baker v. Garrett and Another.* 56

RESIGNATION-BOND.*See BOND,* 2.**RIGHT OF WAY.***See WAY,* 1.**RULE OF COURT.**

S.

SCI. FA.*See PRACTICE,***SERVICE OF PROCESS.***See PRACTICE,* 12.**SET-OFF.***See INSOLVENT,* 4.**SLANDER.***See LIBEL,* 2.**STAMP.***See EVIDENCE,* 4. *BOND,* 1.**STATUTES, CONSTRUCTION OF.***See BANKRUPT,* 3. *TURMPIKE,***SUBPOENA.***See PRACTICE,* 6.**SURRENDER.***See COPTHOLD,* 1.

T.

TENDER.

1. Where a party has separate demands for

unequal sums against several persons, an offer of one sum for the debts of all, will not support a plea stating that a certain proportion of the sum offered was tendered for one of them.

2. An offer of a certain sum in full of a demand is not a legal tender. *Strong v. Harvey.* 304

TITHES.

1. An agreement to take tithes of wheat by one sheaf taken at varying intervals out of each of many shocks of ten, is not illegal. *Collier v. Jacob.* 108
 2. To place a wheat crop in shocks of varying numbers, and throw out the tenth sheaf, is not a legal mode of setting out tithes, although there be no fraud. *Walker v. Ridgway.* 317

TRESPASS.

1. Trespass does not lie against a magistrate for any thing done in the discharge of his duty, unless he is made acquainted with all the circumstances under which he is called on to act. *Pike v. Carter.* 78
 2. Though the freehold of the church-yard is in the parson, trespass lies for the erector of a tomb-stone against a person who wrongfully removes it from the church-yard and erases the inscription. *Spooner v. Brewster.* 136

TROVER.

1. The defendants, bankers in a small town, gave notes of their own to a stranger, of whom they asked no questions, in exchange for a 500*l.* Bank of *England* note: Held, that the plaintiffs, from whom the 500*l.* note had been stolen, and who had duly advertised their loss, might recover the note of the defendants. *Snow and Others v. Peacock and Others.* 406
 2. In an action by the owner of a lost bill of exchange against a banker who had cashed it to a stranger: Held, that the jury were properly directed to consider whether the plaintiff had used due diligence in apprising the public of his loss, and whether the defendant had acted with good faith and sufficient caution in the receipt of the bill. *Beckwith v. Corrall and Another.* 444
 3. In an action of Trover, where the value of the goods converted was not ascertained, the court refused to stay proceedings upon delivery of the goods to the plaintiff or payment of the value thereof. *Tucker v. Wright.* 601
 4. Plaintiff being indebted to *J. G.*, shipped goods under a bill of lading addressed to *J. P.*, with directions to him to sell the

goods on plaintiff's account, and place the net proceeds to the credit of *J. G.*

R. P. having pledged the goods: Held, that the plaintiff had a sufficient title to sue in trover, and that the right to the possession of the goods was not in *J. G.* *Gaweler, J., dissentiente.* *Sellick v. Smith and Others.* 603

5. Defendant, according to one witness, having admitted taking "from his bankers, or at *Doncaster*," and according to another, "from a stranger at *Doncaster* races, for bets won," a 30*l.* bank of *England* note, without inquiring or taking any account of the number of the note, and the jury, in an action by the plaintiffs, who had lost the note, and duly published their loss, having found a verdict for them, the court granted a new trial. *Snow v. Saddler.* 610

TURNPIKE.

By the enacting clause of a turnpike act it was provided that there should be taken of every person attending any cattle or carriage, for every horse drawing any stage coach, the sum of 6*d.*

By an exempting clause it was added, "that if any person should have paid the toll for passing, the same person, upon producing a ticket, should be permitted to re-pass free with the same cattle or carriage."

Held, that the toll having been paid by the coachman on passing, for horses drawing a stage coach, a second toll could not be demanded for the same horses re-passing, though with a different coach and different coachmen, but belonging to the same proprietor. *Norris and Others v. Poole.* 41

U.

USE AND OCCUPATION.

Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant:

Held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year during which the apartments had been unoccupied:

Held, also, that by the admission of another tenant she dispensed with the necessity of a written surrender. *Walls v. Atcheson.* 462

V.

VARIANCE.

See PARADING, 5, 7, 8.



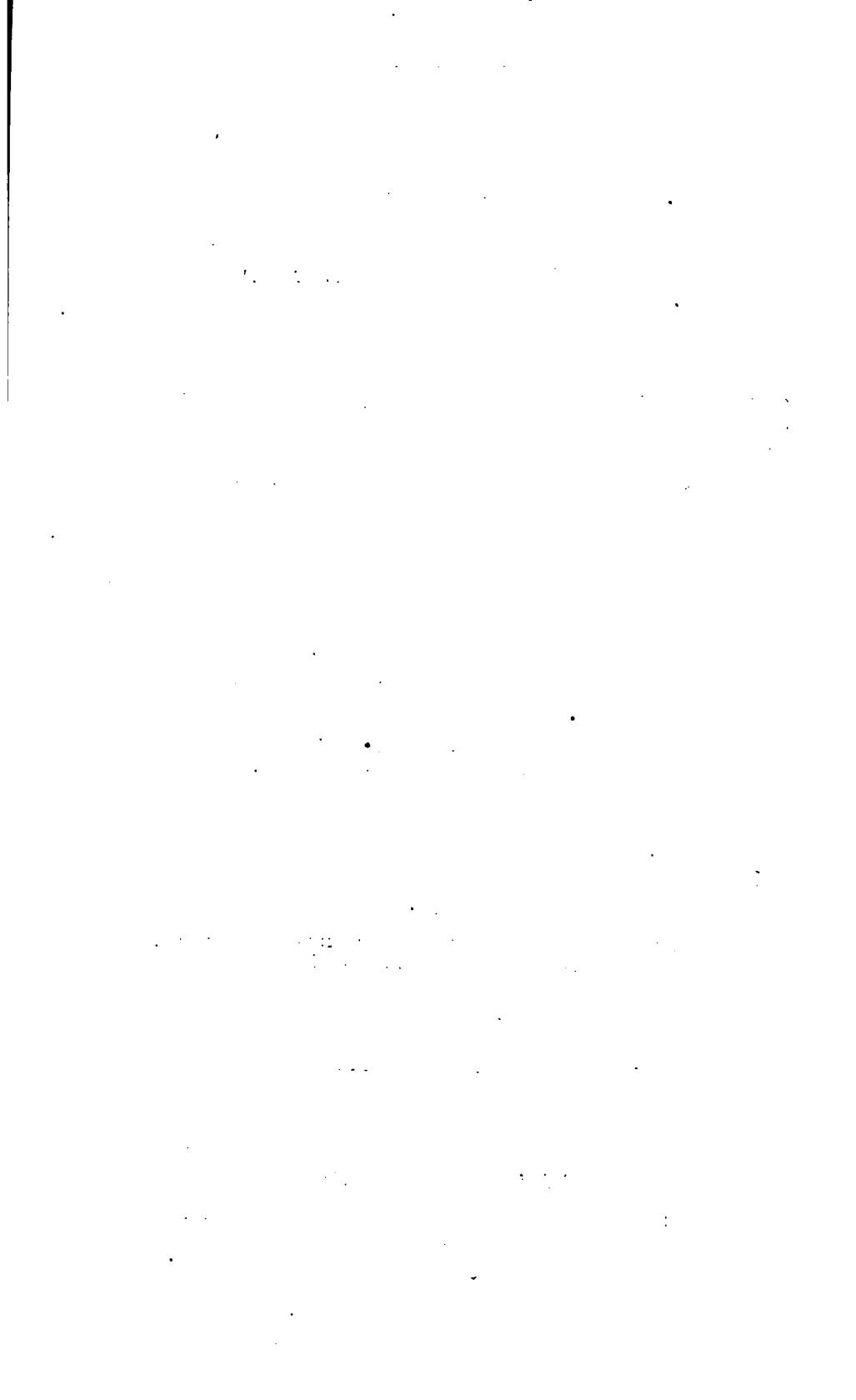
REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
WITH TABLES OF THE NAMES OF THE CASES AND THE
PRINCIPAL MATTERS.

BY
RICHARD VAUGHAN BARNEWALL,
OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL,
OF THE INNER TEMPLE, ESQRS., BARRISTERS AT LAW.

VOLUME V.
CONTAINING THE CASES OF HILARY, EASTER, AND TRINITY TERMS, IN THE
6TH AND 7TH YEARS OF GEO. IV., 1820.

PHILADELPHIA:
T. & J. W. JOHNSON, LAW BOOKSELLERS.

1873.



J U D G E S
OR THE
COURT OF KING'S BENCH,
During the Period of these REPORTS.

Sir CHARLES ABBOTT, Knt. C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir JOSEPH LITTLEDALE, Knt.

ATTORNEY-GENERAL.
Sir JOHN SINGLETON COPLEY, Knt.

SOLICITOR-GENERAL.
Sir CHARLES WETHERALL, Knt.



A

T A B L E

OF THE

N A M E S O F T H E C A S E S

R E P O R T E D I N T H I S V O L U M E .

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
HILARY TERM,
IN THE

SIXTH and SEVENTH YEARS of the REIGN of GEORGE IV., 1826



BYERLEY v. WINDUS, et al., Principal and Ancients of Staple Inn.^t

Extra-parochial persons cannot establish a claim to seats in the body of a parish church, without proof of a prescriptive title; and, therefore, if they sue in the ecclesiastical court, to be quieted in the possession of such seats, this court will grant a prohibition: Semble, that they cannot establish such a claim even by prescription.

PROHIBITION. The declaration, after reciting that the parish of *St. Andrew, Holborn*, was from time immemorial an ancient parish, and that within it there was an ancient parish church during all that time sustained, supported, and repaired by and at the costs and charges of the parishioners; that service was always there performed by the rector of the parish, who received all dues, oblations, and tithes from the parishioners of the parish, and none others; that [2] *the population of the parish had during all the time aforesaid, been much larger than could be accommodated with seats in the church, and that neither the defendants nor the principal or ancients of *Staple Inn* had from time immemorial possessed, had, or enjoyed any pews or seats within the said church, nor had any or either of them any right to possess, have, or enjoy any pews or seats in the church, &c., proceeded as follows; yet the said defendants intending, &c., on the 7th of December, 1821, caused to be exhibited in the consistorial court of *London*, a certain libel on articles, objecting, articling, and libelling against plaintiff and *A. B.*, since deceased, as churchwardens of the parish aforesaid in manner following: First, that *Staple Inn* is extra-parochial, and surrounded on all sides by the parish of *St. Andrew, Holborn*, and inhab-

^t This and the several following cases were decided at the sittings in banc before this term.

ited by a society known by the name of the society of *Staple Inn*, heretofore lawfully constituted as one of the inns of Court of Chancery, and that the society have not had or enjoyed any sittings in any church or chapel whatsoever, saving the church of *St. Andrew, Holborn*. Second, that from time immemorial certain pews and seats hereinafter more particularly mentioned, (and which said pews and seats so claimed by the said defendants, are in the body of the said parish church of *St. Andrew, Holborn*,) have been appurtenant to the said inn, and have been exclusively possessed by, used, had, and enjoyed by the principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid, with the privity, knowledge, and consent of the rector, churchwardens, and parishioners of the said parish of *St. Andrew, Holborn*; and in or about the year 1688, they, the said principal and ancients, or grand fellows of the said society for the time being, re-erected *and rebuilt, or caused to be re-erected or rebuilt, with the like privity, knowledge, and consent, the [¶3] said seats or pews in the said parish church of *St. Andrew, Holborn*, being seven in number, at their own cost and expense; and from that time have repaired and beautified the same from time to time, whenever occasion required, at the sole expense of the funds of the said society: That the principal and ancients, or grand fellows of the said society, for several centuries last past, have been in the constant habit of attending divine service in the said parish church, and of occupying and sitting in the said seven seats or pews marked or numbered 9, 10, 11, 12, 13, 14, and 15, and during the whole of the said period of time the doors of the said seats or pews were kept constantly locked, and the keys thereof remained in the possession of the butler, or some other person in office in or belonging to the said inn: That on the said principal and ancients, or grand fellows leaving the said pews, the said butler constantly locked the doors of the said pews, bringing the keys away with him, and that down to the 17th of *May*, 1818, the said principal and ancients, or grand fellows, or some or one of them, constantly sat in, and used, occupied, and enjoyed the said seats or pews marked numbers 9, 10, 11, 12, 13, 14, 15, without the least hinderance or molestation whatsoever from the rector, churchwardens, or parishioners of the said parish of *St. Andrew, Holborn*; and that down to such time the parishioners of the said parish did not incur any expense whatsoever of building, rebuilding, repairing, or beautifying the said seats or pews: That the said society have occasionally, voluntarily, contributed sums of money towards repairing *and beautifying the said parish church of *St. Andrew, Holborn*, and the steeple belonging thereto, and also paid the [¶4] sexton and others of the said parish from time to time for their respective care and trouble in and about the said seats and pews marked and numbered as aforesaid, and which said charges and expenses were duly entered in the books and accounts of the said society, at or about the respective times the same appear to bear date, in the words and figures following, to wit, &c. And the said libel and articles then further proceeded to object against the said plaintiff and *A. B.*, deceased, that in 1818, the rector, churchwardens, and parishioners of *St. Andrew, Holborn*, or some of them, removed the seats, that immediately the principal and ancients complained by letter, &c., but were not restored; and concluded by praying that the present plaintiff and *A. B.*, deceased, might be admonished to permit the said principal and ancients to have free access to their seats or sitting places in the aforesaid seven seats or pews, and that the said *Byerley* and *A. B.*, and their successors for the future, should refrain from disturbing the said principal and ancients in their quiet and peaceable sitting therein, and that they might be condemned in the costs of that suit, and that otherwise right and justice might be done and administered in the premises. The declaration then stated that the defendants below objected to the libel, but Sir *C. Robinson*, vicar general and official principal of the said consistorial court admitted it. And after the said court had so admitted the said libel, the present defendants tendered to the said court certain witnesses to be sworn and

examined on and concerning their said libel, and exhibit, and afterwards, to wit, on, *&c., at, &c., the said present plaintiff was required by the said spiritual court, at the instance of the present defendants, to give his perfect answer to the several positions or articles of the said libel so given in and admitted as aforesaid. Whereupon the said present plaintiff afterwards, to wit, on, &c., carried into the said spiritual court his personal answer to the several petitions and articles of the said libel, and was then and there duly sworn to the same. The personal answer was then set out, of which the material part was as follows : "That the said *N. Byerley* doth not know or believe that from time immemorial the pews and seats articulate were exclusively possessed, used, had, and enjoyed by the principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid, but he admits that for a great number of years last past, they have so possessed and enjoyed them, and some of the said pews and seats may have been for a great number of years used occasionally by the principal and ancients, or grand fellows of the said society, but others of them have, as he believes, been let by the said society, to persons not belonging to the same, for money ; but, whether or no the said pews and seats, or any of them, were possessed, or used, had, or enjoyed by the said society, with the privity, knowledge, and consent of the rector, churchwardens, and parishioners of the articulate parish of *St. Andrew, Holborn*, he knows not, and has no sufficient means of forming a belief or disbelief thereon. And his respondent doth not believe that the said pews and seats, or any of them were appurtenant to the said inn, the said inn claiming to be extra-parochial, and not having paid any rates for the reparation of the parish church." *Notwithstanding which said personal answers, and the illegality of the said former proceedings, and of the matters contained in the said libel, and although plaintiff afterwards, to wit, on, &c., delivered to the said defendants the writ of prohibition of our lord the King to the contrary thereof, yet the defendants have not ceased further to prosecute the said plea in the said spiritual court.

Please as to prosecuting contrary to the royal prohibition, general issue. But, in order to have a consultation in this behalf, defendants say that they have a possessory right to the use and enjoyment of the said pews and seats in the said libel and declaration mentioned, grounded upon a usage of divers, to wit, one hundred years, and that according to the usage of the said court christian, such possessory right is a sufficient foundation for the said court christian proceeding, to decree and give sentence that the said plaintiff should be admonished to permit the said principal and ancients and grand fellows of the said society of *Staple Inn* aforesaid, to have free access to their seats or sitting places in the said seven seats or pews in the said libel and in the said declaration mentioned ; and that the said plaintiff and his successors should for the future refrain from disturbing the said principal and ancients or grand fellows of the society of *Staple Inn* aforesaid, in their quiet and peaceable sitting therein ; and that according to the usage and course of proceeding in the said court christian for the purpose of the said court christian so decreeing or giving sentence upon such libel so exhibited in the said court christian in the said declaration mentioned, it is not necessary that the said defendants should allege or prove that from time immemorial the *said pews and seats in the said libel and in the said declaration mentioned, were appurtenant to the said inn of chancery, and were exclusively possessed, used, had, and enjoyed by the said principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid, by and with the privity, knowledge, and consent of the then rector, churchwardens, and parishioners of the said parish of *St. Andrew, Holborn* ; and that according to the said usage and course of proceeding of the said court christian, the denial in the said personal answer of the immemorial exclusive possession, use, and enjoyment of the said pews and seats by the said principal and ancients, or grand fellows of the society of *Staple Inn* aforesaid, does not put in issue the existence of such immemorial exclusive possession of the said pews and

seats as aforesaid, and does not form or constitute an issue whereon the said court would proceed to give sentence or judgment on such immemorial exclusive possession as aforesaid, and so the said defendants in fact say that no denial in the said personal answer in the said declaration mentioned, or in any plea in the said court christian hath hitherto been made of such immemorial exclusive possession as aforesaid, so as to put the same in issue, and that no issue on such immemorial possession as aforesaid hath been or is yet joined by the said personal answer, or in any plea in the said court christian; and this they, the said defendants, are ready to verify: wherefore they pray judgment, and his majesty's writ of consultation to be granted to them in this behalf, &c. Demurrer and joinder. The case was argued at the sittings after *Michaelmas* term by

**Mere whether* in support of the demurrer. Two points will be made in support of the plea in this case; first, that a possessory right is sufficient to entitle the present defendants to a decision of the ecclesiastical court in their favor; second, that there is no issue joined there upon the prescription, and that consequently a prohibition ought not to be granted. It must be remembered that this suit is between persons who are not parishioners, and the churchwardens of *St. Andrew's*; now, as against the latter, a possessory title is not sufficient, *Pettman v. Bridger*, 1 Phil. 316. If that be so, then possession can give no right, unless it be of so long continuance as to raise the presumption of a faculty, *Stocks v. Booth*, 1 T. R. 428. But in this case no faculty is alleged, the defendants rely on a prescriptive right to the pews as appurtenant to *Staple Inn*. They say that *Staple Inn* has existed from time immemorial, and that they have for all that time had the seats in question as appurtenant. Now a seat appurtenant to a house can only be claimed in a court of common law, *Hutton's case*, Latch. 116. Noy. 78. *Eaton v. Ayliffe*, Hetley, 94. A prescription for one hundred years, according to the plea, suffices in the ecclesiastical court, but that is contrary to the common law, and must therefore yield to it, 3 Bl. Comm. 112. Besides, the seats claimed in this case are in the body of the church, not in the aisle, and for such seats a man cannot prescribe, *Pym v. Gorwyn*, Moore, 878. Nor can a seat be granted to a man and his heirs, for then he would have it though he should cease to reside in the parish, **Brabin v. Trediman*, 2 Roll. Rep. 24. Poph. 140. S. C. The present claimants are not residents within the parish. This distinction between parishioners and non-parishioners is recognized in *Clifford v. Wicks*, 1 B. & A. 498, and *Mainwaring v. Giles*, 5 B. & A. 356. The body of the church is repaired by the parishioners, it is therefore against reason, as well as law, that strangers should come in to their exclusion. The second question is, Whether there is a sufficient denial of the prescription? If the pews cannot be claimed except by prescription, and the parties claiming are not in a situation to prescribe legally, this question does not arise. This court must inquire whether the ecclesiastical court is proceeding regularly; if the proceedings there are in any way contrary to the common law, a prohibition must go. Now they are proceeding below upon a claim by prescription if that cannot be good, the ecclesiastical court must be wrong. It may be admitted that when in a suit for tithes a *modus* is set up a prohibition will not immediately be granted, for *non-constat* that the *modus* will be denied. But there the ecclesiastical court have properly jurisdiction over the subject matter of the suit, and the *modus* comes in collaterally. *Hutton's case*, Latch. 116. Noy. 78; and *Eaton v. Ayliffe*, Hetley, 94, show this distinction between a claim of tithes and pews. In *Darby v. Cosens*, 1 T. R. 552, *Ashurst* and *Buller*, Justices, seem to think that even in a suit for tithes, the setting up a *modus* puts an end to the jurisdiction of the ecclesiastical court. It is not, however, necessary in this case to contend for that point. The ecclesiastical court may have jurisdiction to decide between parishioners, but not in this case. In *Jacob v. Dallow*, 2 Ld. Raym. 755 2 Salk. 551,

the defendant was a mere wrong-doer, against him therefore a possessory right was sufficient. Besides, on those pleadings the plaintiff, by demurring, admitted the traverse of the prescription, and the prescription itself as alleged was merely that which is so in the ecclesiastical court, viz. for a period of forty years; that court therefore might take cognizance of it. In the present case the defendants cannot get rid of this difficulty, they claim by prescription, and upon that the ecclesiastical court have no jurisdiction to proceed. There is no claim but by prescription, that therefore is the only thing for discussion. Now in *French v. Trask*, 10 East, 348, it was held that where there is nothing to try in the spiritual court but a prescription, a prohibition must be granted, although there has not been any formal denial. If the ecclesiastical court proceed on the possessory title, that is a ground varying from the claim in the libel, and is not a good ground of proceeding, because it cannot avail except as against parishioners.

Taunton, contra. There are two material questions in this case; first, whether the proceedings in the court below are ripe for a prohibition, i. e. whether upon the face of this record any ground for a prohibition is shown; second, whether the ecclesiastical court have jurisdiction over the subject matter of the libel. If the *question had arisen in a special action upon the *11] case for a disturbance, which could only be founded on a prescriptive title, and that had been set out in the declaration, and the claim stated to be in respect of a house, situate out of the parish, then, on motion in arrest of judgment, the argument against the plaintiff's right to recover might have prevailed. But that is very different from the present case. The declaration sets out the libel, and it must be admitted that the libel (incidentally and unnecessarily, and not as the foundation of the claim,) alleges, that from time immemorial the society of *Staple Inn* have held the pews in dispute. But the prayer of the libel is the important part; now, the plaintiffs below do not pray that the spiritual court will proceed on the prescription, or establish a supposed prescriptive title, but that the defendants below may be admonished to permit them to have free access to their pews, and that the defendants and their successors may be restrained from disturbing them in their quiet and peaceable sitting therein. The defendants below were churchwardens, the officers and servants of the ordinary, and the libel merely prays an admonition to them as such to abstain from the tortious acts complained of. Then the personal answer does not contain any direct denial of any thing in the libel, and admits that the society of *Staple Inn* have for many years had exclusive possession of the pews. Until some distinct issue is joined, upon a matter not triable in the spiritual court, this court will not interfere by prohibition. It is a question of fact whether the personal answer to the libel is so far in the nature of a plea as to constitute an issue. The defendants have here pleaded that the personal answer *does not constitute an issue, so that it cannot contain any *12] such denial of the immemorial exclusive possession as to put the same in issue. After libel, the plaintiff in the spiritual court may compel the defendant to answer on oath, which is analogous to the bill and answer in equity, but issues can only be joined by affirmative or negative issues, 2 *Oughton's Ordo Judiciorum*, tit. 61, 62. This court will not interfere on the personal answer alone, *Johnson v. Oldham*, 1 Ld. Raym. 609, *Dike v. Brown*, 2 Ld. Raym. 835, *Stone v. Harwood*, Cas. temp. Hardw. 357, *Boughton v. Hustler*, 3 Gwill. 951, *Dutens v. Robson*, 1 H. Bl. 100. The only authority on the other side is *French v. Trask*, 10 East, 348, but the ground of that decision was, that there was nothing but the *modus* to be tried; and there, too, it was taken for granted that the personal answer was equivalent to a plea. It is clear that the ecclesiastical court have exclusive jurisdiction over claims to seats in a church, with the exception of those by prescription or faculty. [*Bayley, J.*. That is wherever the claim to the pew is a temporal right.] *Watson's Clerg. Law*, c. 39, 3 Inst. 202, *Ayliffe's Parergon*, 484. *May v.*

Gilbert, 2 Bulstr. 150: which also proves that with respect to prohibitions, there is no difference between suits for tithes and other matters; and it appears that the pew was in that instance claimed by prescription. [*Bayley*, J. It does not appear that the party claiming was not a parishioner.] It does not, but *Cross v. Salter*, 3 T. R. 639, shows that the ecclesiastical court will admonish a wrong-doer not to disturb a person in possession of a pew, although "he has no well-founded title to the pew. *Pettman v. Bridger*, 1 Phill. [*13] 318, also shows that that court will proceed upon a mere possessory right; and the same may be collected from *Gray v. Rector of Hornsey*, 1 Hag. 194. In *Jacob v. Dallow*, 2 Ld. Raym. 756, *Holt*, C. J. says, "The defendant, if he pleases, may sue upon his prescription in the ecclesiastical court to have his possession quieted, which the ordinary ought to do upon the foundation of his usage to have sat there." And he afterwards says, "If the defendant had no extraordinary title, yet he had the possession, and being disturbed in it, the ordinary has conusance of the disturbance, and may settle and quiet the possession according to the usage, no temporal right being infringed." *Davis v. Witts*, Forrest, 14, shows that a seat in the aisle of a church may be prescribed for in respect of a house out of the parish. [*Bayley*, J. *Gibson's Codex*, 198, 362, lays down the same thing.] The reasoning on the other side would exclude from the aisle as well as the body of the church, for there is not in principle any distinction between them. *Buxton v. Bateman*, 1 Sid. 88, 201, *Ashly v. Freckleton*, 3 Lev. 73, and *Kenrick v. Taylor*, 1 Wils. 326, all distinctly show that a possessory title is sufficient against a wrong-doer. The possessory title in this case is expressly admitted by the personal answer, and no temporal right is put in issue in the court below. That court has jurisdiction to decide whether such possessory right can exist in persons not parishioners, it is all that they are called "upon to decide, and this court [*14] ought not to prohibit them from so doing.

Cur. adv. vult.

BAILEY, J. This was a case of prohibition. The plaintiff was surviving churchwarden of the parish of *St. Andrew, Holborn*, and the defendants the principal and ancients or grand fellows of *Staple Inn*. The suit to which the prohibition referred was in the consistorial and episcopal court of *London*, in respect of seven pews in the parish church of *St. Andrew, Holborn*, and was against *Byerley* the plaintiff, and *William Boyer*, since deceased. The libel below stated that the messuage, house, or inn of Chancery, called *Staple Inn*, is extra-parochial, and surrounded on all sides by the parish of *St. Andrew, Holborn*; that it is of very ancient standing, and inhabited by a society called the "Society of *Staple Inn*"; that the society has no sittings in any church but *St. Andrew's, Holborn*; that from time immemorial certain pews were appurtenant to the said inn, and were exclusively possessed by the principal and ancients; that about the year 1688, the then principal and ancients rebuilt them at their own expense, and from that time have repaired and beautified them; that the principal and ancients for several centuries had been in the constant habit of occupying them; that the doors were kept constantly locked, and the key remained in the possession of the officer of the inn; that formerly they used to go and return in procession in their gowns, headed by the porter with his staff, and the arms of the inn thereon, and that they used the pews without interruption till *May 1818*; that the parish never incurred any expense in building or repairing the said pews; that "the principal and ancients have occasionally voluntarily contributed towards repairing and beautifying the church and steeple, and paid the sexton and others for their care and trouble about the said pews; that in *May 1818*, the parish repaired the church, and removed these pews; that the principal and ancients immediately remonstrated, and put in their claims, and insisted on their right to rebuild their pews, and offered to pay for them if the parish built them; that the parish

built seven pews on the scite of the ground belonging to the principal and ancients, and the principal and ancients, thereupon gave notice that on the re-opening of the church they should demand the occupation of the pews, and that after having postponed the demand to prevent a disturbance on the day they had fixed, they made it on the 13th of *June* 1819, and were refused admittance by the then churchwardens ; that they renewed their demand on the 3d *November*, 1821, and were refused admittance by *John Boyer*, one of the then churchwardens ; that from *April* 1818, till *May* 1819, *Harwood* and *Buzzard* were churchwardens ; that from 13th *May* 1819, to 4th *May* 1820, *Buzzard* and *Boyer* were ; that from 4th *May* 1820, till 24th *May* 1821, *Boyer* and *Byerley* were, and that on the 24th *May* 1821, they were again sworn in for the year ensuing : and the prayer of the libel was, that *Byerley* and *Boyer* might be admonished to permit the principal and ancients to have free access to their pews ; that they and their successors might be restrained from disturbing them in their quiet and peaceable sitting therein, and that *Byerley* and *Boyer* might be condemned in costs. This libel and an exhibit thereto were admitted in the spiritual court. The principal and ancients tendered witnesses to be sworn and examined concerning the said libel and exhibit, and **Byerley* was required, at the instance of the principal and ancients, to give his personal answer to the several positions or articles of the libel, and he did so accordingly. The personal answer in that part which applies to the position, that from time immemorial the pews had been appurtenant to the inn, and exclusively possessed by the principal and ancients, states, that he does not know or believe that from time immemorial the pews were exclusively possessed by the principal and ancients, but he admits, that for many years they have been so possessed : and after other statements as to what he knows or believes as to the rebuilding in 1688, and other matters of later date, he concludes by saying, that further or otherwise he doth not admit, but denies the said position or article to be true.

The declaration in prohibition states, that the pews in question are in the body of the church, and this is not controverted by the defendants. The defendants in their plea, after the formal denial of the contempt^y state, that they have a possessory right, founded upon an usage of divers, to wit, one hundred years, and that such possessory right is a sufficient foundation for the court christian to admonish the plaintiff to permit the defendants to have free access to these seats, &c. ; and that according to the usage in the court christian, for the purpose of so decreeing upon such libel in the said declaration mentioned, it is not necessary defendants should allege or prove that the pews were appurtenant to the inn, and exclusively possessed by and with the privity and consent of the rector, churchwardens, and parishioners of the parish ; that the denial in the personal answer of the immemorial exclusive possession does not, according to the course of proceeding in the court christian, put in issue the **17] immemorial exclusive possession* ; that no denial in the said personal answer, or in any plea in the court christian, has been made of such immemorial possession, so as to put the same in issue, and that no issue on such immemorial possession has been joined in or by the said personal answer, or in any plea in the court christian. To this plea the plaintiff has demurred, and the defendants have joined in demurrer.

Upon this statement of the pleadings, it appears that the suit below was in respect of seven seats, not in an aisle or in the chancel, but in the body of the church, not by parishioners, but by non-parishioners, persons residing out of the parish, but in an extra-parochial place ; that it was a suit not for a faculty *ex gratia*, but for an admonition to the churchwarden, as churchwarden, *de jure* ; that it is founded, not upon any act of disturbance by *Byerley*, against whom the suit is continued, but upon acts of disturbance partly by his predecessors, and partly by his colleague, and that the *de jure* right the plaintiff below have set out in their libel is, that from time immemorial the pews have

been appurtenant to their inn, and exclusively enjoyed by it, and that the inn has rebuilt, repaired, and beautified them. It was admitted upon the argument on the part of the inn, that the claim below was a claim by prescription, but it was insisted that prescription was not the foundation of the suit, that a possessory right without prescription was sufficient to entitle the inn to a sentence below, and if not, that the state of the proceedings below did not *at present* warrant the prohibition. The first question, therefore, I shall consider is, whether a possessory right could *in this case* have existed without a prescription; for if not, the argument *that a possessory right without prescription would have entitled the inn to a sentence below, fails. The claim [^{*18} in question is by non-parishioners in respect of a messuage or messuages out of the parish. It is true the claimants live in the messuages in respect of which they claim; that those messuages are in no parish, but are extra-parochial, and surrounded on all sides by the parish of *St. Andrew*; but what right can the inhabitant of an extra-parochial place have in the body of a parish church except by prescription? He contributes to none of the expenses of the church; they are borne exclusively by the parish. He contributes nothing to the maintenance of the minister or other officers; they are supported exclusively by the parish. And to whom does the use and enjoyment of the body of the church belong? To the parish and its inhabitants. The ordinary, indeed, has the right of disposing of the seats; but can he dispose of them to a non-parishioner? I apprehend not. Is not his right confined solely to resident parishioners? I take it to be clear that it is. Why is a faculty for a pew to a man and his heirs bad? Because it professes to give the right whether the man and his heirs continue resident or not. *Gibs. 221.* 1 *Hagg.*, 321. 2 *Addams*, 427. Why cannot a seat be claimed either by faculty or prescription as appurtenant to land? Because it is in respect of *inhabitancy* that it is to be used. *Gibs. 222.* Co. Litt. 121, b. Why, if a man quits the parish, is his right to use a seat, whatever was the nature and origin of that right, at an end? Because he has ceased to be a parishioner. 2 *Addams*, 427. Why, if a seat is appurtenant to a house, cannot the owner of the fee restrain his tenant from the use of it? Because the "seat is for the benefit of the [^{*19} house, for the inhabitant of the house, not for the benefit of the owner if he cease to inhabit it. 1 *Hagg.* 319. *Gibson* in his *Codex*, tit. 9, c. 4, under the head of *Rules of Common Law concerning the repairing and ordering of Seats*, says, "Of common right, the soil and freehold of the church is the parson's, the use of the body of the church and the repair of it common to the parishioners, and the disposing of the seats therein the right of the ordinary. And generally where the parishioners repair, the ordinary shall dispose. These heads are every where laid down in the cases on this subject, and have never been disputed." In the case which was cited of *Pettman v. Bridger*, Phill. 323, Sir John Nicholl states the rule to the same effect, but he restrains the right of the ordinary to a distribution *among parishioners*. "By the general law, and of common right," he says, "all pews belong to the parishioners at large for their use and accommodation, but the distribution of seats among them rests with the ordinary. The churchwardens are the officers of the ordinary; they are to place the parishioners according to their rank and station, but they are subject, upon complaint, to the control of the ordinary." In *Fuller v. Lane*, 2 *Addams*, 425, in a very able and elaborate judgment, Sir John Nicholl lays down the same doctrine. "By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are all entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all;" and after laying down this as the general rule, he states, among *other positions, "that no faculty is deemed, either in the spiritual court or at common law, good, to the extent of entitling any [^{*20} person who is a non-parishioner to a seat even in the body of the church."

Again, " whenever the occupier of a pew in the body of the church, *ceases to be a parishioner*, his right to the pew, however founded, and how valid soever during his continuance in the parish, at once ceases and determines." Again : " Of pews annexed by prescription to certain messuages, it is often erroneously conceived that the right to the pew may be severed from the occupancy of the house : it is no such thing ; it cannot be severed, it passes with the messuage, the tenant of which, for the time being, has also *de jure*, for the time being, the prescriptive right to the pew." Lord *Stowell* lays down this last position in 1 *Hagg.* 319—321 ; and in 1 *Hagg.*, 194—314, Lord *Stowell* states that *every housekeeper* has a right to call upon the parish for a convenient seat ; that if an inhabitant wants a pew, the churchwardens ought not to permit an occupancy by a non-inhabitant. They ought not in such a case to let to a non-inhabitant, nor permit prescriptive pews to be so let." A distinction being thus established between parishioners and non-parishioners, can a distinction be also made among non-parishioners, between those who belong to another parish and those who do not ? Upon what principle can such a distinction stand ? The extra-parochials infringe equally upon the rights of the parishioners with those who belong to another parish. They are equally non-contributory to the expenses of the church. It is the fault of those under whom they claim that they have no parish. They have the advantage of being [21] extra-parochial ; they must take the *disadvantages also. Upon authority, therefore, and upon principle, I am of opinion that extra-parochials cannot claim a pew in the body of a church otherwise than by prescription, if they could do so by prescription ; and, consequently, that there could have been no possessory right in this case without prescription.

It was urged, however, upon the argument that such possession as the principal and ancients had exercised was sufficient to sustain a suit by them against a wrong-doer, and that *Byerly*, the plaintiff, was in this case to be deemed a wrong-doer ; but a sufficient answer to that argument is, that *Byerley* personally is not charged to have given to the inn any interruption, and that it was the duty of the churchwardens, as officers of the ordinary, to secure the rights of the parishioners from the encroachment of strangers. And this brings me to the second question, whether the proceedings are in such a state in the court below as to warrant a prohibition *at present*. Where the spiritual court has jurisdiction over the subject matter, it will have jurisdiction equally, whether the claim is founded upon prescription or upon any other right ; it is only when the spiritual court is proceeding *towards the trial of the prescription* that a claim by prescription furnishes ground for a prohibition. If the prescription is admitted, the spiritual court may go on with the cause ; and this was the foundation of the consultation in *Jacob v. Dallow*, 2 *Salk.* 551. 2 *Ld. Raym.* 755. But when once it appears by the proceedings in the spiritual court, that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the courts of common [22] law are not bound to wait till the parties have incurred *the expense of putting it in issue, but the prohibition is grantable *at once* ; and it was upon this principle that the prohibitions were granted in *Darby v. Cosens*, 1 *T. R.* 552, and in *French v. Trask*, 10 *East*, 348. Each of those was a suit for tithes ; in each a *modus* was pleaded ; and a prohibition was granted in each without any issue below upon the existence of the *modus*. In the latter case it was urged that the application for the prohibition was too early, because there was no issue upon the *modus* ; but Lord *Ellenborough* answered, " there was nothing the spiritual court could do, but try the *modus*." The cause was necessarily in progress towards such trial ; there was no alternative. If the *modus* existed, it necessarily destroyed the right to the tithes the suit claimed. And it appears sufficiently upon the pleadings in this cause that the suit below is in progress towards the trial of the prescription. Why otherwise did the principal and ancients tender witnesses to be sworn and examined concerning

the libel? Why was *Byerley* required, at their instance, to give his personal answer to the several positions or articles of the libel? If the prescription was admitted, why should witnesses be tendered to be sworn and examined *generally to the whole of the libel?* Why should *Byerley* be required to state his personal answer *generally to all* the positions and articles; If the prescription were admitted, there could be no occasion for a *general examination, or a general answer* to the whole of the libel; the examination and answer would have been limited to such parts as were not admitted. It is true the plea in this case states that, according to the usage in the court christian, it was not necessary, in support of his libel, to have alleged or proved such a *prescription as that plea states; that the denial in *Byerley's* personal [23] answer did not put in issue the immemorial exclusive possession; that no denial in the personal answer, or in any plea, has been made of the immemorial possession, so as to put the same in issue; and that no issue on such immemorial possession has been joined in or by the personal answer, or in or by any plea in the court christian. And all this is true, but it is not the whole truth. And if the plea were framed by any one acquainted with the course of proceeding in the spiritual court, it was artfully framed to impose upon the ignorance of those to whom such course of proceeding was not known. According to the usage and course of proceeding in the court christian, neither the personal answer nor plea ever put in issue any of the facts in a libel. They are put in issue or admitted by a previous step, a negative or an affirmative issue; a negative issue denying what the libel states, an affirmative issue admitting it. A personal answer is one of the consequents upon a negative issue, and is required, at the instance of the plaintiff below, to supply him with proof of what is previously in question by the negative issue. A plea is a statement of new matter. The defendants, therefore, in this case might safely state in their plea that the immemorial usage was not put in issue by the personal answer, or by any plea. But they could not truly have stated that it was not in issue, for it must have been put in issue by a previous negative issue. So their other statement, that according to the course of proceeding in the court christian, they were not bound upon the libel in question to have proved the prescription their plea states, is an equally safe statement, and if it were made with knowledge of *the law, an equally candid one; for it [24] makes parcel of the prescription what is legally no part, viz. the privity, knowledge, and consent of the parish to the exclusive use of the pews. If the pews were from time immemorial appurtenant to the inn, and the principal and ancients had from time immemorial the exclusive use and enjoyment, their right would be the same whether the parish knew of the exclusive use and enjoyment, and consented to it or not. It is, therefore, perfectly true, that according to the course of proceeding in the court christian, the principal and ancients would not have been bound to prove the prescription, *with that privity and consent as parcel*, because they would not have been bound to prove it by the course of proceeding in any court whatever. These are the answers to which the defendant's arguments and pleadings are open; and, upon the grounds we have stated, we are of opinion that there ought to be judgment for the plaintiff.

Judgment for the plaintiff.^t

LITTLEDALE, J., was absent on the winter circuit during the argument of this case.

^t In Easter term, the same question came on for argument in *Baker v. Baines*; the pleadings being precisely the same, except that the latter cause related to the society of *Barnard's Inn*.

W. E. Tawson, prayed to be heard against the demurrer, inasmuch as the former case had not been decided by the whole court; and in the judgment delivered in that case, it was assumed that the immemorial possession of the pews had been put in issue in the spiritual court, although not by any plea or by the personal answers, which assumption, he said, was unfounded; but

ABBOTT, C. J., said, that the two Judges who were not present at the decision of the former case, had read the arguments and judgment which were then delivered, and perfectly coincided with the opinion then expressed by the court, and that even if the assumption as to the course of proceeding in the court below were erroneous, it was perfectly immaterial, and could not have the effect of altering the judgment.

By a turnpike act, certain tolls were imposed upon carriages drawn by horses, another toll upon horses not drawing, and other tolls upon oxen, &c. There was a proviso that all persons having once paid the toll for their carriages, horses, and cattle, returning the same day with the same carriages, horses, and cattle, should pass toll free. By a subsequent act, reciting that it was expedient to increase the tolls, the provisions in the former act, except with certain alterations, were re-enacted. One of the alterations was that the former tolls should cease, and that instead thereof there should be paid for every horse or beast of draught drawing a carriage, sixpence. After the passing of the latter act, four horses drawing a stage coach passed through one of the toll gates in the morning, and the same four horses, drawing a different stage coach, belonging to the same proprietor, repassed through the same gate in the evening: Held, that no second toll was payable.

ASSUMPSIT. The declaration contained the usual money counts. Plea, general issue. At the trial before *Best*, J., at the Huntingdonshire Summer assizes, 1822, a verdict was found for the plaintiff with 7*l.* 16*s.* 9*d.* damages, and liberty was reserved to the defendant to move to enter a nonsuit. The defendant having moved accordingly, this court directed the following case to be stated:

The plaintiffs were the proprietors of the Rockingham public stage coach, travelling from *London* to *Leeds*, and from *Leeds* to *London*. The defendant was clerk to the trustees appointed under a local turnpike act, passed in 38 Geo. 3, entitled "An act for repairing the roads from the stone pillar upon Alconbury Hill to Wanford Bridge, and from Norman Cross to the south end of Peterborough Bridge, all in the county of Huntingdon." By this act a toll of 1*s.* 6*d.* was imposed upon every coach, berline, &c., drawn by more than two horses passing through certain toll gates continued or to be erected on the roads mentioned in the act, and certain other tolls were imposed upon horses not drawing, and upon cattle; and by the same act it was also provided that all and every person or persons having once paid the tolls so made payable as

*26] aforesaid for his and their carriage, horses, and cattle, "having occasion to return, and actually returning before twelve o'clock at night next after having paid such toll, with the same carriage, horses, and cattle, should have liberty to pass toll free through such gates as he had before paid toll at, and should not be obliged to pay toll a second time on one day." By an act of the 59 G. 3. the said therein recited act of the 38 G. 3, and all and every the clauses, powers, provisions, matters, and things therein contained, (except such parts thereof as were thereby varied, altered, or repealed) were continued in full force and effect to all intents and purposes as if the same were repeated and re-enacted in the body of that act, but subject nevertheless to the alterations and amendments thereby made. By the 59 G. 3, all the tolls imposed by the 38 G. 3 were repealed, and instead thereof, as to the tolls on carriages, a toll of 6*s.* for every horse drawing a coach, berline, &c., was imposed, and it was further enacted, that no person or persons should be liable to the payment of toll at more than two bars on the said roads, on passing between Alconbury Hill and Wanford Bridge in any one day from the 1st of January, 1821, to the 7th of February, 1822.

The *Rockingham* coach going from *London* to *Leeds*, having changed horses at *Stilton*, passed through the *Wansford* toll gate at eight o'clock at night, when a toll of 2*s.* (i. e. of 6*d.* for each horse) was paid by the coachman. The same horses for which the toll had been so paid returned with the *Rockingham* coach going from *Leeds* to *London*, being a different coach, with different passengers, and passed through the said gate at eleven o'clock, and got back to *Stilton* before twelve o'clock the same night. Upon reaching *Wansford Gate* the second time, a second toll of 2*s.* was demanded * by the collector appointed by the trustees, because, although the coachman and horses were the same, the coach and passengers were different. The gate being closed, and the coach prevented from proceeding, the coachman (protesting against the collector's right to exact it,) paid such second toll for the above mentioned period of time. In the like manner the *Rockingham* coach going from *Leeds* to *London*, changed horses at *Stilton*, and passed through the *Sawtry* toll gate at one o'clock in the morning, when a toll of 2*s.* was paid. The same horses returned with the coach going from *London* to *Leeds*, being a different coach with different passengers, at six o'clock in the same morning, when a second toll was demanded, and paid under a similar protest for the same period of time. The toll gates at *Wansford* and *Sawtry* are both situated on the line of road between *Alconbury Hill* and *Wansford Bridge*, and there are no other gates within the same distance.

The case was argued, at the sittings after *Easter* term, 1825, by *Dover* for the plaintiffs, and *Storks* for the defendant. The argument and the authorities cited are so fully commented on by the court, in their judgment, that it is unnecessary to state them here.

Cur. adv. vult.

BAYLEY, J. This was an action brought by the plaintiff to recover back tolls paid by him, between *January*, 1821, and *February*, 1822, for a coach called the *Rockingham*, which runs from *London* to *Leeds*, passing through two toll bars on the *North* road at *Sawtry* and *Wansford*, and the question was, whether two tolls were payable at each on the same day, or only one. The "same horses passed each time through the respective gates, but with different coaches. Each coach belonged to the plaintiff. The plaintiff insisted that he was entitled to exemption the second time of passing, if the horses were the same, though the coaches were different. The case depends upon two acts of parliament, the 38 *Geo. 3.* and the 59 *Geo. 3.* The 38 *Geo. 3.* imposes tolls, first, upon coaches, chaises, &c., if drawn with more than two horses 1*s. 6d.*, with two 9*d.*, or with only one 4*1d.*; second, wagons, &c., according to the breadth of the wheels, and the number of horses, mules, or oxen by which they are drawn; third, upon horses, mules, or asses, not drawing; fourth and fifth, upon oxen, neat cattle, calves, hogs, sheep, or lambs, at the rate of so much per score. There is an exemption, providing that all persons having once paid the toll for their carriages, horses, and cattle, having occasion to return, and actually returning before twelve at night with the same carriages, horses, and cattle, shall pass toll free. The 59 *Geo. 3.* recites that the money borrowed cannot be repaid, nor the roads kept in order, unless the term of 38 *G. 3.* is further continued, *the existing tolls increased*, and some of the provisions altered and enlarged; and it continues the provisions in the former act (except such parts as it alters) in as full, ample, and beneficial a manner, as if they were re-enacted. One of the alterations is, that the former tolls shall cease, and that instead thereof there shall be paid for every horse or beast of draught drawing a coach, &c., 6*d.*, drawing a wagon, &c., 3*d.*, horse, mule, or ass not drawing, 1*1d.*, score of oxen, &c., double the former rates, carriage fixed behind another, if four wheeled, 1*s.*, if two wheeled, 6*d.* This act contains a new exemption clause, *but nothing applicable to the present case. The question, therefore, is, whether the exemption clause in 38 [28]

G. 3, applying the language of that clause to the tolls payable under the 59 G. 3, extends to the case in question, that of the same horses drawing a different coach. According to the mode in which the toll was imposed by the 38 G. 3, upon the carriage, not upon the horses drawing it, the new coach in this case (in conformity with the opinion of the court in *Williams v. Sangar*, 10 East. 66, and *Waterhouse v. Keen*, 4 B. & C. 200, would be liable. According to the mode in which the toll is imposed by the 59 G. 3, upon the horses, not upon the carriage, the new coach in this case (in conformity with *Norris v. Poate*, 3 Bing. 41, would not be liable, but would be exempt. The point for consideration, therefore is, whether the existence of the liability, according to the mode in which the toll is imposed in the 38 G. 3, will extend that liability to the mode in which the toll is imposed by the 59 G. 3. Had the toll been imposed by the 38 G. 3, in the mode in which it is imposed by the 59 G. 3, the exemption in question would certainly have existed. When the 59 G. 3, varies the mode of imposing the toll, has it not the same effect as if the substituted mode introduced into the 59 G. 3, had been inserted in the 38 G. 3.? and that mode would have extended the exemption to the second toll. The variation in the mode is inserted in the 59 G. 3, either at the instance of the framer of the bill, or by the discretion of the legislature; but if it were introduced by the former, the legislature has acceded to it; if it were insisted on by *30] the legislature, the legislature has required it; but in either case *there is a sanctioned variation in the mode. And if the mode is authoritatively varied, who can say that the consequences of that variation are not to follow? It may be a hardship upon those to whom the 38 G. 3, gave an exemption, that that exemption was not continued by the 59 G. 3. But they should have attended to the continuance of that exemption; they would be aware, if they paid proper attention to the subject, that the 38 G. 3, was about expiring, and that some new provision must be forthcoming, and they should have used their endeavors to continue in the new act the same mode of imposing the tolls as exempted them under the old act. They either neglected to do so, or their endeavors were unsuccessful, but the result is, in either case, the same. The previous mode is not continued. A new mode is substituted, and does not the substitution of the new mode supersede, with all its consequences, the old? *Gray v. Shilling*, 1 Brod. & B. 30, is an authority in point that it does, and without any authority upon the point, a variation in the mode implies a change in the intention. Had it been intended to continue the old system, the use of the old language, and the continuance of the old mode, would naturally have been expected. Where new language is introduced, and a new mode adopted, it must be supposed a new system was intended. We are, therefore, of opinion that we must construe the exemption clause in the 38 G. 3, with reference to the new mode of imposing the toll, provided for by the 59 G. 3, as if that had been originally the mode prescribed by the 38 G. 3, and, consequently, that *31] the defendant wrongfully took the toll in question. And *this opinion will produce an uniformity of decision, according to the language of each act, whether it implies to an act where there has previously been no turnpike, or to one where a turnpike with its tolls and toll regulations have previously existed.

Postea to the plaintiff.

JACKSON v. CURWEN.

By a turnpike act, a certain toll was imposed upon every horse or other beast drawing any carriage, &c., a certain other toll upon every horse not drawing, and other tolls upon every drove of oxen, &c. There was a proviso that no collector should take more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle passing once and repassing once in the same day through the same or any of the gates on the said roads, such person producing a ticket denoting that such toll had been paid on that day for or in respect of such horse, beast, or other cattle: Held, that a second toll was not payable in respect of the same horses passing once and repassing once in the same day, but drawing a different carriage belonging to the same proprietor.

DECLARATION stated that a certain toll gate, situate in the county of *Cumberland*, standing upon and across a certain public highway in the county aforesaid, was a gate erected by virtue of a certain act of Parliament passed in the 40th year of his late majesty King *George the Third*, intituled "An act for more effectually improving the roads leading to and from the port, harbor, and town of *Whitehaven*, in the county of *Cumberland*;" and that the plaintiff, after the making and passing of the act, to wit, on the 11th of *April*, 1825, in the county aforesaid, was lawfully possessed of four horses, which then and there drew a certain coach of the plaintiff in and along the said highway, and through the said toll-gate, and for the said horses so passing through the said toll-gate as aforesaid, the plaintiff then and there paid to the defendant, being the toll-gate keeper appointed to collect the tolls at the said gate, the toll by him demanded and due in that behalf, by force of the statute aforesaid, and then and there obtained and received from the defendant, so being such toll-gate keeper, a proper and sufficient ticket, denoting the due payment of [¶32] such toll; and that afterwards, and before twelve o'clock at night of the same day, in the year last aforesaid, in the county aforesaid, the same horses were lawfully drawing another and different coach of the plaintiff in and along the said highway, and near to the said toll-gate, for the purpose of passing through the same free of toll; and for that purpose the plaintiff then and there presented and showed to the defendant the said ticket, and demanded permission of the defendant, as such toll-gate keeper as aforesaid, to pass through the said gate with the said horses and the said last-mentioned coach free from toll, according to the form and effect of the statute aforesaid, yet the defendant, well knowing the premises, but wrongfully and maliciously contriving and intending to injure and aggrieve the plaintiff in that respect, did not, nor would suffer or permit the said horses with the said last-mentioned coach so to pass through the said toll-gate free from toll, but wholly refused so to do; and, on the contrary thereof, wrongfully and falsely pretended that a toll of a certain sum of money, that is to say, a toll of 2s., was due and payable to the defendant under and by virtue of the statute aforesaid, and injuriously fastened the said gate, and kept the same fastened for a long space of time, to wit, for the space of one hour, and thereby wrongfully stopped and detained the said horses and the said last-mentioned coach, and hindered and prevented the same from passing through the said gate, along the said highway, until the plaintiff paid to the defendant the said sum of money so pretended to be due and payable as aforesaid, contrary to the form and effect of the statute aforesaid. There was also a count in [¶33] trover. Demurrer and joinder.^t

^t By sect. 17. of the act the following tolls were imposed:

"For every horse or other beast of draught drawing any coach, sociable, &c., the sum of sixpence :

"For every horse, mare, gelding, mule, or ass, laden or unladen, and not drawing, the sum of two-pence :

"For every drove of oxen, cows, or neat cattle, the sum of one shilling and sixpence per score, and so in proportion for any greater or less number : and

This case was argued by *F. Pollock*, for the plaintiff, and *Patteson*, for the defendant.

BAYLEY, J. It is an established rule that where the toll is imposed upon carriages drawn by horses, and there is a clause of exemption for all persons re-passing on the same day with the same horses and carriage, or with the same horses or carriage, and the same carriage returns the same day drawn by different horses, no second toll is payable, *Williams v. Sangar*, 10 East, 66, *³⁴ *Waterhouse v. Keen*, 4 B. & C. 200. And where the toll is imposed upon the horses drawing the carriage, with a similar clause of exemption, no second toll is payable if the same horses return with a different carriage, *Gray v. Shilling*, 2 Brod. & B. 30. In this case a toll of 6d. is imposed upon horses drawing, and upon horses not drawing 2d., and therefore, according to the above rule, in an ordinary case no second toll would be payable in respect of the same horses returning with a different carriage. Unless, therefore, it appears clearly from the exempting clause in this act of Parliament to have been the intention of the legislature that it should apply to those cases only where the same horses returned drawing the same carriage, the general rule of construction applicable to these acts of Parliament ought to prevail, and then a second toll would not be payable. The word *carriage* is introduced as a subject of toll for the first time in the exempting clause. It enacts, that the collector shall not take more than one toll for the same carriage, horses, beast, or other cattle passing once, and re-passing once in the same day. From that part of the clause, taken by itself, it would appear to have been the intention of the legislature that it should apply to cases only where the same horses re-passed drawing the same carriage. The carriage, therefore, is contemplated as a subject matter of toll. But then the clause goes on to annex as a condition precedent to any exemption, that the party claiming it shall produce a ticket denoting that such toll has been paid on that day for or in respect of such horse, beast, or other cattle. The ticket, therefore, which is to be produced *³⁵ to the collector in order to exempt a party from the payment of a second toll, is to denote only that the toll has been paid in respect of the horse, and not in respect of the carriage. But still if the former part of the clause be construed literally, the production of such ticket will not entitle a party to exemption from the toll unless he re-passes with the same horses drawing the same carriage. From the latter part of the clause it appears that the legislature contemplated a toll upon horses only. From the former part, that they contemplated a toll in respect of the carriage. Taking the whole of the clause together, it seems very doubtful whether it was intended to be confined to cases only where the same persons returned with the same horses drawing the same carriage. There is another clause which shows that the objects of the toll were the horses, beasts, and cattle, and not the carriage. By section 28, the trustees are enabled to compound with any person for any horses, beasts, or cattle passing on the roads, for any of the tolls to be paid in respect of the same. Considering, therefore, that the toll was originally imposed upon the horses drawing, and not upon the carriage, and that it does not

"For every drove of calves, swine, sheep, or lambs, the sum of tenpence per score, and so in proportion for any greater or less number."

Sect. 21. enacted, "That nothing therein contained should be construed to enable any collector of the said tolls to demand or take any more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle, passing once and re-passing once in the same day (such day to be computed from twelve o'clock at night to twelve o'clock in the succeeding night,) through the same or any other gate or gates on any of the said roads, all and every such person and persons producing a ticket denoting that such toll has been paid on that day for or in respect of such horse, beast, or other cattle on the said roads."

Sect. 28. enacted, "That it shall be lawful to the trustees from time to time to compound with any person or persons for any period of time, not exceeding one year, for any horses, beasts, or cattle passing on the said roads, or any part or parts thereof, for all or any of the tolls to be paid in respect of such horses, beasts, or other cattle."

appear clearly that the legislature meant to confine the operation of the exempting clause to cases only where the same horses returned with the same carriage, we think that the general rule of construction applicable to these acts of Parliament ought to prevail, and, consequently, that no second toll was payable for said in respect of the same horses returning the same day with a *different* carriage, the property of the same person. But as it does not sufficiently appear upon the face of this declaration that *the plaintiff passed and re-passed only once, we think the defendant is entitled to judgment. Under [*36 the circumstances, however, the plaintiff may be allowed to amend upon payment of costs.

The following case upon the same subject was argued at the Sittings in Banc, after this term, by *Cross, Serjt.*, for the plaintiff, and *Coltingham*, for the defendant.

CHAMBERS et al., v. WILLIAMS.

Assumpsit for money had and received. The plaintiffs were the proprietors of two stage coaches, one of which travelled daily between *Birmingham* and *Liverpool*, and the other travelled daily between *Liverpool* and *Birmingham*. The defendant was clerk to the trustees under a turnpike road act. By that act the trustees were authorized to take at the toll gates or toll bars erected by virtue of that act, on every day, the following tolls: "For every horse, mule, or other beast, drawing any coach, sociable, berline, &c., or other such like carriage, the sum of sixpence; for every horse, mule, or other beast, drawing any wagon, wain, cart, dray, or other such like carriage, the sum of sixpence; for every *four wheeled carriage* fixed to any wagon, wain, dray, cart, or other carriage, the sum of nine-pence; for every *two wheeled carriage* so fixed, the sum of sixpence; for every horse or mule drawing any other carriage, of whatever name or description, the sum of sixpence; for every ox, steer, gale, or bull, drawing any carriage, of whatever name or description, the sum of four-pence; for every ass drawing any carriage, of whatever name or description, the sum of two-pence; for every horse, mule, or ass, laden or unladen, and not drawing, the sum of one-penny; for every drove of oxen, cows, or neat cattle, the sum of ten-pence per score, and so in proportion for any greater or less number; and for every drove of calves, hogs, sheep, or lambs, the sum of five-pence per score, and so in proportion for any greater or less number." And the said respective tolls were subject to the restrictions in that act contained, to be demanded and taken before any horse, mule, or other beast, coach, wagon, cart, or other carriage whatsoever, or drove of oxen or neat cattle, calves, sheep, lambs, or swine, should be permitted to pass through any toll gate, erected or to be erected, or continued upon the said road by virtue of that act; and upon payment of any of the said tolls, the collector or receiver was thereby required to deliver gratis to the person paying such toll a note or ticket denoting such payment, on which note or ticket should be named and specified the several toll gates freed by such payment. Sect. 28. enacted, that all and every person and persons having paid *the said tolls, on producing a ticket from the collector denoting [*37 such payment, should be permitted to pass and repass once in the same day, through the toll gates or toll bars mentioned in such note or ticket, with the same horses, mules, or other beasts, coach, wagon, cart, or other carriage, or drove of oxen or neat cattle, calves, sheep, lambs, or swine, without being subject or liable to any additional toll for so doing; and no person should be permitted to pass a subsequent time in any one day with the same cattle through any of the toll gates or toll bars aforesaid until he should pay, for every such subsequent time of passing through such toll gates or toll bars the same day, the tolls by that act authorised to be taken. Four of the plaintiff's horses drawing one of the said stage coaches on its way from *Birmingham* to *Liverpool*, conveying passengers and parcels for hire, driven by the plaintiff's coachman, passed about three o'clock in the afternoon of each and every day through one of the gates erected by virtue of the act, and about nine o'clock in the evening of *each and every of the same*; the same four horses, driven by the same coachman, repassed through the same gate, every evening at nine o'clock, drawing the other of the aforesaid stage coaches in its way from *Liverpool* to *Birmingham*, conveying other passengers and parcels for hire. The collector at the said gate demanded a further or second toll duty of sixpence for each of the said four horses upon their repassing through such gate, which demand the plaintiff have resisted, but been compelled to pay, and have accordingly paid the money so demanded by the collector at the said gate, amounting to £3*l. 16s.*, after protesting against the same.

Per Curiam. In this case the tolls are imposed upon the horses drawing carriages, except where a carriage is fixed to a wagon, and different tolls are imposed upon horses drawing different descriptions of carriages, and there is one general clause of exemption applicable to all the cases contained in the enacting clause. In this clause of exemption there is a great want of precision, but inasmuch as the toll claimed in this case must, if due at all, be in respect of the horses drawing, according to the general rule of construc-

tion applicable to these acts of Parliament, no second toll would be payable in respect of the same horses returning with a different carriage. If the framers of this act meant to exact a second toll in such a case, it was their duty to express that intention in plain and unambiguous language. By the clause of exemption, it seems that the legislature contemplated a toll upon carriages and not upon animals, but in fact the toll imposed, except in two instances, was a toll upon animals, and the exemption clause must be construed together with the enacting clause. Taking the two clauses together, and adverting to the rule of construction which has been applied to similar acts of Parliament, where the toll has been imposed on the animal drawing the carriage, and where there is a general clause of exemption applicable both to the horse and carriage, we think it very doubtful whether [38] the legislature meant to impose a second toll where the "same horse returns the same day with a different carriage, and that being so, we ought to incline to that construction which will have the effect of relieving the subject from a burden. *Leaving v. Stone*, 2 B. & C. 515, is distinguishable, because the word "carriage" must have been wholly rejected in the clause unless a second toll was due. But in this case, a toll is in two instances imposed on the carriage, and therefore the word "carriage" in the exempting clause may have effect as applicable to those instances where the toll is imposed on the carriage.

Judgment for the plaintiffs.

PEARCE v. WHALE.

In *assumpsit* for work and labor as an attorney, it was proved that the plaintiff had been retained in the year 1824, to conduct a suit for the defendant in the Court of Common Pleas, and that the bill of costs was incurred in that suit. It appeared that the plaintiff had not taken out any certificate during the year 1814, and four subsequent years. It was proved that he had been admitted an attorney of the Court of King's Bench in 1793, and had not since that time been re-admitted an attorney of that court, but there was no proof that he had not been re-admitted in the Court of C. P.: Held, that the plaintiff's having acted as an attorney of the Court of C. P. in 1824, was *prima facie* evidence that he was at that time an attorney of that court, and that it then lay upon the defendant to show that at the time when the bill of costs was incurred the plaintiff was not an attorney of the Court of C. P., by showing that he had not been re-admitted in that court.

Assumpsit for work and labor as an attorney. Plea, *non-assumpsit*. At the trial before *Graham*, B., at the Spring assizes for the county of *Essex*, 1825, it appeared that in the year 1824, the plaintiff had been retained by the defendant to conduct a suit for him in the Court of Common Pleas, and that the amount of the bill of costs in the course of the suit was 28*l*. It was proved on the part of the defendant, that the plaintiff had not taken out any certificate during the years 1814 and 1815, 1818, 1819, 1820. He was admitted an attorney of the Court of King's Bench in 1792, and had not been re-admitted an attorney of that court. But it was not proved that he had not been re-admitted an attorney of the Court of Common Pleas. It was contended on the part of the defendant, that the plaintiff having omitted to take out his [39] certificate for more than one year, his original admission had become null and void by the 37 G. 2. c. 90. s. 31.^t That it lay upon him to show that he had been re-admitted in the Court of Common Pleas. On the other hand it was contended, by the plaintiff that as he had given *prima facie* evidence that he was an attorney of the Court of Common Pleas at the time

^t By that clause it is enacted, "that every person admitted, sworn, enrolled, or registered in any of the courts, who shall neglect to obtain his certificate for the space of one whole year, shall from thenceforth be incapable of practising in any of the courts by virtue of such admission, and the admission, &c. of such person in any of the said courts, shall be from thenceforth null and void; provided always, that nothing hereinbefore contained, shall be construed to prevent any of the said courts from re-admitting any such person on payment to the said commissioners of the duty accrued, since the expiration of the last certificate obtained by such person, and such further sum of money, by way of penalty, as the said court shall think fit to order and direct."

when the business was done, by having acted in that character, it was incumbent on the defendant to show that he, the plaintiff, had never been re-admitted an attorney of that court. The learned judge reserved the point, and a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit; a rule *nisi* having been obtained for that purpose upon the objection taken at the trial, the case was argued by Broderick for the plaintiff, and Abraham for the defendant.

Per Curiam. In an action by an attorney for slandering him in his profession, it is sufficient for him to prove that he has acted as an attorney of the court of which he is alleged to be an attorney, and if the defendant's words assume that the plaintiff is an attorney, it operates as an admission that he is so, and supersedes *the necessity of other proof, *Berryman v. Wise*, 4 T. R. 366. So, in an action for tithes, it is not necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes and acted as the incumbent is sufficient, *Bevan v. Williams*, 3 T. R. 635. Now in this case it was shown that the plaintiff in 1824, acted as an attorney of the Court of Common Pleas, and that he was retained in that character by the defendant. That was *prima facie* evidence that he was at that time an attorney of that court, and unless that *prima facie* evidence was rebutted by other evidence, the plaintiff was entitled to recover. It then lay upon the defendant to show that at the time when the bill of costs was incurred, the plaintiff by acting as an attorney acted illegally. We think that the defendant did not show that at that time the plaintiff was a person unlawfully acting as an attorney. The rule applies *omnia presumuntur rite esse acta*. The defendant proved that the plaintiff was admitted an attorney of the Court of King's Bench in 1792, and that he neglected for more than one year after that period to take out his certificate. It has been contended that his original admission thereby became void, and that he ceased to be an attorney, until he was re-admitted, and that it lay upon the plaintiff to prove a re-admission; but as the plaintiff had proved that he had acted as an attorney of the Court of Common Pleas in 1824, it must be presumed that he lawfully acted in that character in that court, unless the contrary be proved. Now the defendant did prove that the plaintiff had not been re-admitted in the Court of King's Bench, but he failed in proving that he had not been re-admitted in the Court of Common *Pleas. We think after the plaintiff had made out his *prima facie* [41] case, it was incumbent upon the defendant, in order to show that the plaintiff at that time was not an attorney of the Court of Common Pleas, to prove, not only that he had ceased in the intervening period to take out his certificate, but that he had not been re-admitted an attorney of the Court of Common Pleas.

Rule discharged.

CLAYTON, et al. v. BURTENSHAW, et al.

By an instrument under seal, A. agreed to take and hire of B. certain premises at a certain yearly rent, but no time was fixed for the commencement or determination of the interest. It was also agreed that A. should take at a valuation to be made on a future day, the fixtures, furniture, and stock in trade on the premises. The instrument had a stamp of 1*l.* 10*s.* impressed upon it: Held, that it was only an agreement for a lease, and that the stamp was not sufficient. Semble, It should have been a stamp of 1*l.* 15*s.*, the instrument being "a deed not otherwise charged" in the schedule to 55 G. S. c. 184.

Covenant for not paying for stock in trade, furniture, &c., in pursuance of the following agreement under seal: "Memorandum of agreement made and entered

into this 25th of September, 1815; viz., That is to say, we, the undersigned *Henry, Richard, James, and Charles Burtenshaw*, in the county of *Sussex*, yeomen, do agree with Messrs. *Thomas Clayton, Henry Burtenshaw, and John Burtenshaw*, executors to the estate of the late *George Venall of Henfield*, deceased, to take and hire of the said executors, for our son and nephew *Richard Burtenshaw*, all that house, shop, warehouse, and all appurtenances thereunto belonging, situated, lying, and being in the town and parish of *Henfield*, in the county of *Sussex* aforesaid, at the yearly rent of *35l.* per annum, we paying all taxes, except the property tax. It is also by these presents further agreed that we

*42] will take all the stock in trade of grocery, linen *drapery, and haberdashery, and also all the fixtures and utensils in the shop and warehouse; and such part of the household furniture as we the undersigned shall think necessary for the use of our son and nephew *Richard Burtenshaw*, at a fair valuation, on the 11th of *October* next coming; and for the consideration and amount of such stock, utensils, and household furniture, we do agree to pay or cause to be paid the sum of *1000l.* in the manner hereinafter mentioned, that is to say, &c." This deed was executed by two defendants only. The declaration alleged, that by a certain memorandum of agreement made, &c., the defendants did agree with the plaintiffs to take and hire of the plaintiffs all that house, &c., and it was also by the said agreement further agreed that the said defendants and *James Burtenshaw, &c.*, would take the stock in trade at a fair valuation, &c. Plea, *non est factum*. At the trial before *Graham, Baron*, at the *Sussex Lent* assizes, 1825; the instrument was produced in evidence, when it appeared to have a *30s.* stamp. For the defendants it was objected that this stamp was insufficient, and the learned judge being of that opinion, the plaintiffs were nonsuited. In *Easter* term a rule nisi for setting aside the nonsuit was obtained, against which

Taddy, Serjt., showed cause. The nonsuit in this case was right. The instrument set out in the declaration is an agreement under seal. Now the stamp of *1l.* imposed upon agreements by the *55 G. 3, c. 164*, applies to agreements under hand only. No express mention is made of agreements under seal. This, therefore, must be considered either as a lease or deed. It *43] is not a lease, there is no specific time or term for which the interest *in the premises is created. The only words upon which an argument on the other side can be founded are, "we do agree to take and hire for our son and nephew all that house, &c., at the yearly rent of *35l.*" In *Bac. Abr.*, tit. *Lease*, (*K.*) it is said "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it, for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years," and in *Poole v. Bentley*, 12 East, 168, and *Doe d. Walker v. Groves*, 15 East, 244, words of agreement were held sufficient to make a present demise, but in each of those cases a determinate time for the duration of the interest was mentioned. In this case too the agreement for the future purchase of the fixtures and stock in trade shows that it was not intended to operate as a lease. But supposing it to be a lease, it is not a lease only, but also a transfer of goods. This rule was obtained on the authority of *Corder v. Drakford*, 3 *Taunt.* 382, but that case merely decided that the instrument being in law a lease, could not be read in evidence for want of a lease stamp, and did not decide that such an instrument need not have any but a lease stamp. If the stamp in this case were held to be sufficient, goods to any amount might be sold at a valuation, without paying an *ad valorem* stamp duty. It will be said that this is not a present sale of the goods; if so, neither is it a present demise, for it must receive the same construction as to the house and goods. At all events, therefore, whether it be *44] construed as a lease and *conveyance of goods, or as an agreement for a lease and conveyance of goods, it does not come within the description

of a lease, which by the 55 G. 3, c. 184, is subject to a stamp duty of 1*l.* 10*s.*; but is "a deed not otherwise charged," and the stamp upon such an instrument ought to be 1*l.* 15*s.*

Marryat and *Chitty*, contra. It is true that a conveyance of goods under seal must have an *ad valorem* stamp, but this is not such an instrument. It conveys no goods in particular, but those which the parties might afterwards think fit to take at a price to be afterwards affixed; and upon that the amount of duty would depend. As to the goods, therefore, it is clear that this was merely a preliminary agreement. Besides, these goods were only taken as incident to the house, and according to *Corder v. Draksford*, a stamp for the principal suffices for the accessory also. The interest in the premises would commence on the execution of the instrument, and no time being fixed for its duration, but a yearly rent being payable, it would operate as a lease for a year. If this objection be held good, it will be fatal to most leases of shops and farms, for there are very few which do not contain some stipulation as to taking certain things at a valuation, either at the commencement or expiration of the term. It does not necessarily follow that a deed must have two stamps, because it may operate in two different ways, *Leeds v. Burrow*, 12 East, 1. The courts have taken into consideration the apparent intent of the parties, and have held the stamp sufficient where the whole is one transaction, and "no fraud is intended, *Boase v. Jackson*, 3 B. & B. 185. [*Bayley*, J. This is not a lease only, if indeed it be a lease at all; and it seems difficult to say that it is, for there are no words to bind the lessor, nor does he appear to have executed the instrument.] It may be considered as a counterpart, and it is never necessary for a lessor to show that he executed; it is sufficient for him to produce a counterpart executed by the tenant.

BAYLEY, J. I am clearly of opinion that the nonsuit in this case was right. The statute 55 G. 3, c. 184, sched. part 1, requires a specific stamp upon leases. If the instrument in question were a lease, and a lease only, the 1*l.* 10*s.* stamp which it bears would be sufficient. If it were a mere contract for the sale of goods, and not under seal, no stamp at all would be necessary; but the exemption does not extend to such contracts under seal. If the instrument were a lease and something more, then a further stamp might be necessary; but although I have formed an opinion upon that point, it is not necessary to express it, for I am of opinion that the instrument is not a lease, and that being so, it falls within the description in the sched. part 1, "a deed of any kind whatever not otherwise charged," and a stamp of 1*l.* 15*s.* is necessary. In judging whether this be a lease or not, let us first look at the declaration. The plaintiff does not describe it as a lease, there are no words of demise, the language as there set out is that of the defendants alone. Looking at the instrument itself, I am satisfied that great injustice might be done by holding it to be a lease. Was it the intention of the *parties that it should operate as a present demise? I cannot persuade myself that the defendants ever consented so to consider it. *Non constat* when the interest was to commence, nor how long it was to continue. Now it is hardly to be supposed, that a man would agree to buy the fixtures and stock in trade on the premises without having some certainty as to the length of time during which he would have a right to occupy the premises, and carry on his business there. It has been said that the interest would commence from the execution of the instrument, but it is clear that the property in the goods could not vest at that time. Suppose them to have been afterwards destroyed, could it be contended that the defendants would be bound to take the premises without having the benefit of the furniture and stock in trade? It would be very difficult to establish such a proposition. I am, therefore, of opinion that this instrument operated as an agreement for a lease, as alleged in the declaration, and that it comes within the description at the end of the title "deed" in the sched. part 1, to the 55 G. 3, c. 184., and was, therefore, liable to a stamp duty of 1*l.* 15*s.*

HOLROYD, J. I am of the same opinion. This deed is not, as described in the declaration, or as given in evidence, a lease. It does not contain any words binding the party who was to demise. Even if another part of the agreement containing such words had been given in evidence, it would not have amounted to a present demise, and would not have come within that description of lease which by the last stamp act is required to have a stamp of 1*l.* 10*s.* It was, *47] therefore, necessary to have "a stamp of 1*l.* 15*s.*, the instrument being a deed not otherwise charged in the schedule.

LITTLEDALE, J. It appears to me that the nonsuit in this case was right, whether the instrument in question be a lease or agreement. If it be a lease, still I think it clear that the stamp was insufficient. The fixtures might be necessary to the house, but the goods were not so, and were not the subject matter of the demise. Now the words of the statute requiring certain stamps upon leases apply only to that which is let. The question, therefore, seems free from doubt, for besides the words of demise, or agreement to demise, this instrument contains a contract by deed for the sale of goods. Such a contract is not within the exception in favor of bargains for the sale of goods, and the deed not being otherwise charged was liable to a duty of 1*l.* 15*s.* It is said that inconvenience will be produced by such a decision. Without enquiring whether that be so, or not, it suffices to say that the consequence cannot alter the law.

The court were about to discharge the rule, but as the instrument had been impressed with a stamp of 1*l.* 10*s.* by the advice of the officers of the stamp office, the rule was made absolute upon payment of costs, as between attorney and client.



*48] *DOE on the Demise of ISAAC WINTER v. PERRATT.

DOE on the several Demises of CATHERINE VINEY, THOMAS VINEY and THOMAS GREENSLADE v. PERRATT.

GOODTITLE on the several Demises of JOHN SLADE and JOHN STAINES WEBB v. PERRATT.

Testator, after giving his *T.* estate to certain persons for life, devised it "to *J. C.*, or his male heir, if any, free land, not to be mortgaged or sold; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of my uncle *R. C.*'s family, yielding and paying unto such of the daughters of the aforesaid *R. C.* which shall be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estate." At the time when the will was made, *R. C.* was dead, having left five daughters, all married; the eldest had several daughters, but no son; each of the others had sons; and all these persons were known to the testator. *J. C.* died without issue, and the fourth daughter of *R. C.* died (before any of her sisters, and during the continuance of the life estates given by the will,) leaving a son: Held, that her son was entitled to the *T.* estate, as being the first male heir of the branch of *R. C.*'s family, per Holroyd and Littledale, Js. Bayley, J., dissentiente.

THESE three ejectments were brought by several persons to recover the same lands in the county of Somerset. In each a special verdict was found, in substance as follows:

On the 16th day of March, A. D. 1786, Emanuel Chilcott, was seised in his demesne as of fee of certain tenements known by the name of the Truckwell estate, being the tenements in the within declaration mentioned; and being so seised thereof, afterwards, to wit, on the day and year aforesaid, duly made and published his last will and testament in writing, bearing date, &c., and

signed by him the said *Emanuel Chilcott*, and attested and subscribed in his presence by three credible witnesses, according to the form of the statute in such case made and provided ; and thereby, amongst other things, *devised as follows : " I give unto *John Chilcott*, my kinsman, living in *London*, 100*l.*, to be paid in one year after my decease ; (several small legacies were then bequeathed;) also I give unto *Ann White*, my sister-in-law, the sum of 20*l.*, and the income of *Burge's* cottage, and her living in it, if she thinks proper, during her natural life ; also I give unto *Eleanor White*, 100*l.*, and half of *Truckwell* estate, during her natural life ; also I give unto *William Burge*, my servant man, 5*l.* All the rest and residue of my goode, chattels, rights, credits, personal and testamentary estate, and also my lands, tenements, and hereditaments, I give, devise, and bequeath unto *Elizabeth Chilcott*, my dearly beloved wife, during her natural life, whom I make my whole and sole executrix. And I do allow her the said *Elizabeth Chilcott*, to give what she thinks proper of her said effects to her sisters *Eleanor White*, and *Ann White*, during their natural lives. And after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Eleanor White*, and *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell* estate, to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any, free land not to be sold nor mortgaged on any account whatsoever, but to remain in the *Chilcott's* family for land of inheritance, with two cottages, garden, and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Witcombe*, free land. And if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hanckrick* farm, yielding and paying unto such of the daughters of "the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100*l.* each [49] at the time of the taking possession of the aforesaid estates." *Emanuel Chilcott*, on the 24th of *May*, A. D. 1787, died so seised of the said tenements, with the appurtenances, without revoking or altering his said will, and without issue, leaving the said *Elizabeth Chilcott*, his widow, and the said *Ann White*, and *Eleanor White*, him surviving ; whereupon and whereby the said *Eleanor White*, became and was seised of one moiety of the said tenements, called *Truckwell* estate, with the appurtenances, in her *demesne* as of freehold, for and during the term of her natural life ; and the said *Elizabeth Chilcott*, became and was seised of the other moiety of the said tenements, with the appurtenances, in her *demesne* as of freehold for and during the term of her natural life. *Ann White*, died on the 9th of *April*, A. D. 1791, leaving the said *Elizabeth Chilcott*, and *Eleanor White*, her surviving ; and on the 23d of *April*, 1792, *Elizabeth Chilcott*, duly made and published her last will and testament in writing, bearing date the day and year last aforesaid, and signed by her the said *Elizabeth Chilcott*, and attested and subscribed in her presence by three credible witnesses, according to the form of the statute in such case made and provided ; and thereby, amongst other things devised, and in pursuance of all and every power and powers enabling her in that behalf, gave and devised all those the said tenements comprised in the said *Emanuel Chilcott's* will, over which she had any power of disposition, to her sister *Eleanor White*, and her assigns, for and during the term of her natural life. On the 25th of *December*, 1795, *Elizabeth Chilcott*, died so *seised of the last [50] mentioned moiety of the said tenements called *Truckwell* estate, with the appurtenances, without revoking or altering her said will ; whereupon and whereby the said *Eleanor White*, became and was seised of the entire of the said tenements, with the appurtenances, in her *demesne* as of freehold for and during the term of her natural life ; and on the 14th of *July*, 1820, *Eleanor White*, died so seised of the said tenements, with the appurtenances. *John Chilcott*, in the will of *Emanuel Chilcott* mentioned, (which said *John Chilcott*, was the heir at law of the said *Emanuel Chilcott*,) in the year of

our Lord, 1765, intermarried with one *A. B.*, and afterwards, and in the lifetime of the said *Eleanor White*, in the month of *December*, 1808, died, without ever having had any heir male by him lawfully begotten, and without having levied a fine or suffered a recovery of the tenements aforesaid, with the appurtenances, or any part thereof; but the said *John Chilcott*, had issue, one *Sarah Chilcott*, his only daughter, and in the year of our Lord, 1789, the said *Sarah Chilcott*, intermarried with one *Thomas Webb*, by whom she had issue one *John Chilcott Webb*, her only son, and on the 4th of *April*, 1810, she the said *Sarah Webb* died; whereupon and whereby the said *John Chilcott Webb*, became and was the heir at law of the said *Emanuel Chilcott*. *John Chilcott Webb*, after the death of his said mother *Sarah Webb*, to wit, on the 13th of *August*, 1814, by a certain indenture bearing date the day and year last aforesaid, and made between the said *John Chilcott Webb*, and *Louisa* his wife, of the one part, and *William Gray*, late of *Crewkerne*, in the county of *52] *Somerset*, esquire, since deceased, of the other part, for the "considerations therein mentioned, demised the said tenements called *Truckwell* estate, with the appurtenances, to the said *William Gray*, his executors, administrators, and assigns, for the term of one thousand years; and it was by the said indenture declared that a certain fine *sur cognuzance de droit come ceo, &c.*, with proclamations levied of the said premises by the said *John Chilcott Webb*, and *Louisa* his wife, should ensue to and to the use of the said *William Gray*, his executors, administrators, and assigns, during the said term of one thousand years, and subject thereto to the only proper use and behoof of the said *John Chilcott Webb*, his heirs and assigns forever. The said *William Gray*, on the 21st of *October*, 1815, duly made and executed his will, and thereby, without specifically devising or bequeathing the said tenements, with the appurtenances, or any part thereof, after certain devises and bequests, devised and bequeathed all the residue of his real and personal estate to the said *John Slade*, his executors, administrators, and assigns, and appointed him sole executor of his said will, and the said *William Gray*, on the 13th of *August*, 1817, died without altering or revoking the same, and the said *John Slade*, on the 17th of *December*, 1817, duly proved the said will in the prerogative court of the Archbishop of *Canterbury*, and took upon himself the execution thereof, whereupon and whereby the said *John Slade*, after the death of the said *Eleanor White*, to wit, on the said 20th of *July*, 1820, aforesaid, entered into the said tenements claiming the same, and was possessed thereof as the law requires, and being so possessed thereof, he, the said *John Slade*, afterwards, to wit, on the said 1st of *December*, 1820, within *mentioned, demised to the within mentioned *John Goodtitle*, &c. On the 22d of *April*, 1820, the said *John Chilcott Webb*, died intestate, leaving the said *John Staines Webb*, his only child and heir at law, whereupon and whereby the said *John Staines Webb*, after the death of the said *Eleanor White*, to wit, on the 20th of *July*, in the year of our Lord, 1820, entered into the said tenements, claiming the same, and was possessed thereof as the law required, and being so possessed thereof, he, the said *John Staines Webb*, afterwards, to wit, on the said 1st of *December*, 1820, within mentioned, demised the said tenements, with the appurtenances, to the said *John Goodtitle*, &c. In the lifetime of the said *Emanuel Chilcott*, on the 17th of *March*, 1780, the said *Richard Chilcott*, the uncle of the said *Emanuel Chilcott*, who lived at *Hanerick Farm*, in the said will of *Emanuel Chilcott* mentioned, died, without ever having had a son, leaving five daughters only, that is to say, *Mary*, who was born on the 9th of *November*, 1739; *Joan*, who was born on the 1st of *January*, 1741; *Sarah*, who was born on the 4th of *December*, 1744; *Betty*, who was born on the 25th of *October*, 1746; and *Agnes*, who was born on the 13th of *February*, 1749; and which said daughters were all living at the time of the making of the will of the said *Emanuel Chilcott*, and at the time of his death; and as well the

said five daughters, as the several descendants of the said daughters respectively, hereinafter mentioned, who were born before the making of the said will of the said *Emanuel Chilcott*, were all well known to him at the time of making his said will. On the 6th of June 1768, the said *Mary Chilcott*, the eldest daughter of the *said *Richard Chilcott*, intermarried with one [*54] *George Bishop*, by whom she had issue four daughters only, and no other issue, that is to say, *Betty*, who was born on the 6th day of *August* 1769; *Ann*, who was born on the 11th of *October* 1770; *Mary*, who was born on the 11th of *January* 1772; and *Anna*, who was born on the 2d of *October* 1781. *Mary Chilcott*, afterwards *Bishop*, in the lifetime of the said *Eleanor White*, in the year of our Lord 1799, died. On the 1st of *May* 1794, the said *Betty Bishop*, the eldest daughter of the said *Mary Bishop*, intermarried with *John Derham Perratt*, by whom she had issue, the within named defendant, *Matthew Perratt*, her eldest son, and heir at law, who was born on the 3d of *March* 1796, and which said *Betty Perratt* and *Matthew Perratt* are still respectively living. On the 14th of *May* 1762, the said *Joan Chilcott*, second daughter of the said *Richard Chilcott*, intermarried with one *Isaac Winter*, by whom she had issue, two sons, that is to say, *Thomas Chilcott Winter*, who was born on the 18th of *February* 1763, and *Isaac Winter*, who was born on the 16th of *July* 1770, both of whom were also well known to the testator; and afterwards and after the death of the said *Eleanor White*, to wit, on the 8th of *November* 1820, she, the said *Joan Chilcott*, afterwards *Winter*, died. In the respective lifetimes of the said *Eleanor White* and the said *Joan Chilcott*, afterwards *Winter*, to wit, on the 30th of *December* in the year of our Lord 1817, the said *Thomas Chilcott Winter* died, a bachelor and intestate, leaving the said *Isaac Winter*, his brother and heir at law, him surviving. On the 3d of *April* 1769, the said *Sarah Chilcott*, the third daughter of the said **Richard Chilcott*, intermarried with one *Samuel Parsons*, by whom she had [*55] issue, two sons, that is to say, *James Parsons*, who was born on the 3d of *October* 1771, and *John Parsons*, who was born on the 4th of *January* 1773, and afterwards and in the lifetime of the said *Eleanor White*, to wit, on the 4th of *August* 1813, she, the said *Sarah Chilcott*, afterwards *Parsons*, died; and afterwards, to wit, sometime in the year of our Lord 1813, the said *James Parsons* died intestate, and without issue, leaving the within named *John Parsons* his brother and heir at law him surviving. On the 4th of *August* 1764, the said *Betty Chilcott*, the fourth daughter of the said *Richard Chilcott*, intermarried with one *Benjamin Viney*, by whom she had issue, *Thomas Viney*, her only son, who was born on the 5th of *March* 1765, and the said *Betty Chilcott*, afterwards *Viney*, afterwards and in the lifetime of the said *Eleanor White*, to wit, on the 24th of *February* 1804, died, leaving the said *Thomas Viney*, her only son and heir at law, her surviving. *Thomas Viney* afterwards, and in the lifetime of the said *Eleanor White*, to wit, sometime in the year of our Lord 1795, intermarried with one *Catharine Phelps*, by whom he has issue one son, *Thomas Viney*, who is still living; and the said *Thomas Viney*, the father, afterwards on the 15th day of *July* 1819, duly made and published his last will and testament in writing, bearing date the same day and year last aforesaid, and signed by three credible witnesses, according to the form of the statute in such case made and provided, and thereby gave and devised all his real estate to the said *Catharine Viney*, her heirs and assigns for ever. *Thomas Viney*, the father, afterwards and before the said time *when, &c., to wit, in the month of *September*, in [*56] the year of our Lord 1819, died, without revoking or altering his said will, leaving the said *Catharine Viney*, his widow, and the said *Thomas Viney*, his only son and heir at law, him surviving. On the 11th of *November* 1770, *Agnes Chilcott*, the fifth daughter of the said *Richard Chilcott*, intermarried with one *John Greenslade*, by whom she had issue *Thomas*

Greenslade, her only son, who was born on the 10th of December 1772, and afterwards, to wit, sometime in the year of our Lord 1780, the said *John Greenslade* died, leaving the said *Agnes* his widow, and the said *Thomas Greenslade* his son, him surviving, both of whom are still living. But whether, &c.

The first of these cases was argued at the sittings in *banc*, after *Hilary* term 1822, by *Jeremy* for the plaintiff, and *Bernard* for the defendant; and the second was argued by *Carter* for the plaintiff, and *Bernard* for the defendant. The case then stood over, that the third might be tried, and at the sittings after *Easter* term 1824, it was argued by *Preston* for the plaintiff, and *Bernard* for the defendant. The judgment was then postponed with a view to an amicable arrangement amongst the parties, but the negotiation having been broken off, and now there being a difference of opinion amongst the learned Judges, who heard the arguments, they delivered their judgments *seriatim*.

LITTLEDALE, J. After stating the special verdict, proceeded as follows: It appears by the special verdict, that *John Chilcott* is dead, and never had issue male; he either took an estate for life or in tail, and either way [57] the remainder to his family is at an end; then comes the devise to the family of *Richard Chilcott*. The devise is as follows: "if no male heir lawfully begotten by *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, paying unto such of the daughters of *Richard Chilcott*, which shall be then living, 100/- each at the time of the taking possession of the aforesaid estates." And the question is, which part of his uncle *Richard's* family satisfies the language of this part of the will. It is not the daughters; they are the several stocks from whom the heirs are to emanate. It must be amongst the males that the remainderman is to be found, and it may be said that all the males who represent the daughters of *Richard Chilcott* make up one heir. But if the male heir of each of the daughters was to take a part, and altogether to constitute in the aggregate one heir, it would have required some other words to express that intention. It is *heir* in the singular number, and the *first*. These two expressions, therefore, are such as to show that only one person was meant. The question is, whether any one or more persons answers the description of *first male heir* of the branch of the family of *Richard Chilcott*, uncle of *Emanuel Chilcott*, the testator. I am of opinion, that *Thomas Viney*, the son of *Betty*, the fourth daughter of *Richard Chilcott*, who was born on the 5th of March 1765, and whose mother died the 24th of February 1804, answers that description; and that he having devised to his wife in fee, she is now entitled to recover in the ejection, in which she is one of the lessors of the plaintiff. It is a general rule [58] (though there may be some exceptions, which do not apply to the present case,) that if an unnamed person takes by purchase, he must answer the whole description of the designation by which he is mentioned in the document, whether deed or will. And then it is to be seen whether *Thomas Viney* did answer the full description of "first male heir of the branch of *Richard Chilcott's* family."

First, he is an *heir* of one of the daughters, which daughter, with her four sisters, constitute the family; his mother *Betty*, died in 1804, and he was born in 1765. In 1804, when his mother died, the particular estate which was to support the contingent remainder still continued. Upon her death the remainder became vested in him as an heir, provided it should appear that he filled the other descriptions of *first* and *male*. He was a male heir, because he was the son of that daughter, without the intervention of any female, and, therefore, could take either by descent or purchase.

Thus, then, he fills two of the descriptions. But it will be a subject of more discussion, whether he fills the description of *first* within the meaning of the will. His mother having died before any of her sisters, he was the first person who filled the character of heir, if heir is to be taken in that sense of the

word, which says that a person cannot be heir till the ancestor be dead; and if that be so, then as he is the first person of the descendants of the daughters that fills the character of heir, he unites in him all the three parts of the description; he is heir, he is male heir, and he is first male heir.

There is a maxim in the law, *nemo est hæres viventis*, the accuracy of which has never been questioned as a general proposition. In *Co. Litt.* 378 a. it is said, if a lease for life be made remainder to the right heirs of *J. S.*, *J. S.* being then alive, it sufficeth that the inheritance passeth presently out of the lessor, but cannot vest in the heir of *J. S.*, for that living the father, he is not in *verum natura*, for *non est hæres viventis*; so as the remainder is good upon this contingency, viz. if *J. S.* die during the life of the lessee. In *Archer's* case, 1 Co. 66 b., the devise was to *A.* for life, and afterwards to the next heir male of the body of *A.*, and to the heirs male of the body of such next heir male. *A.* made a feoffment: Held, that the right male heir of *A.* could not enter for a forfeiture in the life of *A.*, for he cannot be heir as long as *A.* lives. It was also held, that the remainder to the right male heir of *A.* is good, although he cannot have a right heir during his life, but it is sufficient that the remainder vests *eo instanti*, that the particular estate determines. In *Challoner and Bowyer's* case, 2 Leon. 70, *W. Bowyer* devised to his youngest son in tail, remainder to the heirs of the body of the eldest son, remainder to the daughters in fee. *W. B.* died, and the second son died without issue, living the eldest son, who had issue, who was the tenant in an assize of novel *disseisin*. It was contended, that though in a grant, the son, living his father, cannot take as heir by limitation as heir to his father, because that none can be said or held heir to his father as long as the father is alive, yet by way of devise the law shall favor the intention of the party, and the intent of the devisor shall prevail. But all the court ^{*was} strongly against it, and held that as well in the case of a devise as a grant all is one, and judgment was given for the plaintiff. In *Else v. Osborn*, 1 P. Wms. 387, *A.* had made a settlement to the use of himself for ninety-nine years (if he so long live,) remainder to trustees and their heirs during his life, &c. remainder to the use of the heirs of his body, remainder to himself in fee. *A.* had two sons; and *A.* and the trustees and the eldest son, when of age, joined in a feoffment and fine to *B.* in fee, as a security for so much money; the eldest son died without issue, and the second son brought a bill to set aside this mortgage. The Lord Chancellor said, "this is plainly a contingent remainder, being limited to the heirs of the body of *A.*, who can have no heir during his life; for *nemo est hæres viventis*."

The word *heir*, however, is not always used in the law as meaning a person whose ancestor is dead, and there are several cases where it applies though the ancestor be living, and in those cases it means *heir apparent*. In *Counden v. Clarke*, Hob. 31, illustrations are given of heirs of this kind as applicable to lands in gavelkind and borough *English*, which, however, do not apply, as there *heirs* are the same as *heir* applicable to socage lands. In *Burchett v. Durdant*, 2 Vent. 311, 313, illustrations are given from writs of ravishment of ward, *Quare filium et hæredem rapuit*, and the statute 25 Ed. 3, by which it is treason to kill the heir of the king. In *Darbison v. Beaumont*, Fortescue, 18, 22, instances of *heir* being used to mean *heir apparent*, are more fully stated, and other illustrations besides ^{*those in} *Ventriss* are there given. But in all these instances, the word *heir* from the subject-matter necessarily means *heir apparent*, and not heir after the death of the ancestor. And it may be contended, that because the word *heir* has these various significations, and may mean *heir apparent* as well as full heir; it ought in this instance to be applied as such, and if that were the case, then *Thomas Chilcott Winter*, the brother of *Isaac Winter*, a lessor of the plaintiff, would be the person entitled, because he was born before *Thomas Viney*, viz. in 1763, and was the first born male of the branch of *Richard Chilcott's* family; and then, as he

was an heir and was a male, the being first born gave him the character of heir apparent, which in this view of considering it is the same thing as heir; and that, therefore, he filled the full and entire description of *first male heir*. There are certainly many instances under wills, where the word heir has been used in the sense of heir apparent. In *Burchett v. Durdant*, 2 Vent. 311, there was a devise to *Higden* in trust for *Robert Durdant*, and after his death to the heirs male of his body *now living*, and to such other heirs male and female as he shall hereafter happen to have. The principal question was, whether the devise to the heirs of the body of *Durdant* now living, was a vested or a contingent remainder. It was urged that a man cannot take as heir in the life of his ancestor, for *nemo est heres viventis*. But it was resolved that it was a remainder vested, for being limited to the heirs of the body of *Robert Durdant* now living, it was a sufficient designation of the person, and as much as [if he had said heir apparent. *The ground of this decision is the use of the words *now living*. If it had not been for the introduction of these words, the general doctrine is admitted. And, even as the case was, Chief Baron *Atkyns*, and Mr. Justice *Powell*, were of opinion that it was a contingent remainder, but as there had been a judgment in the House of Lords or another case upon the same will, where it was held to be a vested remainder, they thought themselves bound by that decision.] In *Darbison v. Beaumont*, Vin. Devise, U b. pl. 5, a remainder was devised to the heirs male of the body of *E. L.* lawfully begotten. *E. L.* was living at the time of the remainder taking place, yet it was held that the heir apparent should take. This [taken by itself would be an authority to show, that *heir* in a will means heir apparent without any further language to show such a meaning. But it is a very short minute, and begins very abruptly in these words, and for default of such issue, without stating what had gone before. In the report of the same case, 1 P. Wms. 229, it appears that the testator by his will gave a legacy to *E. L.* whom he notices as being living, and that she had three sons. And that is the express ground of the decision. Besides, the testator gave the heir at law an annuity, which showed that she should not have the estate. But this judgment of the Exchequer was reversed in the Exchequer Chamber by the two chief justices, though that reversal was reversed in the House of Lords. And that shows there was a great difference of opinion upon it. (And I have before noticed, that in the case of *Burchett v. Durdant*, 2 Vent. 311, the chief baron and one of the puisne judges were of a different opinion, only that they considered themselves as bound by the decision of the House of Lords, so that in those two cases all the three chiefs and another judge differed in opinion.) The same case is reported in *Fortescue*, 18. And there it appears by the will that *Elizabeth Long* was living, and that is the main ground of the argument of *Fortescue*. And these cases, therefore, are all

* The case here alluded to was *James v. Richardson*, an ejectment on the demise of *G. Durdant*, the eldest son of *Robert Durdant*. It is reported in several books, 2 Lev. 232; 1 Ventr. 334; Sir T. Raym. 330; and Sir T. Jones, 29. By the report in Lev. it appears that the Court of *K. B.* held that the remainder vested in *G. Durdant*, as heir male of his father, that judgment was reversed in the Exchequer Chamber, but affirmed in the House of Lords, the judgment of the Exchequer Chamber being there reversed, and nothing is there stated as to the opinions of particular Judges. At the end of that case it is stated, that upon the death of *G. Durdant* a new ejectment was brought against his heir, and upon a new hearing of this matter, judgment was given in the *K. B.* for the heir, that judgment was affirmed in the Exchequer Chamber, and again in the House of Lords. According to the report in Sir T. Raym. the judgment of the *K. B.* in *James v. Richardson* was reversed in the Exchequer Chamber, "nemine contradicente prater, Atkyns Justice del Com. Bank." According to the report in 1 Ventr. 334, there was a difference of opinion in the Court of *K. B.*, *Scroggs*, C. J., *Wyld*, and *Jones*, J., holding that the remainder was vested, *Dolben*, J., that it was contingent. In the report by Sir T. Jones, he merely states what were the several judgments pronounced in the case, without alluding to the opinions of individual judges. When *Burchett v. Durdant* afterwards came before the Court of Exchequer Chamber, it is said in 2 Ventr. 313, that *Atkyns*, *C. B.*, and *Powell*, Justice, seemed to be of opinion that the remainder was contingent.

word, which says that a person cannot be heir till the ancestor if that be so, then as he is the first person of the descendant that fills the character of heir, he unites in him all the description; he is heir, he is male heir, and he is first if

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is reconsidering, however, what is the meaning of the word *heir*, it is necessary that I should advert to a numerous class of cases arising out of the documents laid down in *Littleton*, s. 21, 22, 23, 24, and in Lord Coke's Commentaries upon them, that to entitle a person to claim as purchaser under a devise to heirs male or heirs female of the body, under particular circumstances, a person must show that he fills every part of the description, and that he is actual heir. That, I think, is true as far as applies to this case, and as I have endeavoured to show; but a very numerous class of cases, as applicable to this rule, have occurred, and are collected in a most elaborate and ingenious note of Mr. Hargrave to *Coke Littleton*, 24 b., and in another note to *Coke Littleton*, 164 b. The cases he refers to, are in support of Lord Coke's position, that to entitle a person to take by purchase under a limitation to the heir female, it is necessary to show the person to be heir as well as female. [66]

I have not entered into a consideration of these authorities, as I think they do not bear upon this case; and for the decision of the question, I think it not material whether Lord Coke is right or wrong. The point in all this class of cases has been, whether the person claiming was *heir* as well as *heir apparent*; i. e. not whether he or she was *heir* with reference to the maxim of *nemo est heres viventis*, but *heir* with reference to somebody else being *heir*, and therefore the person claiming being neither *heir* as representing a deceased ancestor

This may be illustrated by what Lord Coke says in *Co.*
 man giveth lands to a man, and the heirs female of his
 issue a son and a daughter, the daughter shall inherit;
 statute working with it) shall be observed. But
 wise, for if *A.* have issue a son and a daughter,
 remainder to the heirs female of the body of
 nothing, because she is not heir; because
 which she is not; because the brother
 not be observed; because here is
 "hereupon."

present claimants are heirs or not,
 heir after the death of his ancestor,
 so is heir to *Betty*, the fourth daughter
 the case of *Thomas Chilcott Winter*,

second daughter, or as is the case of *Mat-*

erent to his mother *Betty*, who was heir of

each of these three persons represent an ances-

tively heirs; each is therefore an heir in one sense

It is not a question of being heir to the testator, or

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particularly noticed the claim of *Matthew Perratt*; his claim is
 the same objection as that of *Winter*, because though his mother *Betty*

heir to her mother *Mary* on the death of *Mary*, yet *Betty*, the daughter
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 now fill the character of heir, as his mother is alive; and his claim, therefore,
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 Judgment should be given for the plaintiff on the count on the demise of *Cath-*
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 defendant in the two other ejectments.

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 [68] three ejectments, arise upon the will of *Emanuel Chilcott*, made 16th of
 March, 1786. By that will, after giving half of *Truckwell* estate (that estate
 being the premises in question) unto *Eleanor White*, during her natural life,
 and the other half (*inter alia*) unto *Elizabeth Chilcott*, his wife, during her
 natural life, with power for her to give what she thought proper to her sisters
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cott, *Eleanor White*, and *Ann White*, all the lands, rights, profits, and here-
 ditaments of *Truckwell* estate, to come to *John Chilcott*, my kinsman, living
 in *London*, or his male heir, if any, free land, not to be sold nor mortgaged on
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 taking possession of the aforesaid estates."

The testator died the 27th of May, 1787, leaving the above named *John*

the same, and appear to have undergone great consideration, but the decision was by no means founded on the unanimous opinion of the judges. It is not, however, necessary to question the doctrine there established; it appears quite correct and consistent with the general rules of law. In **Goodright dem. Brooking v. White*, 2 Blackst. 1010, devise was of a remainder to the heirs and assigns of *Margaret W.*, and held that her heir might take though she was alive; but it appeared by the will that she was alive. *De Grey*, C. J., says, that within a century, a more liberal construction of the words of a testator has prevailed, and they have been generally taken in their popular sense, and he cites cases to show that where the words *now living* have been used, the person called *heir* may take, notwithstanding the ancestor be alive. In that respect *De Grey*, C. J., delivers his opinion in conformity with the cases I have already cited, and this case in *Blackstone* does not go in the least further than those cases, and leaves the law just as it was, and is only a recognition of the decision in the House of Lords, in which the Court of Common Pleas in this instance acquiesced; but it does not at all touch the point, whether the word *heir* can be held to mean *heir apparent* where nothing in the will tends to show it was used in that sense. All these cases, therefore, only come to this, that if there be sufficient upon the will to show that the word *heir* is used in the will in such a way as proves the testator to have meant *heir apparent*, it shall be so considered as he intended it, but they establish nothing more. In this will there is nothing to show that he did intend it to mean *heir apparent*. In the cases above cited, the words *heir* or *heirs* have been applied to the descendants of some one individual; here they are applied generally to those of the five sisters. No preference is shown to any of them, or of their descendants; they are all treated alike where there is a sum of 100*l.* directed to be paid to such of them as shall be alive when the remainder-man comes to the estate. Probably the testator wished to show no preference, and to avoid that, he purposely made it contingent as to which part of the family should have the estate.

This sort of uncertainty in the present will, as to who was to be the object of the testator's bounty, is only what must frequently occur in devises of contingent remainders. In *Boretton v. Nichols*, Cro. Car. 364, Litt. Rep. 159, A. made a feoffment to the use of himself for life; remainder to C., his second son, for life; remainder to the use of the first son of C. who should have issue male of his body, and his heirs for ever; which is quite as uncertain and contingent as the present.

In considering, however, what is the meaning of the word *heir*, it is necessary that I should advert to a numerous class of cases arising out of the doctrine laid down in *Littleton*, s. 21, 22, 23, 24, and in *Lord Coke's Commentaries* upon them, that to entitle a person to claim as purchaser under a devise to heirs male or heirs female of the body, under particular circumstances, a person must show that he fills every part of the description, and that he is actual heir. That, I think, is true as far as applies to this case, and as I have endeavored to show; but a very numerous class of cases, as applicable to this rule, have occurred, and are collected in a most elaborate and ingenious note of Mr. *Hargrave to Coke Littleton*, 24 b., and in another note to *Coke Littleton*, 164 b. The cases he refers to, are in support of *Lord Coke's* position, that to entitle a person to take by purchase under a limitation to the heir female, it is necessary to show the person to be heir as well as female.

I have not entered into a consideration of these authorities, as I think they do not bear upon this case; and for the decision of the question, I think it not material whether *Lord Coke* is right or wrong. The point in all this class of cases has been, whether the person claiming was *heir* as well as *heir apparent*; i. e. not whether he or she was heir with reference to the maxim of *nemo est hæres viventis*, but heir with reference to somebody else being heir, and therefore the person claiming being neither heir as representing a deceased ancestor

or heir apparent. This may be illustrated by what Lord *Coke* says in *Co. Litt.* 24 b. "When a man giveth lands to a man, and the heirs female of his body, and dieth, having issue a son and a daughter, the daughter shall inherit; for the will of the donee (the statute working with it) shall be observed. But in case of a purchase it is otherwise, for if *A.* have issue a son and a daughter, and a lease for life be made, remainder to the heirs female of the body of *A.*, *A.* dieth, the heir female can take nothing, because she is not heir; because she must be both heir and heir female, which she is not; because the brother is heir, and therefore the will of the giver cannot be observed; because here is no gift, and therefore the statute cannot work thereupon."

But the question here, is not whether the different claimants are heirs or not, for each of them is an heir, i. e. either an heir after the death of his ancestor, as is the case of *Thomas Viney*, who is heir to *Betty*, the fourth daughter of ^{*67]} *Richard Chilcott*, or as is the case of *Thomas Chilcott Winter*, who was heir apparent to *Joan*, the second daughter, or as is the case of *Matthew Perratt*, who is heir apparent to his mother *Betty*, who was heir of *Mary*, the first daughter. For each of these three persons represent an ancestor of whom they are respectively heirs; each is therefore an heir in one sense or another of the word. It is not a question of being heir to the testator, or being heir to *Richard Chilcott*, it is an heir of the branch of his family, which branch consisted of five females, each of whom was to be an ancestor, from whom several heirs were to spring.

I have not particularly noticed the claim of *Matthew Perratt*; his claim is liable to the same objection as that of *Winter*, because though his mother *Betty* became heir to her mother *Mary* on the death of *Mary*, yet *Betty*, the daughter of her mother *Mary*, is still living, and therefore *M. Perratt* does not even now fill the character of heir, as his mother is alive; and his claim, therefore, cannot be supported.

And, upon the whole of the case, I think it resolves itself into this, whether the word *heir* is to be taken to mean the heir of a deceased ancestor or *heir apparent*; and as I think it means the heir of a deceased ancestor, I think judgment should be given for the plaintiff on the count on the demise of *Catharine Viney*, in the action in which she and *Thomas Viney* and *T. Greenslade* are lessors of the plaintiff; and judgment for the defendant on the other counts on the several demises of *Thomas Viney* and *T. Greenslade*, and also for the defendant in the two other ejectments.

^{*68]} **HOLROYD, J.** The different claims of the several parties in these three ejectments, arise upon the will of *Emanuel Chilcott*, made 16th of March, 1786. By that will, after giving half of *Truckwell* estate (that estate being the premises in question) unto *Eleanor White*, during her natural life, and the other half (*inter alia*) unto *Elizabeth Chilcott*, his wife, during her natural life, with power for her to give what she thought proper to her sisters *Eleanor White* and *Ann White*, during their natural lives, he devises as follows: "And after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Eleanor White*, and *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell* estate, to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any, free land, not to be sold nor mortgaged on any account whatsoever; but to remain in the *Chilcott's* family for land of inheritance, with two cottages, gardens, and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Wetcombe*, free land, and if no male heir, lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hancrick Farm*, yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100*l.* each at the time of the taking possession of the aforesaid estates."

The testator died the 27th of May, 1787, leaving the above named *John*

Chilcott, who was his cousin and heir at law, surviving; who afterwards dying without issue male, in the lifetime of *Eleanor White*, his estate tail became extinct, and *Elizabeth Chilcott*, the testator's widow, having devised her [69] moiety of the *Truckwell* estate to *Eleanor White*, for her life; and *Eleanor White* having survived *Elizabeth Chilcott* and *Ann White*, and dying on the 14th of *July*, 1820, all their life estates then became extinct; and the question, therefore is, whether any and what person is entitled to the *Truckwell* estate under the devise, by which that estate (after the determination of the above preceding life estates, and also of the estate given in tail male to *John Chilcott*) was to fall "to the first male heir of the branch of the testator's uncle *Richard Chilcott's* family;" or whether that devise is void for uncertainty, so as to make the estate go by descent to the testator's heir at law. As far as the intention of the testator is ascertained and considered in the construction to be given to this will, it may be material to consider what the state of things was with regard to the *Chilcott* family at the time of the making of the will; for it is laid down by *Willes*, C. J., in delivering the judgment of the Court of Common Pleas in *Doe v. Underdown*, Willes, 296, to be one of the certain and established rules for the construction of wills, that the intent of the testator ought always to be taken as things stood at the time of the making of his will. This rule of law had been before laid down by Lord C. J., *King in Wright v. Hall*,^t and has been since confirmed by Lord *Ellenborough* in delivering the judgment of the Court of King's Bench in *Doe v. Scott*, 3 M. & S. 306.

There appears to have been originally three branches of the *Chilcott* family; one branch, of which the testator himself was the only surviving person, but two other branches still remained, both which the testator had in his [70] contemplation in his devises of the *Truckwell* estate. One of those two branches had consisted of his elder uncle *John Chilcott*, who was dead, leaving only one child, the testator's said kinsman *John Chilcott*, named in the will, who at the time of making the will was living, and had one child only, a daughter, then unmarried. As to the other of those two branches, which the testator calls the branch of his uncle *Richard Chilcott's* family, *Richard Chilcott*, who was the testator's younger uncle, was dead without issue male, but he had left five daughters, all married and living; *Mary*, the eldest daughter, had four daughters, but no son or male descendant then, and each of the other daughters of *Richard Chilcott* had a son or sons then living. This was the state of the *Chilcott* family at the time of making the will, and the same continued to be so until the testator's death; and these five daughters of *Richard Chilcott*, and their children, were, at the time of making the will, all well known to the testator. This being found to be the state of things at the time of making the will, let us see what these devises are, as they regard each of those two remaining branches of the family. With respect to the first of those branches, the testator directs the premises, after the life estates are expired, to come to *John Chilcott*, (who was, as above stated, the son of the testator's elder and deceased uncle *John Chilcott*,) or to his male heir, if any, not to be sold or mortgaged, but to remain in the *Chilcott* family for land of inheritance, and if no male heir, lawfully begotten by the said *John Chilcott*, the devisee, then he devises over in favor of the first male heir of the second of those two branches. The devise as to the first of these two branches of the *Chilcott* family, was, [71] in truth, a devise to such person only, as either was, at the time of making the will, or would be at the time of the death of the testator, when the will would first begin to operate, the male heir of that branch of the family in that strict sense which the maxim "*nemo est hæres viventis*," requires. *John Chilcott*, the devisee, was, in the most strict sense, the male heir of that branch of the family, his father being dead. If he, therefore, survived the testator, he would be the only person to take under the devise to or in favor of that branch

^t Fort. 183. 8 Mod. 223. S. C., by the names of *Wright v. Horne*.

of the family : and so it would be in case he died before the testator, supposing that his male heir would take no estate by purchase, as would be the case if in the devise to him, " or to his male heir, if any," the word *or* is to be construed *and*. But supposing the words are to be taken strictly in the disjunctive, so as to prevent the estate to the male heir from lapsing by the father's death during the testator's lifetime, still no person could take under that devise who was not both heir (in the above sense of the word *heir*) and male, according to the cases put by Lord *Coke* in *Co. Litt.* 25 b.; and the son of *John Chilcott*, in case he left one, or if otherwise, the son of his daughter, in case she had died and left one, would be the only person to take under the above description according to those authorities. Her son might have taken, being both heir and male, but according to those authorities, the estate would, I think, not have gone to her son, unless she were dead, he not answering that description of heir during her life, unless something can be collected from the will to show a contrary intent, and no such contrary intent, I think, can be sufficiently made to appear. No other *male heir, but an heir male of his body, could take under the above description, whether by descent or purchase, for the words "his male heir," to be a good description in a will, to take as a purchaser, are to be construed "heir male of his body," according to the doctrine laid down in *Co. Litt.* 27 a., *Hob.* 32., and Lord *Ossulston's* case, 11 Mod. 189. 3 Salk. 338: even if the subsequent words, "and if no male heir lawfully begotten by the said *John Chilcott*," had not shown that such must be the construction. If they are to be construed words of purchase, his (*J. C's*) son, if he had one, would, instead of the father, have taken as a purchaser under that description, if the father had died in the testator's lifetime, as that son would then have been the heir male of the body of his deceased father, and of that branch of the family, within the same strict sense of the above maxim ; and so might the daughter's son (if he, *J. C.*, left no son, and the daughter were dead) have taken by purchase, though not by descent under that description. So that no person could, I think, be held to take under the devise in favor of the first of these two branches of the family of the *Chilcotts*, unless he was, or until he came under the description of "male heir," within the above maxim "*nemo est hæres viventis.*"

This being in my opinion the effect of the devise in favor of the first of the above two branches of the *Chilcott* family, that no one but a male heir, according to the above strict sense of the expression "male heir," could take under it; and the words "male heir," (so far as they regard a male heir of that branch of the family,) *being used by the testator only in that same strict sense, let us see what the devise over in favor of the second of the above two branches of the *Chilcott* family is, and what should be its construction; and whether the devise in favor of the first branch, and the necessary effect of that devise can, and if so, how far it can, aid us in the collection of the testator's intention, or in the legal construction and effect that is to be given to this devise over in favor of the second branch. This devise over is, "and if no male heir lawfully begotten by the said *John Chilcott*," that is to say, "if no such male heir of the body of *John Chilcott*, the devisee, as the above maxim requires;" then "the above lands to fall to the first male heir of the branch of my uncle, *Richard Chilcott's* family." There were, at the time of making the will, *male heirs apparent* of the respective bodies of the four younger daughters of *Richard Chilcott*, and this was known to be so by the testator, and yet he does not (as he did as far as could be done in the devise in favor of the first of the above two branches of the family, viz. in the devise to his kinsman, *John Chilcott*, or his male heir) designate any person by name as the person he intended should take, as he might easily have done, if he intended the first male heir apparent, as such heir was then in *esse*, and the testator knew him. Nor does he say from which daughter of *Richard Chilcott* such male heir should be descended. But the heirs of *Richard Chilcott* were then all females, and

the testator did not intend the estate should fall to a female heir or heirs. I consider his intent to have been (and unless his intent can be shown to have been otherwise, the legal construction, I think, must be) that when and as soon as "there came to be a male heir, instead of a female one (which could only be by there arising a male heir within the maxim "*nemo est heres viventis*,"") the estate should go to and vest in such male heir, and the testator contemplated that there would, or at least might be such a male heir by the death, in the interim, of some at least of those female heirs, the daughters of *Richard Chilcott*, as appears by the condition or proviso that the male heir should pay to such of his (*Richard Chilcott's*) daughters, which should be then living, £100. each, at the time of taking possession of the aforesaid estates. The eldest daughter had no son, but had four daughters, the eldest of whom, after the testator's death, bore a son, the defendant, *Matthew Perratt*: but he is not even yet a male heir of that branch of the family, within the description of the maxim, his mother being still living; and instead of being the first, he is the last male heir of the family in the order of time of birth, even if an heir apparent is to be considered as coming within the devise. The person who first became such male heir, in that strict sense of the expression, was *Thomas Viney*, the son of *Metty Viney*, *Richard Chilcott's* fourth daughter, who, on the death of his mother, who died on the 24th of February, 1804, in the lifetime of *Eleanor White*, and, consequently, during the continuance of her preceding life estate, became the male heir of the body of his mother, and her sole heir, within that strict sense of the above maxim, and became also the first male heir of the body of *Richard Chilcott*, in order of time, according to that strict sense, though not his true and complete heir within the maxim of all the co-parceners making but one heir, but such a male heir, as under the "denomination of male heir in a will, to be capable of taking as a purchaser, according to Co. Litt. 25 b., though he claimed through a female; and though he could not on that account take an estate by descent, as *Richard Chilcott's* heir male. But he was, in the fullest and strictest sense of the words "male heir," the complete male heir of the body of his mother, and, consequently, the complete male heir, in that same full and strict sense, of the body of one of *Richard Chilcott's* family and co-heirs, though he did not fill the character of full male heir of the body of *Richard Chilcott* himself, within the maxim, that all the parceners together make but one heir. But the devise over is not "to the first male heir of *Richard Chilcott*," or "of the body of *Richard Chilcott*," but "of the branch of *Richard Chilcott's* family," which I apprehend must be taken to mean the first male heir of one of his daughters, whether the words of the will, "the first male heir of the branch of my uncle, *Richard Chilcott's* family" are to be construed as if the expression had been either "the first male heir of my uncle *Richard's* branch of the *Chilcott* family," or had been "the first male heir of a branch of *Richard Chilcott's* family;" and the devise must, I think, have one of those two constructions given to it; for in the state of that family, it cannot, I think, be supposed that the testator meant by his expression "first male heir," &c., a person or persons who should fill the character of heir male of the body of *Richard Chilcott*, or of the whole family, within the above maxim of all the parceners making but one heir, so as to substantiate the claim made in one of these ejectments, in behalf of a son of each of *Richard Chilcott's* daughters. Such a construction would, instead of "marking the word "first" as significant of a contrary intent, render that word totally inoperative, and give the same effect to the devise as if the words had been "heir male" or "heirs male" only; and the direction that the male heir should pay to such of the daughters of *Richard Chilcott* as should be then living, £100. each at the time of taking possession of the aforesaid estates, is inconsistent with such a construction. *Thomas Viney*, therefore, on the death of his mother, became, I think, entitled to the *Truckwell* estate in remainder; the estate then, in my opinion, becoming vested in him in remainder, as the per

son first answering the description of first male heir of the branch of the testator's uncle *Richard Chilcott's* family. And the estate in remainder having once vested in him, as such male heir, by purchase, it would not, by any subsequent coming in of any other heir male of an elder daughter of *Richard Chilcott*, or by any other event (according to the doctrine in *Counden v. Clarke*, Hob. 33, and *Driver v. Frank*, 3 M. & S. 25, 8 Taunt. 468,) be divested out of him. *Thomas Chilcott-Winter*, the eldest son of the second daughter of *Richard Chilcott*, was the first born male of *Richard Chilcott's* family, and it has been contended, that the estate vested in him, as answering the description of the "first male heir of the branch of that family," he being the first born *male heir apparent* of any part of *Richard Chilcott's* family. It has been contended, too, that *Matthew Perratt*, as the first male descendant of the eldest daughter of *Richard Chilcott*, is the person answering the description of first male heir ; not such in order of time, but as being a *descendant of the eldest daughter, and as such the nighest and most worthy. But neither of these persons can be deemed to have been entitled to the estate, unless a mere male heir apparent can be brought within the devise. The Master of the Rolls (Lord *Alvanley*,) in *Thellusson v. Woodford*, 4 Ves. jun. 329, in laying down the rule of construction applicable to all wills, after stating that every word is to be taken according to the natural and common import, adds : "And if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain the testator did not so intend." If it appeared therefore, plainly, by the will, to have been the testator's intention that an heir male apparent should take by the devise, I agree that the rules of law would not prevent the giving such a construction to the will as to carry that intent into effect ; but I see no such plain intention on the face of this will, but from the devise to the first branch of the family, and from the sense in which the words "male heir" are used in that devise, and in which they are also afterwards used in the description of the event on which the devise over is given, I should infer a contrary intent ; and the words "male heir" in the expression "first male heir," &c. in the devise over cannot, I think, by law receive a different construction from the sense in which the words "male heir" are used before, unless there be something clearly to show (not a conjecture merely) that the testator intended to use the expression there in a different sense from that in which it was used before, and so as to include an heir apparent ; and I cannot see any such *intent. On the contrary, having previously given the estate to such only of the first branch of the family as were strictly heirs, and used the expression "male heir" in that strict sense, so far as relates to them, it appears to me that it must be taken he meant the like as to the second branch of the family, as to whom he uses the like expression, except so far as a different intent can be made to appear. Independently of manifest or apparent intention, or where the context or necessary or plain import is not in favor of a contrary inference, the legal construction of a devise to the "heir male," "next heir male," or "first male heir," is, I apprehend, such as to exclude a mere heir apparent from taking under such a devise, on the maxim "*nemo est hæres viventis.*" This rule will apply to the construction of the devises to both branches of the *Chilcott* family ; and it will apply to the construction of the devise in question, the devise to the second branch, whether the devise to the first branch be brought in aid or not. This was the rule of the old law as laid down in *Archer's case*, 1 Co. 66, and in *Chaloner and Bowyer's case*, 2 Leon. 70, although in later cases instances are shown both in pleadings and penal statutes (in which I admit great strictness is required) that the word *heir* includes the heir apparent ; as in the statute of treason, "the eldest son and heir of the king," in indictments thereupon, and in the writ of *quare filium* and *hæredem rapuit* brought by the father. But in those cases the objects and context show manifestly that not only the heir apparent is intended, but that it can apply to the heir apparent alone. Independently of a

contrary intent or *inference arising from the subject matter or the context, which intent or inference must be shown, the rule of law, I apprehend, as to deeds, and even as to devises, continues to be the same as formerly. It is true that in *Goodright v. White*, 2 W. Bl. 1010, *De Grey*, C. J., states, that two hundred years ago the word *heir* might have been thought not sufficient to let in an heir apparent, because the description is not legally and technically true, but that within a century past a more liberal construction of the words of a testator has prevailed, and they have been generally taken in their popular sense, which he says is most likely to have been the testator's meaning. But the cases he cites show that, without something to afford a different inference, the construction according to the old rule of law must prevail. In *James v. Richardson*, T. Jon. 99. 2 Lev. 232. 1 Vent. 334. T. Raym. 330, the devise was of a remainder (after a life estate to *Robert*) "to the right heirs male of the body of *Robert now living*, and to such others, heirs male and female as *Robert* should have afterwards of his body." It was held that the words "now living" referred not to *Robert* only, though he was the last antecedent, but that they referred to all, and signified *heirs male now living*, consequently *Robert's son, George*, who was living at the time of making the will, though only heir apparent, was the person intended by the word "heir" especially as the will itself took notice that his father *Robert*, was then living. The latter circumstance alone, I think it appears clearly, would not have been thought sufficient, and that circumstance had been held insufficient but a few years before *by the whole Court of Common Pleas, (when Sir *Orlando Bridgman*, was Chief Justice thereof, in 1661,) in *Collingwood v. Pace*, [**80] Judgments in C. P. by Sir *O. Bridgman*, 410; and notwithstanding both the above circumstances to manifest the intent, in opposition to what would otherwise have been the construction of the words "heirs male," according to the rules of law, the matter was still so doubtful that that judgment was reversed in the Exchequer Chamber. But although that judgment of reversal was again reversed in Parliament, the matter was thought still so doubtful, that the same point was afterwards, in the reign of *W. & M.*, contested upon the same will, in the case of *Burchett v. Durdant*, 2 Vent. 311. Carth. 154, first in the Court of King's Bench, afterwards in error in the Exchequer Chamber, where it was thrice argued; and, finally, again in the House of Lords, though in each of those courts the same judgment was given as had before been given in the House of Lords, in the case of *James v. Richardson*. The next is the case of *Long v. Beaumont*, 1 P. W. 229. 1 Bro. P. C. 490, first in the Exchequer, afterwards in the Exchequer Chamber, and lastly in the House of Lords, cited and also confirmed in *Brown v. Barkham*, Prec. Ch. 467. This was a devise of a remainder "to the heirs male of the testator's aunt, *Elizabeth Long*, lawfully begotten; and for default of such issue, the remainder to testator's right heirs." There was a legacy to the aunt, and legacies to her three sons, taking notice therefore that they were all living, but giving also an annuity to the testator's heir. This was *held to be a sufficient *designatio* [**81] *personæ* to vest the estate in her eldest son in her life, and he was held entitled to take, and that the estate should not lapse, or go to the testator's heir. But the ground of that decision was, that the will, according to the testator's intent, could not otherwise be carried into effect. An annuity was given to the testator's heir, therefore, it was held, the intent was, she should not have the whole estate. The limitation over to the testator's right heirs was, expressly "in failure of *issue* male of his aunt *E. L.*" The word "begotten," too, though this has been held otherwise, was held to be equivalent to the words "now living," in *Burchett v. Durdant*. The intent, therefore, was considered to be plain, that the *apparent heir male* of the body of his aunt should take before *his own heir general*, who was not to take until the extinction of all the issue male of his aunt. It was held that it would be hard, therefore, to expound the will in that sense which was the strictest and most rigorous,

and would *destroy great part of the will*, at the same time that by law it might have another sense, which would support the whole will and intent of the party, and that his intent should take place if, by any possibility, consistent with the rules of law. To this, and to these reasons, I most fully agree ; but notwithstanding these strong reasons, this judgment was reversed by the two Chief Justices in the Exchequer Chamber, though it was finally affirmed in the House of Lords. The rule of law "*nemo est hæres viventis*," was afterwards urged in the case of a devise, in *Brown v. Barkham*, Prec. Ch. 461, in Chancery, [82] where the rule, and the application of it in *Archer's* case, by Lord *Coke, seems not to have been disputed, where it does not interfere with the intent of the testator ; but that rule was held inapplicable to the case of *Brown v. Barkham*, because there the ancestor was actually dead at the time the devise took place.

The next case, I believe, is the case I mentioned before, of *Goodright v. White*, where there was an immediate devise, subject to certain terms of years, to testator's son *Richard*, his heirs male, and to the heirs of his daughter *Margaret White*, where it was held that under the latter words the heir apparent of *Margaret*, should take during her life ; but that was determined upon the particular circumstances and provisions of the will, showing that the testator by those words meant her heir apparent, and that his intent was that a present interest should vest in her heir apparent during her life.

I have not found, nor am I aware of any other cases bearing upon this point since Lord Chief Justice *De Grey's* doctrine in *Goodright v. White*, except one. This is a case of *Buck v. Nurton*, 1 B. & P. 57, in which the rule of construction is laid down by *Eyre*, C. J., upon a question, what shall pass under the devise of "a messuage, with the appurtenances," in which *Heath*, and *Rooke*, Js., concurred that the word "appurtenances" was to be taken in its technical sense. The Lord Chief Justice said : "Lands will not pass under the word appurtenances, taken in its strict technical sense. They will pass, if it appears that a larger sense was intended to be given to it." He further said : "Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case *in *Hob.*, there be *demonstration plain* of an intent to use them in a different sense." That marginal note in *Hob.* is in page 33. It is : "No man shall show me a case in law where by *purchase by devise to an heir*, any may take that is not heir indeed, without *demonstration plain*." That note indeed was long before stated by *Bridgman*, C. J., in *Collingwood v. Pace*, Judgments of Sir O. *Bridgman*, 413, to be a good marginal note, which he then states, and says, "that case is put of the heir of the devisor, but the reason is the same where the same expression is used of the heir of another." There is indeed a later case, *Poole v. Poole*, 3 B. & P. 620, in which the principle of law applicable to the construction of technical words in a will, laid down in *Goodright v. Pullyn*, 2 Ld. Raym 1437, is cited by Lord *Alvanley*, in delivering the judgment of the Court of C. P., "that the operation of the plain and clear words of a settled rule of law should not be defeated or broken into by uncertain or doubtful words." The words in Ld. Raym. are : "They all held that the operation of plain and clear words, and a settled rule of law, should not be defeated or broken into by uncertain or doubtful words." The cases, therefore, since *Archer's* case, and the case in *Leon.*, do not appear to me to break in upon the rule there laid down, according to the maxim *nemo est hæres viventis*, except where there appears to have been a different intent of the testator, or where the adherence to that rule would tend to defeat or destroy the will, or prevent its being carried into effect according to the intent. That appearing to me not to be the case upon the will now in question, but, *a fortiori*, [84] as the *construction I put upon the will appears to me to give full effect to the will according to what I conceive to have been the intent, I think that the estate must be deemed to have vested in *Thomas Viney*, as the person le-

gally answering the description of the first male heir of the branch of *R. Chilcott's* family; and that there is no such uncertainty in the will, construing it as I conceive the rules of law to require, as to let the estate pass by descent to the testator's heir at law. The word "first" in the words "first male heir," means, I think, the person who should first become male heir in order of time, there being nothing to show that the testator intended to use it in a different sense. And as the law gives a *certain* and technical meaning to an expression such as "male heir," unless where a contrary intent appears, the law cannot deem that expression uncertain, so as to pass the estate by descent to the testator's heir at law. If such a contrary intent does not appear, the technical meaning must prevail; if it does appear, the will must operate according to that intent. The heir at law of the testator, therefore, cannot recover, I think, on the ground of a supposed uncertainty; and as no intent contrary to the technical meaning sufficiently appears to me in this will, I think that *Catherine Viney*, the widow and devisee of *Thomas Viney*, and standing in his place, is entitled to recover in the ejectment in which she is a lessor of the plaintiff, and that the defendant, by reason of his possession, is entitled to the judgment of the court in the other ejectments, as the claims against him in those other actions cannot, I think be supported.

BAYLEY, J. All these cases in which special verdicts are found, depend upon the will of *Emanuel Chilcott*, of **March*, 1786. The first two [85] ejectments are brought by persons claiming under that will, on the ground that that will, according to the construction to be put upon it, entitles them, or some of them, to the property in question; the other by the heir at law of the testator, and a mortgagee under a prior heir, on the ground that none of the other claimants have any right under the will, but that the devise under which they claim is, upon the facts of the case void for uncertainty. The will was made the 16th of *March*, 1786, and at that time the testator had a cousin *John*, the son of his elder uncle *John*, and five female cousins, daughters of his younger uncle *Richard*. His uncles, *John* and *Richard*, were both dead, and the testator knew it. These female cousins were *Mary*, defendant's maternal grandmother; *Joan*, the mother of *Thomas Chilcott Winter* and of *James Winter*; *Sarah*, the mother of *John Parsons*; *Betty*, the paternal grandmother of *Thomas Viney*; and *Agnes*, the mother of *Thomas Greenslade*. *Mary* never had a son, but she had four daughters in *esse* at the time the will was made, and she was then above forty-six years of age. The sons of the other nieces were all born before the testator made his will, and testator knew them. *Thomas Chilcott Winter* was the first born, and his mother was the eldest niece that had a son. By his will the testator devised a moiety of the premises in question, called the *Truckwell* estate, to *Eleanor White* for life, and the other moiety to his widow for life, and gave her power to give what she thought fit to her sisters *Eleanor* and *Ann White* for life; and then the will proceeded as follows, "And after the above lives being expired, viz. *Elizabeth Chilcott*, *Eleanor White*:nd *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell* estate to *come to *John Chilcott*, my [86] kinsman living in *London*, or his male heir, if any, free land not to be sold or mortgaged, but to remain in the *Chilcott's* family for land of inheritance; with two cottages, garden and orchard, in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Welcombe* free land. And if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hancrick* farm, yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estate." The testator died in 1787. *Ann White* in 1791. *Elizabeth Chilcott* devised her moiety to *Eleanor* and died in 1792. *Eleanor White* did not die till July 1820. *John Chilcott*, the cousin

was then dead without issue male, so that if any claim could be made under the testator's will, it could only be under that part which directed that the lands should fall to the *first male heir of the branch* of the uncle *R. Chilcott's* family ; and to recover under the will, the claimant must make out that within the meaning of the will he was such first male heir. When *Eleanor White* died, *Mary*, the defendant's grandmother, was dead. *Sarah* and *Betty* were dead ; *Joan* and *Agnes* were living. *Mary*, defendant's grandmother, died before *Sarah* or *Betty*, and *Betty* died before *Sarah*, and under these circumstances defendant claims to be first heir male, because he is the male descendant of the eldest cousin. *Isaac Winter* claims as heir of his brother *Thomas Chilcott Winter*, because *T. C. Winter* was the son of the eldest of *Richard's* daughters who had a son, and because he was born *before any of the other daughters had a son. *Thomas* and *Catherine Viney* claim in right of *Thomas Viney*, *Betty's* son ; because of the sons of *Richard's* daughters he first filled the character of heir, inasmuch as his mother died before any of the other daughters that had a son ; and *John Parsons* and *Thomas Greenslade* insist that all the sons or male descendants of *Richard's* daughters make but one heir, and therefore, they are each entitled to a share of the estate. The heir at law says, that if the devise admits so many claimants, and leaves it in doubt which of them is entitled, the devise is void for uncertainty ; and unless the court is enabled to say with sufficient legal certainty who is entitled, the heir must prevail. Under a limitation, by way of remainder, in a will, to the family of *J. S.*, the word *family* is considered sufficiently certain, and the heir at law of *J. S.* is entitled, *Chapman's case*, *Dyer*, 333. b. *Doe v. Smith*, 5 M. & S. 126, *Wright v. Atkyns*, 17 Ves. 255, so that had the limitation here been to the family of *Richard Chilcott*, each of his daughters would have taken one-fifth. But as the limitation is to the first male heir of that branch, the question is, whether the law can give any and what definite meaning to the words, " *first male heir*. " In the first place, they seem to contemplate an individual person, so as to exclude the construction which would let in a male descendant of each daughter as one entire heir ; and if so, we are to see whether the law has any rules which will enable us to say, who is that individual. Amongst sisters, though they make one entire heir, where it is necessary to give any one a preference, the law gives it to the eldest. Thus, if an advowson belongs to parceners, *and they do not agree whom to present, the right to present the first turn is in the eldest, and her representatives. The right to present the next turn in the second, and so on, Co. Litt. 166, b., 186, b., *Harris v. Nichols*, Cro. Eliz. 19. And if parceners agree that a stranger shall divide the estate into shares, but do not fix in what order they shall choose, they shall choose according to seniority, Co. Litt. 166, b. But this privilege does not pass to the representative of each, because it is considered as arising from the tacit or implied consent of the parties, and is not, as in the case of presentations to advowsons, given by law. But these instances show, that where it is necessary to distinguish between persons in equal degree, as sisters, the law makes the distinction in favor of the eldest, and there are authorities which bring that rule very near the present case. In Co. Litt. 25 b. Lord *Coke* puts this very case, " If lands be devised to one for life, remainder to the *next* heir male of *B.* in tail, and *B.* has two daughters, each of whom has a son, and *B.* and the daughters die, some say this is void for the uncertainty, some that the eldest shall take because worthiest, others that both shall take because they make but one heir." Lord *Coke* elsewhere lays it down as a rule applicable to *Littleton*, that where he sets down differing opinions, he ever sets down his own last ; and if we apply this rule to him, we must take it as his opinion, that the better opinion was that both should take ; and that the next opinion was, that the eldest should take. Whether he means by the eldest the son of the elder sister, or such son as either of them may first have, he does not say ; but I should think the law which regards

certainty and *order, would give the preference to the elder sister's son, though not born till after a son of the younger. The question then would be, whether in this case all the males should take jointly, or whether the estate should be confined to one, and it seems to me, the words "the first male heir," will so confine it. In *Perriman v. Pierce*, Palm. 11, 303, the words "*proximo consanguinitatis, et sanguinis*," were held to give the estate to the elder of several daughters, to the exclusion of the others, partly indeed because a life estate in the property was given to some of the others, and partly because the word *proximo* applied to an individual, not to a body or class. According to Lord *Hale's* MSS. Co. Litt. 10, b. n. 2, that case was as follows, "testator had a son and four daughters, and devised to the son in tail, remainder to the second and third daughters for life, remainder *proximo consanguinitatis et sanguinis* of the testator, and Pasch. 17 Jac. by two judges against one, the remainder vested in all the daughters, when the son died without issue, but afterwards M. 20 Jac. *per totam curiam*, it vests in the eldest daughter only, because *proximo*; and, secondly, because an express estate was limited to the second and third daughters. This case is also stated 2 Roll. Rep. 256. Bridgem. 14. Old Bendl. 102, 106, but those reporters give the arguments of counsel only, not the judgment, and they probably refer to the case as it appeared before the court in M. 20 Jac. not as it was in 17 Jac.; for according to Palm. 11, 303, there were two cases, one 17 Jac. and another 20 Jac. and his statement of the facts, as they appeared 17 Jac. agrees nearly with Lord *Hale's* MSS.; but his statement 20 Jac. materially differs, though it agrees in substance with the other reports. The report in Palm. 11, (17 Jac.) states that the testator had three daughters, that he devised to the two younger for their lives, remainder *proximo consanguinitatis et sanguinis*, and that the issues of the two younger daughters brought trespass against the elder. *Montague*, J., thought the elder daughter entitled to the whole, *Dodderidge* and *Houghton*, Js., that she was entitled to a third only; but whether she was entitled to the whole or a third, the action was clearly barred, because one joint tenant cannot bring trespass against another. The name of this case was *Perriman v. Biford*. In Palm. 303, *Perriman v. Pierce* is reported. It states that the testator had three wives and eight daughters and a son, that he devised to the younger daughter for life, remainder to the son in tail, remainder to the two daughters by the second wife for life, remainder *proximo consanguinitatis de sanguine* of the devisor; that the eldest daughter had two sons, *John* and *William*, that *John* died, leaving the lessor of the plaintiff his son and heir; that the two daughters of the second wife, the devisees for life, left issue, but the son and the other daughters were dead without issue; and the questions were, whether the issues of the three daughters should take by the words "*proximo consanguinitatis, &c.*" or the issue of the elder only, and if the latter, whether the son of *John* or *William*, and after divers motions it was resolved by *Dodderidge*, *Houghton*, and *Chamberlain*, that the issue of the eldest daughter alone should take, and that *John's* son should take, not *William's*, but upon the first of these points they did not agree in their reasons. *Houghton* said, if a man had three daughters, and devised to the , *jungest* in tail, remainder *proximo consanguinitatis*, the eldest shall take, for though all are in equal proximity of blood, the *singular number shows only one is to take. To this *Chamberlain* agreed, and he said it had been so held in *Levitt's* case (which I have not found,) and in *Chapman's* case, which is Dy. 333, the case I have already mentioned; and he said a difference had been taken between *propinquioribus* and *proximo*, which *Dodderidge* denied, and *Houghton* said, had the eldest daughter in the case he put been attaint, the king should have had the whole, which *Dodderidge* denied. *Dodderidge* thought the elder daughter would only take equally with such of the other daughters as were not excluded, but he thought the two daughters to whom life estates were given were excluded, and then

there was no one to take but the issue of the elder daughter. *Chamberlain* agreed in this opinion, *Houghton* not, because the life estates of the mothers furnished no ground for withholding the inheritance from their issue; but for these different reasons they agreed that the plaintiff should have judgment. It being pointed out, however, that the special verdict did not show that *John's* father was the elder brother, so as to show that *John* was the eldest sister's heir, a *venire de novo* was awarded. These cases, therefore, of *Perriman v. Bisfield* and *Perriman v. Pierce*, show that in the opinions of *Montagu* and *Camberlayne*, and in the corrected opinion of *Houghton*, a remainder *proximo consanguinitatis* of a testator, who had several daughters, would not vest in all, according to the latter opinion mentioned by Lord Coke, but in one only; and if *proximus* would have that effect there, it seems to me the *first* would have the same effect here; and then the only remaining question is, whether the seniority of the sisters is not to be guide in deciding who upon the construction of this will is *first male heir*, and it seems to me it is. The elder [92] sister is, according to *Perriman v. Bisfield*, nearest in consanguinity, and wherever the law is compelled to make a distinction between them, she ranks first, and the person who is male heir through her, is as it seems to me, entitled to the appellation of first heir. To apply the word *first* to the son of such sister as first has a son, or to the son of such sister as shall first die, which are the other rules insisted upon in the argument of these cases, is to decide upon chance and accident, not upon principle; and the language of this clause considered with reference to the state of *Richard Chilcott's* family at the time this will was made, falls in with the notion, that by the words *the first*, the testator was contemplating his nieces according to their seniority, and meant that a male descendant of the eldest should take in preference to a male descendant of the second, and so on. Each of the four younger nieces had a son at the time the will was made, and testator, who knew their ages, could without difficulty have pitched upon each by name, so as to have made every one of them in such order as he might have thought fit, the objects of express devise. The eldest alone had no son, and though there was little probability she should, for she was above forty-six years old, testator might wish to take the chance, and with a view to the chance, might devise as he has done, to the first male heir. But without relying upon what might be this testator's motives, I am of opinion, that upon a limitation to the first male heir of several sisters, the families of the different sisters are to be resorted to, according to their seniority; and that of several males in equal degree, he is to be deemed first male heir who is found in the elder sister's line. Thus in this case, had *Mary*, the elder sister, had a son, though he had been younger than the sons [93] of each of the other daughters, I should have thought him first male heir; so if each of the other four daughters of *Richard Chilcott* had had daughters only, though each of such grandchildren had had a son born before *Matthew Perratt*, I should have thought *Matthew Perratt* entitled as being in that case first male heir. But as *Matthew Perratt* is the son of a daughter of *Richard Chilcott's* eldest daughter, not the son of a son, I think he cannot be said to fill the character of first male heir of *Richard Chilcott's* branch, but that that character belongs to *Isaac*, the son of the next eldest sister. But before we can say that *Isaac Winter* is entitled, it is necessary to consider whether, as his mother was living when *Eleanor White*, the last tenant for life died, he could be considered as first male heir of the branch of *Richard Chilcott's* family during her life; and this will depend upon two legal rules, the one, that to entitle a man to take as heir male by purchase, he must be heir as well as male, (and in this case till his mother's death, *Isaac Winter* was not heir;) the other, *quod nemo est haeres viventis*; and if either of these rules is to prevail in this case, it will bar *Isaac Winter's* claim. The first rule is certainly not universal; it has many exceptions, and in most of the instances in which it has prevailed, the very heir has not been (as here) *lineal* ancestor of

the person who claims as heir male; but the question has most frequently arisen between *collaterals*; the person claiming as heir male has been *presumptive* heir male only, not heir male *apparent*, so that another person might afterwards be born who would answer the whole description of heir and male, and it never has prevailed where it is evident upon the instrument containing the limitation, that the presumptive heir male was the person intended. Indeed, where the limitation *is so far specific as to show clearly that the first male descendant in a given line is first intended, the second next, and so [*94] on, and the ancestor is to take nothing, it should seem to be immaterial whether the ancestor continues in *esse* or not; and the male descendant should be allowed to take, whether his ancestor is dead, so as to make him *perfect heir*, or living, so as to make him *heir apparent* only. In the leading case of *Counoden v. Clark*, Hob. 29; Jenk. 294, Hil. 10, Jac. 1, where the devise was to the right heirs males of the posterity of testator and of his name, the claim was by testator's brother, against the grand-daughters of the testator; and besides the objection that he was not heir male of the body of the devisor, which according to Lord *Ossulston's* case, 3 Salk. 336; 11 Mod: 189; Palm. 50, is essential, he was heir male *presumptive* only, for if either of the grand-daughters had had a son, that son would have been right heir male. So in *Ashinhurst's* case, Hob. 34, the claim seems to have been by a collateral heir of the devisor, against the daughters of the devisor, and a son of any of these daughters would have been right heir male. The case put in argument in 1 Co. 103 b., "that upon a devise to the heirs male of the body of J. S., if J. S. has two sons, and the elder dies in the lifetime of J. S., leaving a daughter, and then J. S. dies, the younger son shall not have the land," is open to the same observation, for the younger son is heir male *presumptive* only; if the granddaughter, the elder son's daughter, were to have a son, he would be heir male, he would have both the qualifications of being heir and male. In *Anon.* Palm. 60. M. 17 Jac., testator devised to his executors till they could raise 1000*l.*, and then *willed that his heirs male should have the land; he left a [*95] brother and a daughter, and when the 1000*l.* was raised, the brother claimed the land, but his claim was disallowed, because he was not heir as well as male; but there had the daughter had a son, that son would have been heir male. So in the case put in Co. Litt. 24 b. of a remainder to the heirs female, of a man who has issue a son and daughter, the daughter cannot take as heir female, for if the son were to have a daughter, she would be heir female of the body of the father. In *Dawes v. Ferrars*, 2 P. Wms. 1; Prec. in Ch. 589, the devise was to the devisor's right heirs male for ever, his brother's son filed a bill against his grand-daughter, for the title deeds and to stay waste; and a demurrer to the bill was allowed, because he was not heir male of the body of the testator, and because though male he was not heir, for if the granddaughter were to have a son, that son would be heir male. A bill of review was afterwards brought by the heirs at law of the brother, against the granddaughter's assignee, and on case to B. R. they certified it as their opinion, that the plaintiffs were not entitled to the estate, because they conceived the testator's brother could not take by the description of right heir male of the testator, *Gwyn v. Hooke*, 1st February 1743, 8 Vin. Abr. 317, tit. Devise, (W b.) In Lord *Ossulston's* case, the claimant was testator's brother, and he claimed against testator's daughter; and her son, were she to have any, would have been right heir male. In all these instances the *real heir* has been a *collateral* of the person claiming as heir male, not his *lineal ancestor*; and in each of them a person might thereafter have come in *esse*, *who would have [*96] answered the description of "heir male," by being both heir and male. I will now refer to cases where the rule has been prevented from applying, because it was apparent, upon the face of the instrument in which the limitation was contained, that it was the intention that the special heir male, the heir male *presumptive*, though not heir general, should take. In *Counoden v. Clark*

Lord *Hobart* says, it will go to the *very heir*, because *no other sense appears* to the court, but he admits, that if a contrary intent did appear, it would prevail. In Vent. 381, Lord *Hale* mentions this case : "A man having three daughters gave them 2000*l.*, and devised his land to his heir male," and provided, that if his daughters "troubled his heir," the gift to them of the 2000*l.* should be void. He had no son, and his nephew was the heir male presumptive ; and it was resolved that his nephew should have the land, though he was not strictly heir, as well as male, because the testator evidently pointed to his heir male presumptive ; and his daughter's sons, who would have been his regular heirs male, were out of his intention. In *Brown v. Barkham*, Prec. in Ch. 442, 460 ; Co. Litt. 24 b. n. 3, (which was the case of a trust,) a conveyance was decreed to the heir male presumptive, the special heir male, because that appeared the intention ; and in *Wills v. Palmer*, 5 Burr. 2615, the special heir male, though not heir general, was held entitled upon the same ground. Inasmuch, therefore, as in this case the *very heir* is not collateral to, but the lineal ancestor of the claimant, inasmuch as the claimant is not heir male presumptive, but heir male apparent, and no preferable heir can ever come into esse, and inasmuch as the intention is, as it seems to *me, apparent upon [97] this devise, that the first and nearest male descendant of the eldest sister, if there should be any in time, should take, I am of opinion that the first of the rules I have mentioned will not prevent the claim of *Isaac Winter*. As to the second rule, "*quod nemo est hæres viventis*," if I am right in supposing, that by the *first male heir* in this case, is to be intended the first, according to the seniority of the several daughters of *Richard Chilcott*, there are several authorities which induce me to think it immaterial whether the mother is dead, so as to make the claimant perfect heir, or living, so as to make him heir apparent only. And if the rule "*quod nemo est hæres viventis*" were applicable here, the devise in favor of *Richard Chilcott's* branch would altogether have failed, had the testator's widow made no devise in favor of her sister *Eleanor*, so as to postpone the time when *Richard Chilcott's* branch was to take ; because, at her death, all *Richard Chilcott's* daughters were living ; or had *Eleanor* died before any of those daughters, the same consequence would have followed. In *Farrington v. Derel*, 9 H. 6, 23 ; 11 H. 6, 12, the testator devised to his widow for life, remainder to his son *John* in tail male, remainder to his own next heir male in tail male ; testator died, *John* died without issue, the widow died, and the daughter of testator's daughter, being his heir, entered and enfeoffed plaintiff ; the grand-daughter afterwards had a son, who entered as testator's next heir male, and enfeoffed defendant ; the grand-daughter was still living. A special verdict was found, and it was twice before the court and much debated ; and *Newton* said, the first time it was before the [98] court, in 9 H. 6., *that the great grandson was heir male by force of the gift, though his mother was in full life ; and though this was denied by *Paston*, in 11 H. 6, it was re-asserted by *Cotton* ; and the chief point discussed was, whether the great grandson was not born too late to make a valid claim, his birth not occurring until after the death of the tenant for life ; and this, according to Hob. 33, and Bro. Abr. Dev. 5, was the great question in the case. No decision is reported, but I think it may be taken for granted, that the mother's being in full life was not considered a clear objection to her son's claim ; for had it been so the case could hardly have undergone the discussion it did. In *James v. Richardson*, T. Raym. 330 ; Pollex. 457 ; T. Jon. 99 ; 1 Vent. 334, and in *Burchett v. Durdant*, 2 Vent. 311, both of which cases arose upon the same will, a devise in remainder to the heirs male of the body of *R. D.* now living, and to such other heirs male or female as he shall hereafter have of his body, was held to vest in *R. D.*'s eldest son, in the lifetime of *R. D.*, so that that son must have been considered as answering the description of the *heir male* of his father, whilst his father was living ; and had that son died without issue in his father's lifetime, leaving a brother, no doubt it

must have been held, as a consequence of that decision, that the estate would immediately have vested in that brother, notwithstanding his father was alive. The first of these cases was decided in the House of Lords, and the second was afterwards decided in the B. R. and the Exchequer Chamber. I am aware that great stress was laid in those cases, upon the words *now living*, on the ground that those words imported that the testator considered them as filling the character of heirs within *the meaning of his will, though their father was living; but I can see no reason why the word *heir*, upon this will, may not be considered as including the heir apparent, notwithstanding his mother is alive; it being clear she was not to take. And this testator knew that each of the daughters of *Richard Chilcott* was living when he made his will, as the testator did in *James v. Richardson*, and *Burchett v. Durdant. Darbison v. Beaumont*, Fort. 18; 1 P. Wms. 229; 1 Bro. P. C. 489, is another authority upon the same point. In that case there was a devise in remainder to the "heirs male of the body of my aunt, Mrs. *Elizabeth Long*, wife of *Richard Long*, clerk, lawfully begotten, and for default of such issue to testator's right heirs," the will gave Mrs. *Long* a legacy, and named her three sons; so that testator considered her living, and knew that she had three sons. The eldest of these sons brought ejectment under this devise against testator's heir; and, *Elizabeth Long* being still alive, the defence was, that her son could not claim as heir male of her body; but, after great debate and consideration, the Exchequer (except *Bury*, B.) held that he might; and though their judgment was reversed by the two Chief Justices, it was affirmed unanimously in dom. proc. The printed reasons urged in the House of Lords were, that in this will the words *heirs male of the body of E. L.*, designated who the persons intended were; and that an heir apparent was sufficient heir to answer the description in this case. This point was again under consideration in *Goodright v. White*, 2 B. Bl. 1010. A remainder was there limited to the heirs male of testator's son, and to the heirs of one of his daughters. *The son and daughter were both noticed by the will as living; and the daughter being living when the particular estate ceased, the question was, whether her son could take in her lifetime, under the description of her heir; and the Court of C. P. decided that he might. *De Grey*, C. J., noticed, that two hundred years ago it might have been thought not sufficient, because the description is not legally and technically true; but within a century a more liberal construction of a testator's words has prevailed, and they have been generally taken in their popular sense, which is most likely to have been his meaning; and he refers to *James v. Richardson*, *Long v. Beaumont*, and *Brown v. Barkham*. Upon these authorities, inasmuch as it appears to me, upon the face of this will, that the testator meant the male descendants of *Richard Chilcott* to take, according to their proximity to *Richard Chilcott*, and the seniority of their lines, without reference to the question whether their mothers were living or not, and that the life or death of the mothers was foreign to the apparent intention of the testator, I am of opinion that *Isaac Winter* is entitled to recover, as being the son of the eldest of his daughters who had a son, and as, therefore, filling the character of his first male heir; and if I am right in this, there ought to be judgment for the lessor of the plaintiff, in that ejectment which is brought on his demise, and judgment for the defendant in the other ejectments.

Judgment for the lessor of the plaintiff on the demise of *Catherine Viney*.
For the defendant in the other ejectments.

*Sir C. HAGGERSTON, Bart., v. HANBURY, et al.

Sir C. H., tenant in tail, in possession, of certain hereditaments and premises, subject to an outstanding term, by indenture, in order to bar the estate tail, and all remainders expectant thereupon, and to limit the same to himself in fee, and in consideration of 10*s.*, granted, bargained, and sold the same hereditaments and premises, and the reversion, &c., thereof to *A.* and *B.*, their heirs and assigns, to hold to them, *A.* and *B.*, to the use of *A.*, that he might become tenant of the freehold of the said premises, in order to suffer a recovery. The deed was afterwards duly enrolled as a bargain and sale : Held, that it operated as a grant of the reversion to *A.* and *B.*, and that *A.* became solely seised of the premises, so as to be a good tenant of the freehold of the entirety.

THE following case was sent by the Master of the Rolls for the opinion of this court. By indenture dated 10th of *October*, 1721, the hereditaments and premises in question, in this cause were demised to certain persons, their executors, administrators, and assigns, for the term of three hundred years, from the date of the said indenture, upon certain trusts. In *April*, 1780, Sir *C. Haggerston*, was tenant in tail male in possession of all the said hereditaments and premises, subject to the said term of three hundred years, which term of three hundred years was then standing in the said trustees. By indenture dated 14th of *April*, 1780, duly made and executed by and between the said Sir *C. Haggerston*, of the first part, *J. Leteney*, and *S. Burke*, of the second part, and *J. Silvertop*, of the third part, it was witnessed that for barring, docking, and extinguishing all estates tail, and all reversions and remainders thereupon expectant, of, and in the manors and hereditaments therein mentioned, and for limiting the same unto and to the use of the said Sir *C. Haggerston*, his heirs and assigns forever ; and in consideration of 10*s.* to Sir *C. Haggerston*, paid by *J. Leteney*, and *S. Burke*, he, the said Sir *C. Haggerston*, did grant, bargain, and sell unto *J. Leteney*, and *S. Burke*, and to their heirs and assigns, the said hereditaments and premises, and the reversion and reversions, remainder •102] and *remainders yearly, and other rents, issues, and profits, and all the estate, right, title, interest, use, trust, property, claim, and demand at law and in equity, of the said Sir *C. Haggerston*, of, in, and to the said hereditaments and premises, and every part and parcel thereof, with the appurtenances. To hold the same unto *J. Leteney*, and *S. Burke*, their heirs and assigns, to the use of *J. Leteney*, his heirs and assigns forever. To the intent that he might become perfect tenant of the freehold of the said premises, in order to suffer a common recovery thereof, and that the said recovery should enure to the only proper use and behoof of Sir *C. Haggerston*, his heirs and assigns forever. In *Easter* term, 20 *G. 3.*, a recovery of the premises in question was suffered, wherein *J. Silvertop*, was defendant, *J. Leteney*, tenant, and Sir *C. Haggerston*, vouchee. The said indenture of the 14th of *April*, 1780, was, after the return of the writ of *seisin*, duly enrolled as a bargain and sale within the statute of the 27 *H. 8.*, c. 16. The question for the opinion of the court was, whether *J. Leteney*, became solely seised of the said hereditaments and premises comprised in the said indenture of the 14th of *April*, 1780, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the said hereditaments and premises.

Tinney, for the plaintiff. By the deed of *April* 14th, 1780, *Leteney*, became solely seised of the premises therein mentioned. Sir *C. Haggerston*, thereby granted, bargained, and sold unto *Leteney* and *Burke*, the hereditaments and premises, and the reversion, &c. Now those words are sufficient, and are apt words to pass to the reversion by way of grant, and the intent that they should •103] "so operate is plain, for the use is limited to *Leteney*, alone to make him perfect tenant to the *præcipe*, which could not be if the deed were to operate as a bargain and sale. It is a very old maxim that Judges should be astute in discovering and giving effect to the intent of parties, Earl of *Claw-*

rickard's case, Hob. 277. According to a great variety of decisions, that maxim appears to have been constantly acted upon for a long series of years. *Crossing v. Scudamore*, 1 Mod. 175. 2 Lev. 9, *Osman v. Sheafe*, 3 Lev. 370, *Roe v. Tranmer*, 2 Wils. 75. Willes, 682, *Shove v. Pincke*, 5 T. R. 124, are all instances where deeds incapable of operating strictly according to the words were so construed as to be made operative according to the intent of the parties. There is not, however, any case completely in point as an authority for the present; for in each of those cases the deed would have been wholly void if taken according to the letter. The mere introduction of the words "bargain and sale" is not sufficient to make the deed operate as a conveyance taking effect by the statute of uses, and not as a common law grant of the reversion. If it were so, the ordinary conveyance to uses by lease and release would be rendered bad, for in almost every release, the words "bargain and sale" are introduced. No one will contend that the enrolment of such a deed would vest the legal estate in the releasee to uses. There are two principles of construction applicable to this case, which make it clear that the deed operated as a grant of the reversion. First, that where a deed may operate to pass land either by the common law or by the statute, it shall be held to operate at common law, *Co. Litt.* 49 b. A rule which *has not been over-turned, though it is not now allowed to prevail against the apparent intent of the parties, *Barker v. Keat*, 2 Mod. 250, *Roe v. Tranmer*. Secondly, where a deed in one way passes land by itself, without any further act, it shall be held so to operate, rather than in any other mode to the perfection of which some further act is necessary, *Barker v. Keat*, 2 Mod. 250, *Lutwich v. Mitton*, Cro. Jac. 804. And in an anonymous case, 3 Leon. pl. 39, p. 18., it was expressly held that a deed must operate in that way in which it first had full effect. Now if the deed in question be held to operate as a grant of the reversion, the estate passes immediately. If it be a bargain and sale, enrolment is necessary to make it valid. These rules, in addition to the apparent intent of the parties, make it incumbent on the court to decide that the deed was in effect a grant of the reversion; and then the use would be executed in *Letting* alone, so as to make him a good tenant to the practice of the entirety of the lands. The doctrine of election cannot affect this case, inasmuch as the grantees were not to take any beneficial interest.

Cresswell, contra. The words of the deed in question are properly those of a bargain and sale; and that the parties so considered them is manifest from their having enrolled the deed as a bargain and sale. At that time, therefore, they must have intended that it should so operate; and it cannot now be held to have a different operation, although as a bargain and sale it would not carry into effect the whole object of the parties to the deed. *Tyrrell's case*, Dyer, 156, a, is a strong authority to this point. *Jane Tyrrell*, widow, for the sum of 400*l.* paid *by *G. Tyrrell*, her son and heir apparent by indenture enrolled in Chancery, bargained, sold, gave, granted, covenanted, and concluded to *G. T.* all her manors, lands, &c., to have and to hold the said, &c., to the said *G. T.* and his heirs forever, to the use of the said *Jane* for life, &c. And it was held that the limitation of uses upon the *habendum* was void, because an use cannot be declared upon an use. Now it is clear that the deed might have operated as a covenant to stand seised, and then the limitation of uses would have been good; nor can it be doubted that the parties (at all events the grantor) intended that the use should be well limited to herself for life. But as it appeared to have been the intention that the deed should take effect as a bargain and sale, and it had accordingly been enrolled, it was held so to operate, although the uses were thereby defeated. There are no such principles of law as those stated on the other side, and which are supposed to govern this case. The passage referred to in *Co. Litt.* 49, b. is this: "When a man hath two ways to pass lands, and both of the ways be by the common law, and he intendeth to pass them by one of the ways, yet, ut res

magis valeat, it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and settling it by the statute, there, in many cases, it is otherwise." Lord Coke, does not there mean to say that a conveyance at common law is to be preferred to one taking effect by the statute, but that a common law conveyance cannot, *ut res valeat*, operate as a conveyance to uses, or a conveyance intended to have effect under the statute, operate at common law. And even this distinction is now at an end, *Roe v. Tramner*.

[*106*] The next principle of law which is "supposed to be favorable to the present plaintiff is, that where a deed is capable of a two-fold operation, but according to one construction takes effect immediately, without the performance of any further act, it shall be so construed, rather than in a mode which renders such further act necessary to its validity; and *Barker v. Keat*, and *Lutwick v. Milton*, and Anon. 3 Leon. were cited as instances. Now in each of those cases the deed was held to operate as a bargain and sale, that being a conveyance by which the land passed immediately; and it is clear from other authorities that a bargain and sale takes effect from the time of the execution, although it may afterwards be rendered void by a neglect to enrol it within the time prescribed by the 37 H. 8, c. 16. The whole question, therefore, turns upon the application of the rule of law given in Co. Litt. 49, b., and *Shep. Touch.* 83., that "if a man have two ways to pass lands, and he intends to pass them one way, and they will not pass that way, *ut res valeat*, they may pass the other way." Now here it appears to have been the intention to pass these lands by bargain and sale to *Leteney* and *Burke*; that the reversion might so pass is clear from *Fox's* case, 8 Co. 105, although the limitation of uses would be void. The first part of the rule is, therefore, inapplicable; and indeed it has been admitted, that in all the cases upon this point, the deed, if taken according to the letter, would have been wholly void; and it may also be observed, that in each of them the construction put upon the instrument was against the grantor; that which is now contended for is in his favor. Neither was it originally necessary to construe this deed as a grant of

[*107*] "the reversion in order to carry into effect the main object of the parties. That object was to make a tenant to the *præcipe* to suffer a recovery. If the deed operated as a bargain and sale, *Leteney* and *Burke*, would be joint tenants, and the writ might have been against them jointly. Suppose *Leteney*, to have died before the recovery, and a writ to have been issued against *Burke*, it could hardly have been contended that this deed had not the effect of vesting the estate in him as the survivor of two joint-tenants, so as to make him a good tenant; and if so, it must have operated as a bargain and sale; to say now that *Leteney*, was tenant of the whole, is to say that the deed might at the same time have a two-fold operation. The point now raised has never yet been decided, and Mr. *Preston*, in his edition of *Sheppard's Touchstone*, 83., makes this observation upon it: "It is far from being clear that a deed, though enrolled, and capable of effect as a bargain and sale, may not be pleaded as a grant, so that uses may arise from the person or estate of the grantee." At all events, therefore, the defendants have good ground for saying that it is far from being clear that it can be so pleaded.

The following certificate was afterwards sent:

This case has been argued before us by counsel, and we are of opinion that the said John *Leteney* became solely seised of the said hereditaments and premises comprised in the said indenture of the 14th of April, 1780, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the said hereditaments and premises.

J. BAYLEY.
G. S. HOLROYD.
J. LITTLEDALE.

*WILLIAMS v. JONES.

An attorney entered into a written contract, whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted, no time was expressly fixed for the commencement of the partnership: Held, that no time being expressly appointed, the partnership commenced from the date of the agreement; that parol evidence was properly admitted to show that the person taken into partnership was not an attorney at the time when the agreement was executed; but that it could not be received to show that the agreement was not to take effect until he should be duly admitted, for that would make the agreement different from that which it purported to be; viz. an agreement for a present partnership.

Assumpsit upon an agreement, dated the 11th of November, 1822, whereby plaintiff, "in consideration of 250*l.* paid by the defendant, and of 100*l.* to be paid by defendant within two years from the date thereof, agreed to take *T. Jones*, the defendant's son, into partnership with him, as attorneys and solicitors, and to give him a moiety of the profits of the partnership, and of the profits arising from the hundred court of *Werrall*, of which the plaintiff was lord, and a moiety of the royalties." The partnership to continue for ten years. Breach, non-payment of the 100*l.* Plea, *non-assumpsit*. At the trial before *Warren, C. J.*, of *Chester*, at the Spring assizes, 1825, for that city, the plaintiff proved the agreement as set out in the declaration, but it appeared by the cross examination of his witnesses that the defendant's son was not admitted an attorney until April, 1823. For the defendant it was contended, that the agreement was illegal, as constituting a partnership between an attorney and a person who had not at that time been admitted. For the plaintiff evidence was offered that the agreement was not put in force before the admission of the defendant's son. The learned Judge thought the evidence inadmissible, and directed a nonsuit. In *Easter* term a rule *nisi* for a new trial was granted, and now

Cross, Serjt., was called upon to support it. No time being fixed for the commencement of the partnership, it was open to the plaintiff to give parol evidence upon that point. The contract, upon the face of it, was perfectly legal, the defendant sought to impeach the legality of it by parol evidence that the defendant's son was not at the date of the contract an attorney; it was, therefore, but reasonable that the plaintiff should be allowed by testimony of the like nature to answer the presumption of illegality so raised, by showing that the agreement was not to take effect until after the party had been duly admitted. The agreement contains reference to the date, in order to fix the time of payment, but no such reference is made to point out the commencement of the proposed partnership. [*109]

BAYLEY, J. Where a written contract has been entered into, the court must look to that in order to ascertain the meaning of the parties; and we are not at liberty to admit the introduction of parol evidence to show that the agreement was in reality different from that which it purports to be. The declaration in this case describes the contract as forming a partnership to commence in *presenti*, and as made between parties, then attorneys, and the agreement corresponds with the description given in the declaration. It is described as an absolute contract, but it is now contended that it was conditional, to commence in *futuro*, if *T. Jones* should be admitted an attorney. But it is impossible to put such a construction upon it. Here, then, there was a bargain giving a present share of the profits of an attorney's business to a person not admitted; that was illegal, according to the 22 G. 2. c. 46. s. 11.; and even if the evidence had been admissible, to show that the agreement was to take effect in *futuro*, the agreement as proved would not correspond with the description of "it in the declaration, and on that ground the nonsuit would be right. [*110] This rule must, therefore, be discharged.

HOLROYD, J. I am of opinion that the nonsuit in this case was right. Whatever may have been the intent of the parties, which I collect to have

been that the instrument should take effect immediately, at all events the law gives it that effect, no time for its commencement being mentioned in the instrument. Parol evidence was properly admitted to show that the agreement was illegal, but not for the purpose of varying the contract, by adding to or diminishing from it. It is contended for the plaintiff that evidence should have been admitted, which certainly would have shown the contract not to be illegal, but would at the same time have shown it to be different from the legal import of the instrument declared upon. If the evidence had merely gone to rebut the illegality, I should have thought it admissible ; but it went further, and then two objections arose to it ; first, it went to show that an agreement apparently absolute was really conditional ; secondly, its effect was to add by parol to an agreement, which, according to *Boydell v. Drummond*, 11 East, 142, could not be valid, unless in writing, inasmuch as it was not to be performed within a year from the making of it.

LITTLEDALE, J., concurred.

Rule discharged.

D. F. Jones was to have opposed the rule.



*111] "DOE on the joint and several Demises of EDWARD RAWLINGS, JOHN TASKER, MARY PINCKE, Widow, SARAH NETTLEFOLD, ABRAHAM NETTLEFOLD, and ROBERT SKILL, v. T. WALKER, J. JENNINGS, and R. SUTHERDEN.

A. was leasee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809. In December, 1799, A. took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809. The lessor died in December, 1800, and devised the premises in question to A., the lessee, for his life. By lease and release, A. in 1806, conveyed his life estate to B. Held, that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life.

EJECTMENT to recover premise in the parishes of Dartford and Wilmington, in Kent. Plea, not guilty. At the trial before Alexander, C. B., at the Spring assizes for the county of Kent, 1825, the jury found a verdict for the plaintiff, subject to the opinion of this court on the following case.

Thomas Williams being seised in fee of the premises in question, by his last will and testament duly executed and attested so as to pass real estates, devised the premises in question unto his nephew John Williams : "to hold the same unto and to the use of his nephew John Williams and his assigns, for and during the term of his natural life ; and from and after his decease, unto and to the use of John Williams and Thomas Williams, the two sons of his said nephew John Williams, their heirs and assigns for ever, as tenants in common and not as joint tenants." The said Thomas Williams by indenture of lease of the 17th of December, 1799, then made between him and his nephew John Williams, demised to the said John Williams the premises in question, to have and to hold the same unto the said John Williams from Michaelmas-day, which would be in the year 1809, "when the then present lease of the said premises to *the said John Williams will expire," for *112] and during the full end and term of sixty years from thence next ensuing, and fully to be complete and ended, yielding to the lessor and his heirs and assigns the yearly rent of 60*l.* John Williams took down the two houses demised to him by the lease of 1799, and on the site of them built a new brick messuage at a considerable expense. At the time of making such lease, the

said *John Williams* was in possession of the premises by virtue of a lease thereof for a term of twenty-one years from *Michaelmas*, 1798, which would expire at *Michaelmas*, 1809, at the yearly rent of 60*l.* The testator, *Thomas Williams*, died without revoking or altering his will, and his nephew *John Williams* took possession of the premises devised to him for life, and from that time until his death, which took place in *August*, 1823, continued in possession of the said demised premises, without paying any rent under either of the said leases. *John Williams*, (the son of the said *John Williams* who was next heir of the testator) one of the devisees in remainder, died intestate without issue, leaving his brother *Thomas* his heir at law him surviving. The case then set out several conveyances, from which it appeared that the interest of *Thomas Williams* in the premises in question had vested in the lessors of the plaintiff. It further appeared, that by deeds of lease and release of *May*, 1806, *John Williams* conveyed his life estate to *James Parker*, to the use of *James Parker*, his heirs and assigns, for the life of *John Williams*, and in trust for the said *John Williams*. Upon the death of *John Williams*, the tenant for life, in *August*, 1823, the lessors of the plaintiff claimed the possession of the premises in question, as deriving title to the same from the said *Thomas Williams* the surviving *remainder-man in fee, and on the ground that the said term of sixty years was no longer subsisting. This case was argued at the [*113] sittings in Banc after last *Trinity* term by

Chitty, for the lessors of the plaintiff. The lease for sixty years, which was to commence in 1809, was merged in the life estate which *John Williams* took by devise under the will of *Thomas Williams*. It is clear that he accepted the estate devised, for he paid no rent during his life. There can be no doubt that the lease in possession merged, but it will be said that the lease in reversion being a mere *interesse termini*, did not merge. *Salmon v. Swann*, Cro. Jac. 619, is an authority to show that such an interest will merge. There *A.* seized in fee, demised to *B.* for one hundred years, to begin at a future time; and before that time made a lease to *C.* for twenty-one years, to begin presently. *B.*, before the commencement of his term, assigned it back to *A.*, who afterwards granted a rent charge, for which the grantees distrained upon *C.* The question was, whether the future term was merged in the inheritance, or if it had any existence in *A.*, so that he might thereout grant the rent; for then it would avoid the second lease, being prior to it, and by consequence be liable to the payment of the rent-charge. It was resolved, that the first term was merged. But *Colbourne* and *Mizetone's* case, 1 Leon. 129, is an authority expressly in point to show, that an *interesse termini* will merge in a life estate devised to the lessee. There *H. Leigh*, being seized of a house called the *Marygold*, and two other houses in *London*, leased the said two houses to one *Alice Cheape*, for twenty-one *years if she should live so long, and afterwards made a lease in reversion of the said two houses to *Alice Leigh*, [*114] for twenty-one years, and afterwards he devised these two houses, and also the house called the *Marygold*, to the said *Alice Leigh*, for her life to bring up his children, and died; after his death the said *Alice Leigh*, entered into the house called the *Marygold*, and took the rents and profits of the said two other houses, for seven years by virtue of the said will; and it was held that the lease for twenty-one years was merged in the estate for life. That case is expressly in point, and must govern the present.

Bollund, contra. *John Williams's* interest under the second lease was a mere *interesse termini*; he had not any actual term, but a right to have a term at a future time, by entry when that period should arrive, *Co. Litt. 46, b., Bacon's Abr.*, tit. *Leases*, 6 Ed. 185, 216. *Heming v. Brabazon*, *Bridgman's Reports*, by *Bannister*, p. 6. Such an interest, not being an estate, does not prevent or cause merger, *Dyer*, 112. *Whitchurch v. Whitchurch*, 2 P. Wms. 236. It is incapable of being surrendered, 1 *Bridgman*, 7. It cannot be the foundation of a release from the lessor, *Co. Litt. 270, a. b.* *Barker v. Keat*.

2 Mod. 250, *Shepherd's Touchstone*, 324. It is not affected by any tortious act, as abatement, intrusion, or *disseisin*, *Bruerton v. Rainsford*, Cro. Eliz. 15, *Saffyn's case*, 5 Rep. 124, b. Now merger is a surrender in law, producing the same effect as a surrender in fact would have produced. Then an *interesse termini* not being capable of being surrendered, cannot be merged. Com. Dig., tit. **Surrender* (E.) *Shep. Touch.* tit. *Surrender*, p. 303. The interest, therefore, under the lease, which was to commence in 1809, did not merge in the life estate. Neither was it extinguished. Extinction by operation of law is the legal consequence of an actual union of something issuing out of and constituting part of the profits of the land, (as common, rents, or other rights,) with the immediate ownership of the land itself, the existence of both interests in one person, at one and the same time, being inconsistent. *Vin. Abr.* tit. *Extinguishment* A. pl. 18, 19., C. pl. 14, 33, 42., F. 18. Now here there was no inconsistency in the existence of a life-estate, with a right at a future time to have an estate which might exist longer than the life-estate, and which might not arise till the life-estate had ceased. The case of *Salmon v. Swann*, Cro. Jac. 619, only decided that the assignment of an *interesse termini* to the reversioner would not defeat an interest which he had created anterior to the acquisition of the *interesse termini*. There a person seised in fee in possession, subject to this future interest, granted a lease for twenty-one years before, and a rent charge after, the purchase of the *interesse termini*, and it was held that the lease should prevail over the rent. It is true that the court talked about the future term being drowned in the inheritance. But it is observed by Mr. Preston, in his treatise on *Conveyancing*, vol. 3, p. 135., that although in the report, the language of the court be applicable to merger, it must be read as referring only to extinguishment. Now taking it in that sense, there cannot be a doubt that such an interest might at any time be extinguished by the act of the parties. It may be released to any person having an estate in the reversion, and to the extent of that estate will the release operate to the extinguishment of the future term. The owner of that estate having created interests out of it, could not by purchasing the *interesse termini*, defeat the interest he had so created. His purchase would enure for the benefit of the persons in whose favor he had created such interests, and that could only be by the law's considering that the interest so purchased by him, which, if not extinct, would have defeated the interests of his grantees, was extinguished in the estate out of which these latter interests were created. The decision in *Salmon v. Swann*, does not apply to this case, where the freehold comes to the person having the *interesse termini*, not by his own act, but by *devise*. The lessee could not, before the future term arose, alienate his life interest, and then set up the term against that alienation. If the term had come in *esse* during the life, and the life-estate had been still vested in the testator, a merger would have taken place; but the question in this case was whether anterior to the term taking effect in possession, the future right was extinguished, and if extinguished, whether the extinction was partial or total. Applying the principle of *Salmon v. Swann*, to this case to its utmost extent, the acceptance of the devise would extinguish the *interesse termini*, so far only as it was inconsistent with the life-estate, but in this case there was no inconsistency, for the life-estate might have ceased before the term arose, and when the term arose the life-estate was vested in another person. At no period, therefore, has there been a concurrence of estates so as to constitute a merger, or a "concurrence of a right with an estate so as to occasion an extinguishment." *Colbourne and Mixstone's case*, 1 Leon. 129, is relied upon as an authority to show that *John Williams's* interest in this lease was merged or destroyed by his acceptance of the devise. But the facts of that case are mis-stated in the report in *Leonard*. It appears by the record that *Alice Leigh's* interest in two of the messuages was concurrent at the time when she took the life-estate. Her interest in the term at that time was a subsisting

interest, not an *interesse termini*, it therefore, merged in the life-estate. The case of *Colbourne* and *Mixstone*, therefore, as explained by the record, is not an authority in point.

Cur. adi. vult.

The judgment of the court was now delivered by

BAYLEY, J. This was an action of ejectment, and the single question presented to our consideration upon the argument in *July*, last was this, whether a term for years created in *December*, 1799, to commence from *Michaelmas*, 1809, was annihilated by a life estate devised to the lessee in *January*, 1799, and merged in such life-estate, the life-estate being conveyed away by the lessee before *Michaelmas*, 1809, so as to prevent the lessee from having both estates by way of present interest at one and the same time. The facts as to this point were very short. In *January*, 1799, *Thomas Williams*, the owner in fee, devised to *John Williams*, for life. The premises were at that time under lease to *John Williams*, for a term which would expire at *Michaelmas*, 1809. Before he died, viz. in *December*, 1799, the testator made a further lease to *John Williams*, for sixty years from *Michaelmas*, 1809. [*118] The testator died in *December*, 1800. By deeds of lease and release of *May*, 1806, *John Williams*, conveyed his life estate to *James Parker*, to the use of *James Parker*, his heirs and assigns, for the life of *John Williams*, and in trust for the said *John Williams*. *John Williams*, therefore, had the legal estate for his own life from *December*, 1800, to *May*, 1806, when he passed away the legal estate to *Parker*, and the question is, whether his interest under the lease of *December*, 1799, was merged in that his legal estate. His interest under the lease of *December*, 1799, gave him no right of possession during any part of the time that he had in himself the legal estate for his own life; it gave him only a species of what the law calls an *interesse termini*, a right to have the possession at a future time, viz. at *Michaelmas*, 1809; and when the nature of an *interesse termini*, and the principle of the doctrine of merger is considered, we shall have no difficulty in coming to the conclusion that in this case there was no merger. The right upon a lease to commence in *presenti* is, (except under the statute of uses,) until entry and *interesse termini* only, and so is the right upon a lease to commence in *futuro*; and the same rules are applicable to both. Each is a *right* only, not an *estate*. The whole *estate*, notwithstanding such right, is in the lessor. In neither case will a conveyance by the lessee to the lessor operate as a surrender, nor will a release from the lessor to the lessee operate by way of enlarging the estate. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an *estate*; and the lessee may extinguish it by a release to the lessor, but it has all the properties and consequences of a right only, not of an *estate*. Upon an ordinary lease, to commence instanter, [*119] the lessee has at common law an *interesse termini* only till entry, *Co. Litt. 46 b.*, a release to him before entry, to increase his estate, is not good, *Co. Litt. 46 b.*, 270 *a.*, nor can the lessor grant away the estate by the name of the reversion, for before possession by the lessee there is no reversion in the lessor, *Co. Litt. 270 a.*; nor can the lessee surrender the term; and in the case of a lease to commence in *futuro*, all the common law rules of an ordinary lessee before entry apply. He cannot surrender because he has a right only, not an *estate*, and a right only cannot be surrendered, and there is no reversion in which this may drown, *Co. Litt. 338 a.*, and *Lord Coke*, puts this case distinctly, to illustrate the difference in effect in certain cases, between a surrender in fact and a surrender in law; for he says, "If a man make a lease for years to begin at *Michaelmas* next, this future interest cannot be surrendered, because there is no reversion wherein it may drown; but by a surrender in law it may be drowned. As if the lessee before *Michaelmas*, take a new lease for years, either to begin presently or at *Michaelmas*, this is a surrender in law of the former lease." In

Sheppard's Touchstone, 324, it is laid down distinctly, that a release to him, cannot enure by way of enlargement, because he has no estate. "If the release be before the term begin, or after the term begin, but before the lessee hath entered, though it may be good to extinguish any rent reserved on the lease, it is not good to enlarge the estate." So, *Co. Litt.* 270 a. "Before entry the lessee hath but an *interesse termini*, an interest of a term, and no possession, and, therefore, a release, which enures by way of enlarging an estate, *cannot work without a possession, for before possession there [120] is no reversion. But if a man make a lease for years to begin presently, reserving a rent, if before the lessee doth enter, the lessor releases all the right that he hath in the land, albeit this release cannot enlarge his estate, it shall, in respect of the privity, extinguish the rent." But an *interesse termini*, may be granted away or released. *Co. Litt.* 46 b. Now, what is the doctrine of merger, and the principle upon which it is founded? *Blackstone*, in 2 *Comm.* 177, describes it as occurring, when a greater and a less estate coincide and meet in one and the same person, without any intermediate estate, and he puts as an instance where tenant for years obtains the fee. *Bacon*, in his *Abridgment*, tit. *Leaves*, (R.) describes it as occurring where there is an union of the freehold or fee and a term for years, in one person at the same time, in which case the greater estate merges and drowns the latter, because they are inconsistent and incompatible; and Mr. *Preston*, describes it as the conclusion of law on the union of *two estates*. Apply any of these descriptions to this case. There must be an union of two estates, here there is no such union. The *interesse termini* does not acquire the character of an estate, until the legal interest in the life estate is passed away. Instead of two estates having been in *John Williams*, at the same time, he had never in him more than one estate. He had nothing but the life estate till *Michaelmas*, 1809, and nothing but the term after that period. Then where is the inconsistency or incompatibility which is essential to constitute a merger? Where a man, but for the doctrine of merger, would be reversioner to himself, would be tenant for years with an immediate reversion in himself for years, for life, or in *fee, there is an inconsistency, and incompatibility in his filling both [121] characters. He, in the character of reversioner, would be the person to call upon himself, if his reversion were in fee, or for life, for waste; it would be to himself he would have to perform the services due from him as tenant; and as reversioner, even for years, he would be able to interpose his second term to protect himself from acts of forfeiture committed by him as tenant under the first; and to prevent these and similar objections the doctrine of merger is founded. But where is the inconsistency or the incompatibility of a man having, not two *concurrent*, but two *successive estates*? The objections apply only where they are concurrent; they do not apply where one follows the other. If tenant for years acquire a life interest in the estate *pour autre vie*, the two being concurrent, one only can exist, and the other is merged; but why may not a lease be granted to tenant *pour autre vie*, &c., to commence when his life estate ceases? He will then be tenant of the freehold, so long as *cestui que vie* lives, but amenable to the reversioner for every duty to which that tenancy is subject; and he will be tenant for the term when *cestui que vie* dies, and still amenable to the reversioner for all the duties of that tenancy. He will never stand in the character, which the law of merger is calculated to prevent, of reversioner to himself. As to the cases cited, *Salmon v. Swann*, was a case, as it seems to me, not of a merger of an estate, but of the extinguishment of a right; and though *Colbourne v. Mixstone* appears, according to the report in *Leonard*, to have been the case of an *interesse termini*, it appears by the roll to have been the case of a subsisting and concurrent term. In *Salmon v. Swann, Brook*, the owner in *fee, subject to an *interesse termini* for [122] one hundred years, to commence on Lord Cobham's death, made a lease for twenty-one years, and then took a grant of the *interesse termini*. He

afterwards granted a rent charge of 30*l.* per annum, and the question was, whether a distress for arrears of that rent, accrued after Lord Cobham's death, should prevail against the lease of twenty-one years; if the term for one hundred years were to be considered as in *esse*, it would; because that term would supersede, and be paramount to the term for twenty-one years; but if that were not to be considered as subsisting, it would be otherwise; because then the term for twenty-one years would be paramount to and prevail against the rent charge. It was resolved that the term was drowned in the inheritance, for notwithstanding the lease for twenty-one years, the *interesse termini*, was not so severed from the inheritance, but that by grant thereof to him who had the inheritance, the future term was drowned, and should never rise again. But was this by way of *merger* of an estate by an union of the two estates, or by way of *extinguishment* of the right? The transaction is rather in the nature of a surrender, for it is passing the *interesse termini* to the owner of the inheritance, not an accession of the inheritance to the owner of the *interesse termini*; but there can be no surrender of an *interesse termini* to the reversioner as we have seen; and can there be a merger where there could be no surrender? The only principle upon which, I take it, that case was decided, was this; that the grant to *Brook*, operated not to keep alive the *interesse termini*, but to destroy it; that it could not be taken to have been obtained by him, that he might raise the term upon Lord Cobham's death, and so defeat his own lease for twenty-one years; but that it must be taken to have been obtained by him to protect his own lease; that he must be supposed to have acquired it for honest purposes to extinguish it, not for dishonest purposes to have the one hundred years term enjoyed. This, therefore, is no authority, as it seems to us, for the merger of an *interesse termini*; nor is *Colbourne v. Mixstone*, when the true state of that case, as it appears upon the roll, is known. The question in the case was, whether a lease of two houses to *Alice Leigh*, had been merged by a devise to her for life. According to the report in *Leon*, she had only a lease in *reversion*, expectant upon the determination of a prior lease, which would have given her an *interesse termini* only, but according to the record, she had a lease of *the reversion*, a concurrent lease, which gave her a present estate. The question was, whether the executor of *Alice Leigh*, had improperly omitted in her inventory a lease of two houses, and this depended upon another question, whether a devise by the lessor of these two houses to *Alice Leigh*, for life, had extinguished that lease. According to the report in *Leon*, the houses were previously in lease to *Alice Cheap*, for twenty-one years, if she should so long live, and the lease to *Alice Leigh*, was a lease in *reversion* for twenty-one years; no distinction is taken between an *interesse termini*, and a right to possession upon *Alice Cheap's* death, but the only material point discussed was, whether *Alice Leigh*, had sufficiently assented to the devise to her for life, so as to have vested in herself the life estate. But upon advertizing to the record, it appears that what was called in *Leon*, a lease in *reversion*, was in reality a lease of *the reversion*, "commencing immediately from the date of such lease. The court is under great obligation to Mr. *Bolland*, for having referred them to the record, because that reference removes every difficulty that case could have produced. The record shows that *H. Leigh*, the testator had the *Marygold*, and three other houses; that he demised one of the three houses to *Melley*, at 3*l.* 6*s.* 8*d.* per annum, another to *Burdon*, at 5*l.*, and another to *Chippindall*, at 2*l.* That within a year after the lease to *Chippindall*, he demised the *reversion* of that house, when it should happen, to *Alice Leigh*, for twenty-one years from the date of that said demise, at 2*l.* per ann. rent, and afterwards demised the *Marygold*, and the other two houses to *Alice Leigh*, from thenceforth, for twenty-one years, paying yearly 9*l.* 6*s.* 8*d.* rent, and afterwards devised the said messuages and rents to the said *Alice Leigh*, for the better education of her children: that he died, and she entered into the *Marygold*.

and thereof, and of the reversion of the three houses, was seized for life, and received the rents reserved by the three leases, so that *Alice Leigh's* term, in two of the messuages was a running term at the time she took the life estate; and had the terms in these two houses subsisted, she would at the same time have been possessed of the reversion of those two houses for her term of twenty-one years, and also seized of a life estate, of an immediate estate of freehold, at the same time. The case, therefore, as the two houses, was a case not of an *interesse termini* as supposed, but of a subsisting term. These two cases, therefore, conclude nothing in favor of the plaintiff, and upon the grounds we have previously mentioned, we are of opinion, that, there was no merger ^{*125]} in this case, and that as to so much of the property in question as depends upon that point, there should be judgment for the defendant. The question on the case is exclusively upon the merger, and what is to be the consequence of our opinion, the case does not state.

Postea to the defendant.

TOWSEY v. WHITE.

The 3 G. 4. c. 126. s. 65. enacts, "that no trustee of any turnpike road shall have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act: nor shall any such trustee let out for hire any wagon, wain, cart, &c., or any horses, &c., for the use of any turnpike road for which he shall act as a trustee, nor by himself or by any other person for or on his account directly or indirectly receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act during the time he shall be acting as a trustee of such road, and that every trustee so offending shall, for every such offence, forfeit 100l." Sect. 143. enacts, "that if the penalty shall exceed the sum of 20l., it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending previous to the commencement of such action, and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed." One A. had contracted with the trustees of a turnpike road to make certain improvements on the road, and he agreed to perform the same for a specific sum. One of the trustees afterwards agreed with A. to let him his horses and cart at the rate of 5s per day, and he did so let them, and they were used on that part of the road which was agreed to be improved by A.: Held, that the trustee was liable to the penalty imposed by Sect. 65. of the act.

In the notice of action, it was not stated that the defendant, at the time when he let his cart and horses to hire, was a trustee acting in execution of the act: Held, that the notice was therefore bad.

Held, also, that a party omitting to give the notice required by the act of Parliament was barred, not merely of his right to recover the costs of his action, but of his right of action altogether.

THIS was an action of debt on the 3 G. 4. c. 126. s. 65. for penalties. At the trial before Burrough, J., at the Lent assizes, 1825, for the county of Wilts, the jury found a verdict for the plaintiff for one penalty for 100l. subject to the opinion of this court upon the following case:

Upon the trial it appeared in evidence that for a considerable time previous to the month of July, 1824, and at the time of the commencement of this action, the defendant was one of the trustees or commissioners of ^{*126]} the turnpike road leading from Wincanton in the county of Somerset, to and through the parish of Mere, in the county of Wilts, unto Wiloughby Hedge turnpike gate, in the said county of Wilts, and had acted as such, and ordered the surveyor upon different occasions where to put stones upon the road, and that it being determined by the commissioners to improve a certain portion of the said road, to wit, that part of the said road situate

between *Mere* and *Willoughby Hedge*, they caused a meeting of commissioners for the purpose of letting the same by tender to be advertised, to be holden at the Town Hall, *Wincanton*, on *Saturday*, the 17th of *July* then instant; that such meeting was accordingly holden there, at which the defendant attended with other commissioners, and acted with them, when a contract for making the intended improvement was entered into with one *Hodgkinson*, who agreed to perform the same, according to a plan and specification, for the gross sum of 119*l.* *Hodgkinson* commenced his work about the 20th of the same month, at first with men only, but afterwards applied to the defendant to let him his horses and carts. The defendant agreed to let them at the rate of 5*s.* a day for a horse and cart, accordingly furnished three horses and three carts for about a week, and afterwards a greater number, and that they were used in hauling earth and stones on the part of the road in question, so agreed to be improved by *Hodgkinson*. *Hodgkinson* told him what it was for, and saw the defendant there whilst the horses and carts were so used. He paid the defendant for the letting of each horse and cart, by an order on *Measrs. Messiter*, the treasurer of the trustees, but without any reference to his, *Hodgkinson's*, contract with the trustees; and the whole was so paid *by *Hodgkinson*, previously [*127] to the payment of his own demand, by the trustees, according to the contract. The defendant's horses and carts were proved to have been used on the said part of the road, on one of the days specified in the notice. *Hodgkinson* went to the defendant and asked him for his horses and carts; the defendant did not go to *Hodgkinson*. *Hodgkinson* hired horses and carts of other persons, and he paid all alike. On the 19th of *October* following, and twenty-one days before the commencement of the present action, the defendant was personally served with the following notice:

"Sir, you being one of the trustees and commissioners of the turnpike road leading from the town of *Wincanton*, in the county of *Somerset*, to and through the parish of *Mere*, in the county of *Wilts*, unto *Willoughby Hedge* turnpike gate, in the said county of *Wilts*; and having on divers days, to wit, on, &c., [several days in *August* were then specified,] supplied materials for the use of that part of the said turnpike road which is in the parish of *Mere*, and having also, on the aforesaid days let out for hire your wagon, wain, carts, horses and teams, for the use of that part of the said turnpike road which is in the parish of *Mere* aforesaid, contrary to an act passed in the third year of the reign of his majesty *George* the Fourth, whereby you have forfeited the penalty or sum of 100*l.* for each of the aforesaid offences so committed by you, amounting together to the sum of 700*l.*; I do, therefore, according to the act, give you notice, that I shall, at or soon after the expiration of twenty-one days from the time of your being served with this notice, commence and prosecute an action of debt against you in one of his majesty's *courts of record for the [*128] recovery of the said sum of 700*l.*" The action was commenced within three calendar months after the horses and carts above mentioned had been let, furnished and used as aforesaid.

Jeremy for the plaintiff. The question in this case is, whether the defendant, who was clothed with the character of a trustee at the time when he let to hire his cart and horses to a party who had contracted to repair the road, has incurred the penalty imposed by the 3 G. 4. c. 126. s. 65. That section enacts "that no trustee of any turnpike road shall enjoy any office or place of profit under any act of Parliament, in execution of which he shall have been appointed, or shall act as trustee or commissioner, or have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act, &c., &c.; nor shall any such trustee let out for hire any wagon, wain, cart, &c., or any horse, &c., for the use of any turnpike road for which he shall act as a trustee or commissioner; nor by himself or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to

his use or benefit, out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee or commissioner of such road." It then enacts, "that if any person after having been appointed a trustee or commissioner of any turnpike roads shall, without having first resigned his office, be concerned in any such contract or bargain, or let out for hire any wagon, wain, cart, horse, &c., or receive any money out of the tolls aforesaid, every trustee or commissioner so offending shall for every such offence *129] forfeit 100l." The object of the act was, to prevent a trustee from deriving any profit directly or indirectly from any work to be done upon the roads. This is a case, therefore, within the mischief intended to be remedied, and it is within the very words of the act. *West v. Andrews*, 5 B. & A. 328, is an authority in point. Section 143 enacts, "that if the penalty shall exceed the sum of 20l., it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending, previous to the commencement of such action; and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed." Now the effect of that provision is merely to subject the party, who omits to give the notice required by the act, to the loss of his costs. But if that be otherwise, still the notice given in this case satisfies the terms of the act of Parliament. The cases decided on the 24 G. 2. c. 44. do not apply, because that statute required that the notice should clearly and explicitly explain the cause of action. But where statutes require notice of action to be given to magistrates, it has been held to be sufficient to give a notice, containing matter sufficient to apprise the magistrate of the nature of the action about to be brought. *Robson v. Spearman*, 3 B. & A. 493, *Jones v. Bird*, 5 B. & A. 837. But here, all that the act requires is, that twenty-one days' notice should be given previous to the commencement of the action, and the act of Parliament has been complied with in that respect.

*130] *R. Bayly*, contra. The notice was intended for the benefit of defendants, and the clause requiring the notice should be construed liberally in their favor, and not strictly against them. The object of the enactment was, that defendants should be apprised of the nature of the offence with which they were to be charged, in order that they might prepare for their defence. Now here the notice does not show that the defendant had committed any offence against the act of Parliament, for it does not state that, at the time when he let out his horses to hire, he was trustee acting in the execution of the act. A declaration stating only the facts contained in this notice, would have been bad in arrest of judgment. The statute 24 G. 2. c. 44, requires that a notice should state the nature of the writ and process; and in *Lovelace v. Curry*, 7. T. R. 631, it was held, that a notice which omitted to describe the nature of the writ or process was bad. If the notice be insufficient, the plaintiff is not merely deprived of his costs, but barred of his action; for the proviso applies not mere to the matter immediately preceding it, but to the whole of the former part of the sentence; and to that part which gives the right to sue in the superior courts. But, assuming the notice to be sufficient, the defendant is not liable to the penalty imposed by the act; for this was not a contract made for the use of the road, within the meaning of the act. Here the contract was for a specific sum, and therefore, whether the horses of the defendant did more or less work would be immaterial to the commissioners. This was a sub-contract with the contractor, made *diverso intuitu*, from the contract made by *Hodgkinson* with the commissioners.

*131] *BAYLEY*, J. Upon the question, whether the defendant has committed an offence within the meaning of the 3 G. 4, c. 126, s. 65, I have no doubt whatever. This is a case clearly within the spirit of the act. The great object of the legislature was to prevent any bargaining between the

trustees and the contractors, so as to give the former an interest adverse to their duty. Now, it is the duty of a trustee to take care that the work to be done upon the roads should be contracted for on terms the least expensive to the public. But if such trustee has horses and carts to let to hire, and he may lawfully let them to any person who contracts to do the work upon the roads, the consequence will be, that where several persons offer to do the work, it will become the interest of the trustees to give an undue preference to that person who is willing to hire his horses and carts. This is the case, therefore, within the mischief contemplated by the act, and it is a case within the words of the act, for the defendant did let out his cart and horses for the use of the turnpike road, for which he acted as a trustee. Then comes the question, whether the notice given in this case was sufficient to entitle the plaintiff to sue; and that raises two questions, the first is, whether according to the true construction of the 3 G. 4, c. 126, s. 148, a plaintiff who omits to give notice, or who gives an insufficient notice, be barred of his right of action or only deprived of his right to costs. The second question is, whether the notice given in this case was such as the act of parliament required. I am of opinion, that the effect of a plaintiff's omitting to give any notice or to give such a notice as the act requires, is to deprive him not merely of the right to recover costs, but to recover at all. Section 148, enacts, "that if the sum sought to be recovered exceed 20/-, the party is to bring his action in the [*132] superior courts; and the plaintiff, if he recovers, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending previous to the commencement of such action, and that the same be commenced within three calendar months after the offence. Now, whether the proviso applies only to the matter immediately preceding it, which relates to costs, or to the whole of the preceding sentence, must be collected from the context and nature of the other parts of the proviso. Now, the first part of the proviso, which enacts that there shall be no more than one recovery for the same offence, could not have been intended to apply to the right to recover costs only. It is impossible that the legislature could have intended to subject a party to several actions for the same offence, provided the party suing him were willing to forego costs. The same observation applies to the last part of the proviso. It never could have been intended that a party should be subjected to an action at any distance of time for a penalty, provided the plaintiff were willing to forego his costs. As two out of three parts of the proviso must have been intended to apply to the whole of the matter in the sentence, and not to that which immediately preceded it, it may be fairly inferred that the other part, which requires that notice should be given, applies to the whole of the sentence, and consequently it is a condition precedent to the right of bringing an action, that the party suing should give the notice required by the act. I am, therefore, of opinion, that it was the intention of the legislature, that a party suing for a penalty under this statute "should be deprived of any right of action unless he [*133] complied with the terms of the proviso; one of which is, that he gave the notice required by the act of parliament. That being so, then the question arises whether the notice in this case was sufficient. The proviso requires twenty-one days' notice to be given to the party offending previous to the commencement of such action. That implies, that some communication should be made to the defendant of the intention of the plaintiff to sue. It certainly would not be sufficient for a party to state in the notice that the defendant had offended against the statute, and if a notice in that general form would not be good, some degree of particularity is required. Now, I am of opinion, that it ought at least to be shown on the face of the notice that an offence was committed against the act of parliament, and no offence could have been committed, unless the defendant, at the time when he let his cart and horses to the contractor, acted as a trustee. It is not stated in the notice, that the defendant

did at that time act as trustee. An essential ingredient in the offence created by the act is therefore omitted, and upon that ground alone I think the notice is bad.

HOLBROOK, J. I am of the same opinion. At first I thought that the proviso merely related to that part of the section which immediately preceded it, and by which it was enacted, that if the plaintiff recovered, he should have full costs; but upon further consideration, I am fully satisfied that the proviso extends to the whole of the matter in the section; and, consequently, that unless a party complies with all the terms of the proviso, he is barred of any right of action whatever.

Judgment of nonsuit.

A. on the 18th of March 1824, paid into the *Totness* country bank a quantity of notes of a bank at *Dartmouth*, to bear interest from that day. The *Totness* bankers sent the notes early on the following morning to the *Dartmouth* bank. Upon the receipt of them there, the latter, according to their usual course of dealing with the *Totness* bankers, gave them credit in account for the amount of the notes. The course of business between the two banks was, that if the *Totness* bank received notes of the *Dartmouth* bank in the course of the day, they sent the notes on the following morning to the *Dartmouth* bank. If the *Dartmouth* bank received notes of the *Totness* bank, they, at the close of the business of the day, sent them to the *Totness* bank. If the balance of the day was in favor of either bank, the amount was paid by a bill upon their respective agents in *London*. The *Dartmouth* bank continued to pay their notes until the evening of the 19th: Held, that, as between *A.* and the *Totness* bankers, the taking of credit in account for the amount of the *Dartmouth* notes was equivalent to payment to the *Totness* bankers, and therefore that *A.* was entitled to recover the amount from them.

ASSUMPTION. The declaration contained the usual money counts, a count for interest, and a count upon an account stated. The defendants paid 145*l.* into court, and pleaded the general issue. At the trial before Abbott, C. J., at the summer assizes for the county of *Devon*, in 1824, the jury found a verdict for the plaintiff for 655*l.*, subject to the opinion of this court upon the following case.

The defendants for many years past have carried on the business of bankers at a bank at *Totness*, in the county of *Devon*, called *The Totness Bank*, and at another bank at *Newton*, in the same county. The *Totness* bank opens at ten every day, and closes at four. On *Thursday*, the 18th of *March* 1824, the plaintiff, who was not a customer of the defendants, went to the *Totness* bank and paid in there a number of country bank notes, amounting to the sum of 800*l.*, which were received by the defendants as a deposit of 800*l.*, to bear interest from that day at the rate of three per cent. per annum, to be withdrawn only after twenty days' notice, and the interest to cease from the day of the notice. The notes so received from the plaintiff were all payable to the *135] bearer on demand, and consisted of notes to the amount of 657*l.* of a bank at *Dartmouth* in the said county, called *The Dartmouth General Bank*, which was at that time carried on under the firm of *Hine & Co.*, of other notes to the amount of 30*l.* of another bank at *Dartmouth*, called *The Dartmouth Bank*, carried on by other persons under the firm of *Harris & Co.*, and of other notes of other country banks in the neighborhood. Of the 657*l.* of the *Dartmouth General Bank* notes, 600*l.* were immediately tied up in separate bundles, containing each 100*l.*, and with the remaining 57*l.*, and all other notes of the two *Dartmouth* banks received in the course of the day,

were put aside into a separate division, marked *Dartmouth*, to be sent as hereinafter mentioned. The *Totness* bank never paid away the notes of the *Dartmouth* banks in the course of their issues to customers. In the course of the day the *Totness* bank received 432*l.* of *Dartmouth* and *Dartmouth General Bank* notes from other persons, and at the close of the business of that day, all the *Dartmouth* notes which had been so received from the plaintiff, together with the last mentioned notes, were put up in a parcel directed to Messrs. *Hine & Co.*, *Dartmouth*, and this parcel was afterwards given to the person employed by the post-office in carrying the letters between *Totness* and *Dartmouth*, to be delivered by him to Messrs. *Hine & Co.* on his arrival at *Dartmouth*, and it was accordingly delivered to *Hine & Co.* at the *Dartmouth General Bank*, early in the morning of the 19th of March, before the usual hour of opening that bank. The amount of all the notes in the parcel was 1119*l.*, and before the opening of that bank the said sum of 1119*l.* was placed to the credit of the defendants in the books of *Hine & Co.*, the defendants being indebted to *Hine & Co.* to *the amount of 340*l.* as hereinafter [*136] mentioned, and the notes of the *Dartmouth General Bank* contained in the parcel, were then put into the usual drawers for the purpose of being re-issued. The bank opened at the usual hour, ten o'clock in the morning, and continued to pay all demands till half past three o'clock in the afternoon, when it stopped payment; but before that time, all the notes of the *Dartmouth General Bank*, received in the *Totness* parcel, had been paid away to different persons in the usual course of business. In the course of that day the *Dartmouth General Bank* had also received from different customers sundry notes of the *Totness* bank, amounting to 50*l.* or 100*l.*, but these were paid after the stoppage, by the clerk of *Hine & Co.* to the executor of Mr. *Hine*, who was at the time of the stoppage in a dying state, and died only one or two days afterwards. It was the practice of the *Totness* bank at the close of every day's business, to make up parcels of country bank notes for the different banks with which they corresponded. The correspondence between the *Totness* bank and the *Dartmouth General Bank*, was for the most part carried on by the postman. The distance from *Totness* to *Dartmouth* is about ten miles; the postman at that time left *Totness* for *Dartmouth* about five o'clock, and arrived at *Dartmouth* between six and seven in the morning, and left *Dartmouth* on his return at six, and arrived at *Totness* about eight in the evening of the same day. The course of business between the two banks was as follows. If in the course of any one day the defendants received any quantity of notes of the *Dartmouth General Bank*, or of the *Dartmouth* bank, or of another bank at *Brixham* in the same county, at the close of the business of the day, they put all such notes *into one parcel, and gave it to the [**137] postman to be delivered to *Hine & Co.* the following morning. If *Hine & Co.* in the course of any one day received any notes of the *Totness* bank, or of the *Newton* bank, or of another bank at *Totness*, carried on by other persons, called *The Totness General Bank*, at the close of the business of the day they put up all such notes into one parcel, and sent it the same evening to the defendants, by the postman, on his return to *Totness*. If upon the making up of the parcel of the *Dartmouth General Bank* on the evening of any one day, a balance was left in favor of the *Totness* bank, that balance was ordered to be paid in *London* by the *London* agents of the *Dartmouth General Bank* to the *London* agents of the *Totness* bank, by a letter sent by the *Dartmouth General Bank* for that purpose by the *London* post of the same evening; but if on the contrary, upon the making up of such parcel the balance was in favor of the *Dartmouth General Bank*, and the *Totness* bank did not receive a sufficient quantity of notes in the course of the next day to meet that balance, the difference was ordered to be paid in *London* by the *London* agents of the *Totness* bank to the *London* agents of the *Dartmouth General Bank*, by a letter sent by the *Totness* bank for that purpose by the

London post of that evening. On the morning of the 17th of *March*, the accounts between the two banks were exactly balanced, but on the evening of that day the *Dartmouth General Bank* sent by the postman a parcel for the *Totness* bank, containing 25*l.* in *Totness* notes, and a good check upon the defendants, drawn by one of their customers for 315*l.* The parcel arrived as usual after the banking hours, and was not opened till the opening of the bank *138] on the following morning, and the **Totness* bank became their debtors to the amount of 340*l.*

The case was argued by *Carter* for the plaintiff, and *Coleridge* for the defendant. The question principally discussed in argument was, whether the defendants had or had not been guilty of laches by leaving the notes with the *Dartmouth* bankers; but it was also insisted on the part of the plaintiffs, that as the defendants had consented to take credit in account with the *Dartmouth* bankers for the amount of the notes on the morning of the 19th (when they might have received the same in money,) as between the plaintiff and them, that was equivalent to payment: at the moment when they took that credit, they trusted the *Dartmouth* bankers at their own peril. As between the plaintiff and the defendants, it was the same thing in point of legal effect, as if at the time when the credit was given in account, the *Dartmouth* bankers had paid the amount of the notes in money, and that money had then been returned to the *Dartmouth* bankers by the defendants to hold it for their use. As the judgment of the court proceeded entirely upon the latter ground, it is unnecessary to state the arguments upon the other point.

BAYLEY, J. There can be no doubt that the plaintiff is entitled to recover to the extent of 340*l.*, the amount of the debt due from the *Totness* bank to the *Dartmouth* bankers. It appears by the case stated for the opinion of the court, that it was the practice for the *Totness* bank to receive the notes of other country banks. They must, therefore, adopt some mode of getting payment, and for that purpose, in the ordinary course, would employ agents to present *139] them for payment, and would be bound by the acts of such agents. "It is the duty of an agent so employed to present bills or notes for payment, to take care that something equivalent to payment should take place. In this case the defendants authorized their agent to give possession of the notes to the *Dartmouth* bankers. The latter, therefore, who were the makers of the notes, became the agents of the *Totness* bank, but instead of immediately paying the notes to the latter, or to any person on their behalf, entered them according to their usual course of dealing, in account to the credit of the *Totness* bank. The *Dartmouth* bankers were also the agents of the *Totness* bank as to other notes, and they received the amount of those notes in cash. But they, by the authority of the defendants, entered the amount of their own as an item of credit in an account between them and the defendants. I am of opinion that, as between the *Totness* bank and the plaintiff, the taking of that credit must be considered as payment. If the notes had been presented by any other person employed by the defendants as agent, he might have had money for them. The *Totness* bankers, by making the *Dartmouth* bankers their agents, and authorizing them to give credit in account for the notes instead of paying the amount of them immediately, must be taken to have consented that that credit given to them by the *Dartmouth* bankers should be equivalent to that payment which would have taken place if any third person employed by them had presented the notes for payment. The defendants, from the time when the credit was given them, trusted the *Dartmouth* bankers. The course of dealing shows that the *Totness* bankers authorized the *Dartmouth* bankers to deal with the notes as if they had been paid by them. For if they had not *140] been paid, they ought to have been returned to the *Totness* bankers, *but they were in fact re-issued by the *Dartmouth* bankers. Upon the principle that, by the course of dealing, the *Dartmouth* bankers were made the agents of the *Totness* bankers, and that the latter gave authority to the former

to give credit in account for their own notes instead of paying them immediately in money, I think that the *Totness* bankers must, as far as the plaintiff is concerned, be considered to have received payment of these notes from the *Dartmouth* bankers, and consequently that the plaintiff is entitled to recover 657*l.*, the full amount of the *Dartmouth* notes paid by him into the hands of the *Totness* bankers.

HOLROYD, J. The notes were received by the defendants as cash payable with interest from the moment when the notes were received, and not merely from the time when the defendants would in due course receive payment of them from the *Dartmouth* bank. The notes were, therefore, treated as cash. I do not mean to say that if they turned out to be of no value at the time when they were deposited, that they must be considered as cash. That would be a very different case. The defendants, instead of sending a clerk to receive cash for the notes, sent them to the persons who ought to have paid them, but they sent them, not for the purpose of being paid in money, but of being placed to their credit in account. When that credit was given, the legal effect was the same as if the notes had been paid to them in money, and the *Dartmouth* bankers had agreed to hold that money to the use of the *Totness* bank; or the same thing as if the notes had been actually paid to the defendants, and the defendants had lent the amount to the *Dartmouth* bank. By allowing [^{*141} the amount of the notes to be placed to their credit in account, the defendants authorized the *Dartmouth* bank to treat these notes as their own. And if the latter had a right to re-issue them by the authority of the defendants, that could only be on the understanding that they had become the property of the *Dartmouth* bank. I think these notes must be considered as cash notes deposited with the defendants, and that the amount having been paid to them by the *Dartmouth* bankers, remained in their hands to the use of the plaintiff.

LITTLEDALE, J., concurred.

Judgment for the plaintiff.

CURTIS, et al., Assignees of GEORGE LAING, a Bankrupt, v. DAVID BARCLAY.

It was agreed between A., resident in London, and B., who resided in the West Indies, that the former should accept bills drawn upon him by B. to a specified amount, upon A.'s having bills of lading filled up to his order for coffee, sugar, cotton, and rum, and that after deducting his (A.'s) advances, charges, and commission, the balance was to be paid to C., who was a merchant resident in London, and for whom B. acted as agent in the West Indies. B. shipped goods with a bill of lading filled up to A.'s order. At the time when the goods arrived C. had become bankrupt. A. demanded the goods, but the captain having wrongfully refused to deliver them, he brought trover against the captain. Before any assignees were chosen under C.'s commission the cause was referred to arbitrators, but they not having made any award, the cause was tried, and A. recovered the proceeds of the goods. The assignees of C. having brought assumpsit for money had and received to recover the proceeds of the goods: it was held, that A. was authorised by the bill of lading to act for the benefit of all concerned, and to do all that was necessary to obtain possession of the goods, and there being nothing to show that a reference was an improper step, it was held that A. was entitled to deduct the costs of the reference as well as of the cause.

ASSUMPSIT for money had and received. At the trial before Abbott, C. J., at the London sittings before Michaelmas term 1823, a verdict was found for the plaintiffs for 667*l.* 11*s.* 6*d.*, subject to the opinion of this court upon the following case:

*142] The plaintiffs were assignees of the estate and effects *of *George Laing*, a bankrupt, under a commission of bankrupt issued against him, dated the 29th of *January* 1819. The act of bankruptcy was committed in the early part of *January* 1819. The commission, although issued in *January*, was not opened till the 31st of *August* 1819. The bankrupt carried on business in *London* as a merchant, and exported a considerable quantity of goods to the *West Indies*, in the month of *September* 1818. *James Laing* was the agent of the bankrupt, and had the superintendence and management of the merchandize so exported. In the month of *September* 1818, the bankrupt and the house of the defendant, which then consisted of himself and his brother, (since deceased,) carrying on business under the firm of *Barclay* brothers, came to the arrangement contained in the letters set forth in the case. It appeared from the correspondence, that in *November* 1818, it was agreed, between *James Laing* and the defendants' house, that the defendants' house should accept bills to be drawn upon them by *James Laing*, to the extent of 30,000*l.* upon having bills of lading filled up to their order, for coffee, sugar, cotton, and rum, and that after deducting their advances, charges, and commissions, the balance was to be paid to *George Laing*. On the 18th of *March* 1819, the defendant received a letter from *James Laing*, advising him that he had shipped forty-one puncheons of rum, and fourteen half tierces of coffee on board the *Susan*; the following bill of lading was inclosed in the letter. "Shipped, by the grace of God, by *James Laing*, as agent, in and upon the good brig called the *Susan*, (master, *D. Gibson*,) forty-one puncheons of rum and fourteen half tierces of coffee, to be delivered at the aforesaid port of *London*, (the act of *God*, &c. *excepted,) unto Meassrs. *Barclay Brothers* or their assigns, he or they paying freight for the said goods 5*s.* sterling per cwt. for coffee, and 4*½* per gallon for rum, with primage and average accustomed." The *Susan* had been chartered by the bankrupt. The ship arrived in *London* with the goods mentioned in the bill of lading in *April* 1819. The defendant demanded them of the captain, as consignee under the bill of lading; the captain claimed to have a lien on the goods for the freight due to him under the charter-party. The defendant refused to pay more than the freight due under the bill of lading; and upon the captain's refusal to deliver the goods, upon receipt of such freight, the defendant and his late partner, on the 17th of *April* 1819, brought an action of trover in their own name against the captain for the non-delivery, pursuant to the bill of lading. The cause was referred to the arbitration of two barristers, but no award being made, the cause was tried, and a verdict obtained in favor of the present defendant and his said late partner, who in pursuance thereof received the proceeds of the goods from a broker, who had been employed, by consent of the defendant and the captain, to receive the proceeds of the sale of the goods, and retain the same as a stakeholder. The proceeds, amounting to 73*7l. 2s. 8d.*, were paid to the attorneys of the now defendant, on the 28th of *November* 1820, and by them paid over or accounted for to the defendant. The costs of insurance and other charges which the defendant was entitled to retain and be reimbursed out of the said proceeds, amounted to 6*7l. 11s. 2d.* The costs incurred by the defendant in the cause and arbitration, amounted to 16*7l. 11s. 6d.* The now defendant has *not been able to obtain payment of these costs from the captain, who is insolvent, and resides in *Scotland*.

In *May*, 1819, the defendant received a letter from *James Laing*, advising him that he had drawn a bill upon him for 500*l.* That bill was afterwards presented to the defendant, who refused to accept the same. In *July*, 1819, the defendant received directions from *James Laing*, to pay over to *George Laing*, the balance of the proceeds of the goods shipped by the *Susan*. After the defendant refused to accept the bill, *James Laing*, procured it to be paid by the defendant out of funds belonging to himself, and commenced an action against the defendant, to recover the damages which he alleged he had sus-

tained by the defendant's refusal to accept the bill, and he obtained a verdict for 525*l.* viz. 500*l.* the amount of the bill, and 25*l.* damages, and ultimately recovered judgment thereupon for that sum, and costs, which the defendant in *Hilary* term, 1823, paid. The defendant paid 4*l.* 6*d.* into court, and if he is entitled to set off against, or to deduct from the demand in this cause, the sum of 167*l.* 11*s.* 6*d.*, the amount of the said costs, and also the said sum of 500*l.*, the amount of the bill of exchange; the plaintiffs' demand will be satisfied by such payment into court and set-off.

This case was argued in the course of these sittings by *F. Pollock*, for the plaintiffs, and *Campbell*, for the defendant.

For the former it was contended, that the plaintiffs were entitled to recover the entire proceeds of the cargo sold by the joint act of the captain and the defendant, as they would have been if they had brought trover. In that case the sale must have been considered a wrongful conversion, and the plaintiffs would be entitled to recover the whole value of the goods. But the plaintiffs had brought *assumpsit*, and it appeared that the defendant, before the bankruptcy of *G. Laing*, had entered into an obligation to accept bills on account of the goods shipped, and in consequence of that obligation he became ultimately compelled to pay the sum of 500*l.* If the defendant had no more than a lien on the goods, that lien never attached; for the goods never came into his possession. It was finally admitted, however, that the legal title to the goods was in the defendant; that the possession of the captain was his possession; and, therefore, that the defendant was entitled to set-off the sum of 500*l.*, as well as the costs necessarily incurred in recovering the goods; but it was contended, that they were not entitled to be allowed the costs of the reference. The act of bankruptcy had been committed, and the commission had issued at the time when the reference was agreed to by the captain and the defendant; and they had no power to bind the bankrupt or his assignees by the submission. The defendant had no right of property in the goods, except as a mere security against the bills he might accept against them. For the defendant it was urged, that the plaintiffs, in this action, could recover only so much money as the defendant had received to their use. The plaintiffs never had any title but to the net proceeds of the goods. By the terms of the contract, *G. Laing*, was only to have the balance, after deducting the charges. Now any costs *bona fide* incurred by the defendant, in order to obtain possession of the goods, are part of the charge upon the goods. If the defendant, therefore, incurred the costs of the reference, *bona fide*, with a view of speedily obtaining possession of the goods, they become a charge upon the goods: and there is nothing to show that the submission was not *bona fide* entered into with a view to obtain speedy possession of the goods.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the court.

This was an action by the assignees of *G. Laing*, a bankrupt, against the defendant, as surviving partner of his brother, for money had and received to the use of the plaintiffs, as such assignees; and the question was, whether the defendant was entitled to deduct from the plaintiffs' demand a sum of 167*l.* 11*s.* 6*d.*, for certain costs, which the defendant's house had incurred, and a sum of 500*l.* for a bill of exchange the defendant's house had paid. The plaintiffs had a verdict for 667*l.* 11*s.* 6*d.*, so that the sums I have mentioned exactly balanced that account. The 667*l.* 11*s.* 6*d.* for which the verdict was taken, was the balance of a sum of 737*l.* 2*s.* 8*d.*, received by the attorneys for the defendant's house, after the bankruptcy of *G. Laing*, as the produce of certain goods shipped by *James Laing*, from *Demerara*, in *January*, 1819. The facts relating to those goods raise the question in this cause. In *September*, 1818, it was bargained between *James Laing*, and the defendant's house, that the defendant's house should accept bills, to be drawn upon them by *James*

Laing, to the extent of 30,000*l.* upon the defendant's house having bills of lading filled up to their order for coffee, sugar, cotton, and rum, and that after deducting their advances, charges and commission, the balance was to be paid to *George Laing*. Upon the footing of this bargain, rum and coffee were shipped by the *Susan*, a bill of lading *making them deliverable to defendant's house, or their assigns, they paying freight for the same, was transmitted to the defendant's house, and a bill for 500*l.* was drawn by *James Laing*, upon the defendant's house, which bill they were compelled to pay. The amount of that bill (500*l.*) constituted one of the items which the defendant claimed a right to deduct; and after putting the question as to that sum in the only way in which it could be put on the part of the plaintiffs, the claim as to that sum was candidly abandoned, and the question was confined to the other sum, the 167*l.* 11*s.* 6*d.* The following were the facts as to that sum. When the goods by the *Susan* arrived, which was in April, 1819, the captain wrongfully refused to deliver them upon the terms of the bill of lading, viz. upon the payment of the freight for the same, and insisted upon all the freight payable under a charter-party, before he would deliver them; and in compelling him to deliver them upon the terms of the bill of lading, the defendant's house incurred an expense to the amount of 167*l.* 11*s.* 6*d.* That sum was composed partly of the costs of an action, and partly of the costs of a reference; and it was urged upon the argument that there was a distinction between these two species of costs; and that if the defendant should be entitled to deduct the former, the costs of the action, he could not be entitled to deduct the costs of the latter, the costs of the reference. The validity of this distinction, however, will depend, as it seems to us, upon the powers which, under the circumstances, the bill of lading gave the defendant's house; for if the effect of the bill of lading were to authorize the defendant's house to act for the benefit of all concerned, and to vindicate their own rights and the rights of those to whom the property would belong, when their rights should be satisfied, they would be entitled to reimburse themselves out of the proceeds, whatever they should reasonably and properly expend in that respect: and is not this the effect of the bill of lading? It entitles them solely and exclusively, in the first instance, to the possession of the goods, but is that possession to be for their own benefit only—to give them the whole and entire property? Certainly not: they are to pay themselves; but as soon as their demand is satisfied, their right cease, and whatever remains is to be *George Laing's*. When a wrong-doer, therefore, withholds possession, they have a right for themselves, and a duty towards *George Laing*, to take proper steps to obtain the possession; and the expense properly incurred, of obtaining that possession, is a charge upon the goods. They are to be re-paid out of the goods the advances they have made; but the goods re-pay them nothing till they can get possession, and when they have got possession, if expense has been incurred in obtaining that possession, the repayment of the advances cannot be said to have begun till the discharge of the expense is ended. If a debtor assign a demand he has for 500*l.* to a creditor, and the creditor necessarily incurs an expense of 100*l.* to get it, how much is his debt diminished? not 500*l.*, the sum paid, but 400*l.*, the sum he can put into his pocket. So here, what is the sum put into the funds of the defendant's house, not 667*l.* 11*s.* 6*d.*, the sum which the goods produced, but 500*l.* only, the surplus, after deducting the expenses, and that 500*l.* defendant is entitled to keep, to reimburse himself the amount of *James Laing's* bill. For what purpose was it that the bill of lading was sent to the defendant's house? that they might reimburse themselves: they ought, therefore, to have the power *fully to reimburse themselves. In what situation were they placed when the goods arrived? The captain, *George Laing's* agent, in this respect, wrongfully refused to deliver. *George Laing*, was a bankrupt, so that he could give no directions. No assignees were chosen, so that no directions were given by

them. The defendant's house, therefore, were fully warranted in doing what seemed best. Had any part of the expense of 167*l.* 11*s.* 6*d.* been improperly incurred, had the reference been an improper step, had there been any misconduct in the house, in neglecting to advise with *George Laing*, or whoever at the time might be acting for him, questions upon those points would have been proper for the consideration of the jury; but stated as this case is, without any imputation as to the incurring of this expense, we are of opinion, that the defendant is entitled to deduct this sum as well as the 500*l.*, and that a nonsuit ought to be entered.

Judgment of nonsuit.



GRANGER v. GEORGE.

The statute of limitations is a bar to an action of trover, commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period.

The declaration was filed generally, as of *Michaelmas* term: Held, that the defendant might give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill."

CASE for not taking care of and re-delivering to plaintiff three boxes containing deeds, papers, &c., of plaintiff, which had been delivered to defendant to be safely kept and re-delivered to plaintiff on request. Count in trover for the boxes, &c. Pleas, first, not guilty; second, that the causes of action in the *declaration mentioned did not accrue within six years next before the exhibiting of the bill of plaintiff in this behalf. Replication, that the causes of action did accrue within six years, &c. At the trial before Abbott, C. J., at the *Westminster* sittings, after last *Michaelmas* term, it appeared that the boxes were placed in the defendant's custody about the year 1816. Plaintiff had before that time become bankrupt, and a commission issued against him, and on the 10th of *November*, 1816, defendant delivered up the boxes with their contents to certain persons describing themselves as assignees under that commission. The writ in the present action was sued out on the 26th of *November*, 1824, returnable on the 29th, but the declaration was filed generally as of *Michaelmas* term, in that year. The boxes were demanded by the plaintiff in *September*, 1824, and there was no evidence that he knew of the conversion in 1818, until the defendant, at the time of the demand, said that he had delivered them up in 1818. Under these circumstances it was contended for the plaintiff, that although the plea of the statute of limitations might be an answer to the first count, yet it could not to the count in trover. That as the plaintiff never knew that the goods were parted with in 1818, until he demanded them in 1824, he was not bound to treat the act in 1818, as a conversion, but might rely upon the demand and refusal in *September*, 1824. It was also contended, that the declaration must be taken to have been filed on the first day of *Michaelmas* term, and that the defendant could not in answer show the time when the writ was issued, his plea being that the cause of action did not accrue within six years before the "exhibiting of the bill," not "before the commencement of the suit." The Lord Chief *Justice thought that the statute of limitations was an answer to the plaintiff's case, and directed a nonsuit.

Scarlett, now moved to set it aside, contending as before, that the plaintiff could not be bound by the defendant's tortious act in 1818, of which he had no notice. It is true that in *assumpsit* the courts have held the statute to be a

bar where the breach of contract has been committed more than six years before the commencement of the action, although the plaintiff did not discover it until within that period; but there is no such decision as to an action of trover. Again, the declaration being entitled generally, had reference to the first day of *Michaelmas* term, and then the bill must be taken to have been exhibited within six years after the conversion. If the defendant wished to show the real time when it was filed, he should have applied to the court to compel the plaintiff to entitle his declaration specially, according to the rule given in *Tida's Prac.* 430, Sixth edition.

ABBOTT, C. J. The evidence given on the part of the plaintiff did not make out, with any distinctness, either the time or terms of the actual deposit with the defendant. But it appeared, that when in September, 1824, the boxes were demanded, the latter replied, that in 1818, he had delivered them over to certain persons whom he named; and it was proved that he had so parted with them on the 10th of November, in that year. It also appeared, that the plaintiff's declaration was filed generally as of *Michaelmas* term, the writ, however,
*152] *was returnable on the 29th of November. Under such circumstances, I thought I was bound to consider the bill as exhibited on that day, which left the effect of the statute of limitations open to the defendant. Upon that point I thought, and I still retain the same opinion, that the statute began to run from the time of the act done by the defendant, although the plaintiff had not any notice of it; there not being evidence of any fraud practised by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done. The plaintiff was certainly guilty of laches in not making inquiries respecting the property at an earlier period, and has no ground of complaint that he is not now entitled to recover.

BAYLEY, J. The gist of this action is the conversion. Now when the defendant proved that the goods had been out of his possession for more than six years before the commencement of the action, it was manifest that he could not have converted them within that period. The cases of *Short v. McCarthy*, 3 B. & A. 626, and *Brown v. Howard*, 2 B. & B. 73, show that the want of knowledge in the plaintiff makes no difference. Upon the other point, it is true that the declaration relates *prima facie* to the first day of term, but that is matter of evidence, and when the writ was produced, returnable on the 29th of November, the presumption was that the party declared on that day. The nonsuit was therefore right.

Rule refused.

Where a commission of bankrupt issued against a person then in custody at the suit of the petitioning creditor, and who afterwards applied to the Court of K. B., and obtained his discharge under the 49 G. 3. c. 121, s. 14., on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission: Held, that he could not, in an action against the assignees, dispute the validity of the commission.

TRESPASS for breaking and entering plaintiff's dwelling house, and seizing and carrying away his goods. Plea, not guilty. At the trial before Abbott, C. J., at the Westminster sittings, after last *Michaelmas* term, it appeared that the action was commenced in order to try the validity of a commission of bankruptcy issued against the plaintiff. The defendants admitted the trespass, and in answer proved that the plaintiff, being in custody at the suit of *Wace*, when the commission issued, afterwards applied to the Court of King's Bench,

to be discharged, and was accordingly discharged on the ground of his having become bankrupt, and that *Wace*, had proved his debt under the commission. The Lord Chief Justice, on the authority of *Goldie v. Gunston*, 4 Camp. 381, held, that the plaintiff ought not to be permitted to dispute the bankruptcy in this action, after having taken the benefit of it in obtaining his discharge, and directed a nonsuit.

Campbell, now moved for a new trial. The evidence given on the part of the defendants certainly cast a great *onus* on the plaintiff, but it ought not to have been treated as a conclusive answer to the action. The proceeding on the part of the bankrupt was taken under the 49 G. 3, c. 121, s. 14. But by the operation of that section, the action by *Wace*, was discontinued by the act *of proving his debt, *Ex parte Woolley*, 1 Rose, 394. The right to detain the debtor was then at an end, and the debtor was on that ground [*154] entitled to be discharged. In the 6 G. 4, c. 16, s. 59., the greater part of which is copied from the 49 G. 3, c. 121, s. 14., a provision is inserted whereby a bankrupt is spared the trouble of applying to be discharged, for no creditor who has brought an action against and arrested the bankrupt is allowed to prove under the commission, without signing a sufficient authority for his discharge out of custody. A discharge under the 5 G. 2, c. 30, s. 13, is very different; that may be an estoppel, for there the bankrupt relies upon the certificate, which is a bar to any action by the creditor; it is, therefore, reciprocally binding on both creditor and debtor. But a creditor may contest the commission, although he has proved under it, *Stewart v. Richman*, 1 Esp. 108, *Rankin v. Hirner*, 16 East, 191. The plaintiff, therefore, ought not to be estopped from disputing the validity of the commission, for all estoppels must be mutual, *Co. Lit.* 352. a. So also they should be certain to every intent, and are not to be taken by way of argument or inference. The supposed estoppel, in this case, can only be taken by inference. Again, an estoppel must be pleaded, otherwise the jury may find the truth of the fact, and the court will give judgment accordingly, without regard to the estoppel, *Com. Dig.*, *Estoppel*, (C.) (E. 10.) *Pleader*, (S. 5.) Here the estoppel not being pleaded, the jury should have been allowed to find the truth of the fact.

ABBOTT, C. J. I am of opinion that the nonsuit in this case was right. I do not consider this as a case of *estoppel strictly and technically so called. But the plaintiff having brought an action against the defendants for seizing his goods, they plead the general issue, thereby denying that the goods of the plaintiff were taken. It appeared in evidence that a commission of bankrupt had issued against the plaintiff on the petition of *Wace*, at whose suit the plaintiff was then in custody. *Wace*, having proved under the commission, the plaintiff applied to this court to be discharged out of custody, on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission, and he was accordingly discharged. The estoppel, in this case, therefore, arises by matter of evidence, and the question is, whether a party, having availed himself of the commission for one purpose, can afterwards be allowed to assert to the same Judges before whom he took the benefit of the commission, that the commission was invalid. Lord *Ellenborough*, gave his opinion to the contrary, and that has never since been questioned. I think his judgment was founded on good sense and good law, and that we ought not to allow the plaintiff to say in this court that he was not a bankrupt. This decision will not be conclusive upon him; he may petition the Great Seal, and there an enquiry may be directed to be made by the trial of an issue, and the defendants may be prevented from relying upon the estoppel.

The other Judges concurring,

Rule refused.

*GALE v. LAURIE, et al.

The 53 G. 3, c. 159, s. 1, is to be construed as if the words, "with all her appurtenances," had been inserted after "ship or vessel," as in sect. 7. Whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owner, constitutes a part of the ship and her appurtenances within the meaning of the 53 G. 3, c. 159., and the owner is liable to the extent of the value thereof for damage done to another vessel in the manner described by that act.

THE plaintiff declared in prohibition, that by an act of the 53 G. 3, c. 159, entitled, "An act to limit the responsibility of ship owners in certain cases," it was amongst other things enacted, that no person or persons who was, were, or should be owner or owners, or part owner or owners of any ship or vessel, should be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter or thing done, omitted, or occasioned without the fault or privity of such owner or owners, which might happen to any other ship or vessel, or to any goods, wares, merchandize, or other things being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which might be in prosecution or contracted for at the time of the happening of such loss or damage. The declaration then stated, that on the 9th of March, 1820, the plaintiff was owner of a ship or vessel called the *Dundee*, then sailing on the high seas, bound on a certain voyage to the *Greenland* fisheries, with certain fishing stores on board thereof, consisting of harpoons, lances, spears, and whale lines, for the purpose of catching whales and other fish on the said voyage, and casks and cisterns for containing the oil and blubber proceeding from the said whales and other fish; and that the *Dundee* did then, without the fault or privity of such owner, come in collision with and sink a certain other ship or vessel called the **Princess*

*157] *Charlotte*, then also sailing on the high seas, bound on a certain voyage to the port of *London*, of which ship the defendants were the owners: that the defendants entered an action in the High Court of Admiralty, and that thereupon the *Dundee*, her tackle, apparel, and furniture were valued and appraised at the sum of 2685*l.*, and the fishing stores at the sum of 2236*l.*, and that bail was given in the sum of 9000*l.* without prejudice to and expressly reserving the question as to the liability of the plaintiff in such action beyond the sum of 2685*l.*, being the agreed value of the *Dundee*, her tackle, apparel, and furniture. But that although the Court of Admiralty had no power or authority whatever under the statute aforesaid, or any other statute or law of this realm or otherwise, to make the fishing stores of any ship or vessel liable to answer for or make good any loss or damage arising or taking place by reason of any such neglect, matter, or thing done, omitted, or occasioned without the fault or privity of the owner or owners of such ship or vessel, which might happen to any other ship or vessel, or to any goods or merchandize or other things being in or on board of any other ship or vessel, yet the Court of Admiralty decreed the said fishing stores on board the *Dundee* as aforesaid to be liable to contribution against the form and effect of the said statute; and that the defendants had not ceased to prosecute their suit in the said Court of Admiralty, to the great damage of the plaintiff, and against the king's writ of prohibition to them delivered, and, therefore, the plaintiff as well, &c. brought his suit, &c. Plea, suggesting as ground for a consultation, that the said fishing stores so being on board the said ship or vessel in the declaration mentioned, called the *Dundee*,

*158] at the time of the happening * of the loss or damage in the declaration mentioned, were, and are part and parcel of the said last mentioned ship or vessel, appurtenances, and freight, according to the true intent and meaning of the said act of parliament in the declaration mentioned and set forth, and that the value of the said fishing stores did form part of the value of the

said ship or vessel, appurtenances, and freight, within the true intent and meaning of that act. Issue thereon. At the trial before *Abbott*, C. J., at the *London* sittings, the jury found a special verdict, the material parts of which were as follows :

At the time of the passing of the said act of parliament, the fishing stores belonging to ships employed in the *Greenland* fisheries, consisted, and still do consist of, harpoons, lances, spears, lines, boats, and various other things for the purpose of catching whales and other fish, and preparing their blubber, and of casks for containing and bringing home to *England* the blubber and oil proceeding from the said whales and other fish caught upon the voyage ; and the value of such casks was, and is generally, one half of the whole value of such fishing stores. In the outward voyage of the said ships the said casks were, and are carried out on board the ships ready for receiving the blubber and oil, and are used for several voyages ; but in ships employed in the *South Sea* fisheries, (which are provided with similar fishing stores,) the staves and hoops of the casks for the purpose of containing the oil obtained or the principal part thereof, were and are carried out in packs, and were and are made up into casks in the *South Seas* ; and the oil so obtained by such last mentioned ships, when brought home to this country, was and is sold in the said casks, the purchasers thereof purchasing and paying *for such last mentioned casks [*159 with such last mentioned oil. According to the usage of trade, where policies of insurance have been effected on ships, their tackle, apparel, munition and furniture, which ships are employed in the *Greenland* fisheries, and losses have happened to such ships and their fishing stores, such stores have not been, and are not covered by such policies, nor has a loss upon the fishing stores been paid for by the underwriters upon the ships having the same on board, and when a particular average loss has happened upon any such policy, the fishing stores on board such ships have not contributed to such particular average, but it is the practice that such fishing stores are insured in separate policies or by separate valuations, and the said usage and custom of merchants existed long before and at the time of the passing of the act of parliament. It is usual for ships employed in the *Greenland* fisheries, during the fishing seasons, to make intermediate voyages to the *West Indies* and *Honduras*, or the *Baltic* sea, or to be used in the coasting trade of this kingdom, and when such ships go such intermediate voyages, or are so employed in the coasting trade, the said fishing stores are all landed and left behind ; and such ships, whilst employed in the *Greenland* fisheries, are in all respects fitted and equipped with tackle, apparel, boats, and stores for the ordinary purposes of navigation, and have every thing belonging to ordinary ships, and are in all respects capable of navigating the seas and performing voyages independently of and without the fishing stores. According to the usage of the herring fishery upon the east coast of this kingdom, and so northward, the owners or the masters of the ships employed in the said herring fishery have provided one share of the nets and "other fishing stores put on board such last mentioned ships, and the crews of the said last mentioned ships have provided the remaining [*160 shares of the said nets and other fishing stores ; but when such ships have been hired by merchants for the fishing season, (as has frequently been the case,) one share of the nets and fishing stores have been provided by the owners, another by the crew, and the remainder by the merchants, and the usage of the said herring fishery was the same before and at the time of passing the said act of parliament.

The case was argued at the sittings in banc before *Easter* term 6 G. 4, by *Campbell*, for the plaintiff. Upon the facts found by the special verdict, the fishing stores cannot be considered as appurtenances to the ship, but to the cargo ; they are not wanted for the purposes of navigation, but are necessary to the procuring and bringing home a cargo. Suppose the act had said that a party should be liable to the extent of the cargo and its appurtenances, it could

not be contended that these stores were not to be taken into consideration, and if they are appurtenant to the cargo, they cannot also be appurtenant to the ship. It is found by the special verdict, that such stores would not be covered by a policy upon the ship, her tackle, apparel, and furniture ; and those are, properly speaking, the appurtenances of a ship. Suppose the ship were chartered, and the stores did not belong to the owner of the ship, or that the stores were the joint property of the owner of the ship and other persons, as in the herring fishery, it could not then be said that the stores passed with the ship ; yet if appurtenances in one case they must be so in all. The act should, therefore, *be construed according to the ordinary meaning of the words used, rather liberally than strictly, so as to promote the shipping interest, which appears to have been considered as the object of the legislature in passing the statute upon which this question has arisen, *Wilson v. Dickson*, 2 B. & A. 2 ; *Cunnan v. Meaburn*, 1 Bing. 435 ; and *Hoskins v. Pickersgill*, Marsh. Ins. 765.

*161] *Tindal*, contra. The statute 53 G. 3, c. 159, being made to alter the common law, and abridge the remedy which a party grieved before had, must be construed strictly. The second section shows that all the property of the owner of the ship, on board the ship at the time of doing the injury, was intended to be liable ; and it provides for a difficulty which might arise as to the calculation of freight. In this case the object of the voyage could not be carried into effect without the stores, they could not be used for any other purpose but fishing, and were the property of the owner of the ship. Suppose a ship to be fitted out as a privateer, the guns are not necessary to sailing, but to the purposes of the voyage. In like manner the fittings of a packet ship, although often very expensive, are not necessary to what seems on the other side to be considered the abstract idea of a ship, viz., something that will carry another thing from some one place to some other place. Yet the guns, in the former case, and the fittings in the latter, would be appurtenances of the ship. The finding of the jury that a policy upon a ship, her tackle, apparel, and furniture would not cover these stores, cannot affect the present *question ; for the word *appurtenances* is larger than furniture ; besides a policy is an instrument construed by the usage amongst merchants, and that cannot affect the construction of an act of parliament.

Cur. adv. vult.

The judgment of the court was now delivered by

ABBOTT, C. J. This case came before the court upon a special verdict found in a suit brought by the owner of a ship called the *Dundee*, against the owners of a vessel called the *Princess Charlotte*. The suit in this court is for a prohibition to the instance court of admiralty, to prevent the execution of a sentence therein given against the owner of the *Dundee*, in favor of the owners of the *Princess Charlotte*, in a suit instituted in that court for the recovery of damages for the loss of the *Princess Charlotte*, which was sunk by collision with the *Dundee*. And the question arises upon the statute 53 G. 3, c. 159, "An act to limit the responsibility of ship-owners in certain cases." At the time of the collision, which happened without any fault or privity of the plaintiff, the *Dundee* was sailing outward on a voyage to the *Greenland* fishery, having on board the necessary stores and implements for the taking of whales and other fish, and procuring and bringing home the oil and blubber obtained from them. In the Court of Admiralty a valuation was made of these stores and implements, distinct from the value of the ship. There was no question as to the collision, or the responsibility of the plaintiff independent of the statute. The sentence of the Court of Admiralty was against the plaintiff, both *162] as to the value of the ship and the value of these stores and *implements. It was contended, that the plaintiff was not answerable in respect of the value of the latter, and on that ground a prohibition was applied for ; the plain

tiff declared in prohibition, the cause went down to trial, and a special verdict was found. (The Lord Chief Justice then read the parts of the special verdict before set out, and proceeded as follows.)

The case was argued before us, in the month of April last; and we are of opinion that the present plaintiff, the owner of the *Dundee*, is responsible to the value of the fishing stores.

By the first section of the act it is enacted, "that no owner or owners of any ship shall be liable to answer for any loss or damage arising by reason of any act, &c., done without the fault or privity of such owner or owners, to any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due during the voyage, which may be in prosecution, or contracted for at the time of the happening of such damage." In this section the word "ship" only is used, but in the following sections the phrase "value of the ship and her appurtenances" occurs not less than ten times. The same phrase occurs in the first section of the 7 G. 2, c. 15, and of the 26 G. 3, c. 86. The three acts are all in *pari materia*, and there can be no doubt, that the first section of the act on which this question arises, is to be understood as if the words "with all her appurtenances," were used therein, supposing those words would make any difference in the sense.

These acts were certainly made to encourage persons to become owners of ships, and in conformity with similar provisions contained in the law of many of the maritime states of the continent of Europe. Their effect, [*164] however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law; and there is nothing to require a construction more favorable to the ship-owner, than the plain meaning of the words imports. The ship in question was in the prosecution of a voyage in which no freight could be earned. The fishing stores were not carried on board the ship as merchandize, but for the accomplishment of the objects of the voyage; and we think, that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers, or goods, or the fishery.

This construction furnishes a plain and intelligible general rule; whereas if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil.

It is true, that in the case of insurance these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. And the construction of a policy can furnish no rule for the construction of this act of parliament which was passed for purposes of a different nature. Our judgment in the present case is given upon a particular ship engaged in the *Greenland* whale fishery, and with reference to her particular state at the time. It is not necessary to give any opinion upon particular cases of ships fitted out in a different manner or for other fisheries, until some question [*165] arising out of such a case shall come judicially before us.

The judgment of the court is to be entered for the defendants. And it is a satisfaction to us to know, that the state of the record is such as to furnish an opportunity of correcting our judgment if it be erroneous.

Judgment for the defendants.

WOOLLEY, et al., Assignees of the Estate and Effects of DOWMAN and OFFLEY, Bankrupts, v. JENNINGS, et al.

Where a warrant of attorney was given with a defeasance, stating it to be given "as a security for 4000*l.*, and lawful interest thereon;" Held, that it was to be construed as a continuing security, and not merely as a security for money then due.

TROVER for several bills of exchange. Plea, not guilty. At the trial before Abbott, C. J., at the *London* sittings after last *Michaelmas* term, it appeared, that on the 20th of *January*, 1823, the bankrupts gave to the defendants a warrant of attorney, with the following defeasance: "The within warrant of attorney is given to secure the payment of the sum of 4000*l.*, with lawful interest thereon." On the 4th of *October*, 1823, judgment was entered up on the warrant of attorney, and a *fieri facias* issued, under which the bills of exchange in question were seized. On the 29th of *October*, *Dowman* and *Offley* became bankrupts. Between the 20th of *January* and the 4th of *October*, 1823, the bankrupts, in the course of their dealings with the defendants, had paid into their hands a larger sum than 4000*l.*, and it was thereupon contended, that the warrant of attorney was discharged: but the Lord Chief Justice was of a

*186] *different opinion, and the jury found a verdict for the defendants.

The *Attorney-General* now moved for a rule *nisi* for a new trial. The sum secured by the warrant of attorney was paid off before judgment was entered up. Sums amounting in the whole to much more than 4000*l.* were paid by the bankrupts into the hands of the defendants, between the 20th of *January* and the 4th of *October*. There was a running account between them, the monies paid in were, therefore, to be applied to the first items of the account, nothing to the contrary having been said when the money was paid. In such case, the party receiving the money has no right to appropriate it to the discharge of any particular items; *Clayton's case*, 1 Mer. 572, *Bodenham v. Purchas*, 2 B. & A. 39. If no warrant of attorney had been given, it is clear that the payments would have been considered applicable to the first items of the account; and it seems difficult to understand how that should be altered by giving a collateral security.

Per Curiam. In *Kirby v. Duke of Marlborough*, 2 M. & S. 18, Lord *Ellenborough* said, "This is a bond given by the surety, as an indemnity for advances to a definite amount; it is the same as if the surety had expressedd that the bankers might lend to the amount of 3000*l.*; and when the advance was made to that amount, the guarantee became *functus officio*, and was not a continuing guarantee." This case is very different; there is nothing on the face of the warrant of attorney or the defeazance to show that it was intended *187] to secure the *balance existing at the time when it was given. In the absence of any thing to show such an intention, it must be construed as a continuing security.

Rule refused.

RIPLEY, et al. v. SCAIFE.

By a charter-party, the freighter of a ship agreed to pay for her 200*l.* per month for six months certain, and so in proportion for any longer time that she might be in his employ. The ship was to be kept in repair by the owner. Before the termination of the voyage for which the ship was chartered, certain repairs were necessary, which occupied a period of twenty-eight days: Held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight.

ASSUMPSIT on a charter-party, with a penalty of 1500*l.* for non-performance. There were several special counts claiming the penalty, and the money counts. It is, however, unnecessary to state the former, as nothing ultimately turned upon them. Plea, *non-assumpsit*. At the trial before Abbott, C. J., at the London sittings after last *Michaelmas* term, it appeared, that the defendant was owner of the ship *Alliance*, and had, on the 21st of June, 1821, entered into a charter-party with the plaintiffs, whereby it was mutually agreed between them, that the said vessel should, at the owner's expense, be made, and during the voyage be kept tight, staunch, and strong, and well found, and provided, &c., and should take on board at *Liverpool*, from the freighters, a cargo not exceeding, &c., and without delay, set sail and proceed to *St. Thomas*, and make delivery according to bills of lading, and should then take in other goods for *St. Domingo*, and make delivery there; and after such delivery the said ship should, at the owner's expense, be immediately made ready to perform her homeward voyage, &c. And the freighters agreed that they would pay to the owner for the freight of the said vessel after the following rate; namely, the sum of 200*l.* British sterling per month for six months certain; *and so in proportion for any longer time she might be employed. The said pay to commence from the 25th of July then next, or should the vessel sail from *Liverpool* before that day, then the pay should commence from the day of sailing, and so continue until her arrival into dock at the homeward port of discharge; and should *London* be the port of discharge, then the freighters were to pay 100*l.* more. The vessel having taken in a cargo sailed for *St. Thomas*, and thence for *St. Domingo*; at the latter place some repairs were necessary, they were done at the expense of the owners, and occupied a period of twenty-eight days. On the homeward voyage the captain was to call for orders at *Cork*, but was driven into *Liverpool* by tempestuous weather. At *Liverpool* other repairs were done which detained the vessel ten days. She then sailed for *London*, arrived there on the 9th of April, and delivered her homeward cargo in the *West India Docks*. The defendant demanded freight for the whole time from the vessel's first departure from *Liverpool* until her arrival in *London*, including the two periods of twenty-eight and ten days, occupied in repairing the ship; and the plaintiffs were obliged to pay the money, in order to obtain possession of their goods. For the defendant it was contended, that the time during which the freight was payable was to be computed from the sailing to the return of the vessel; and that there being no stipulation for deducting any days that might be occupied in repairing the ship, the plaintiffs had paid no more than the defendant was entitled to receive. The Lord Chief Justice was of that opinion, and the jury under his direction found a verdict for the defendant.

*Scarlett now moved for a new trial, and contended, that the charter-party had not been properly construed. In the first part of that instrument it was agreed that the vessel was to be kept in repair at the expense of the owner, and afterwards that the freighters should pay freight at the rate of 200*l.* per month for six months certain, and so in proportion for any longer time she might be employed. Now if the freighters are bound to pay freight for the period of time consumed in repairing the vessel, the repairs will in effect be done at their expense, and not at the expense of the owner. And the

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ship not being under the control of the freighters during the progress of the repairs, cannot be considered to have been in their employ at that time. They were, therefore, improperly charged with freight during that time, and are entitled to recover in this action the money which they were compelled to pay, in order to obtain possession of the cargo.

ABBOTT, C. J. I am of opinion that the plaintiffs were liable to pay the whole sum demanded for freight, and, consequently, that they cannot recover any part of the money paid by them on that account. There is in the charter-party an express stipulation for the payment of freight from a certain day, for six months certain; and so much longer as the vessel should be employed by the plaintiffs. There not being any other stipulation for the case of repairs, I think that the ship was in the employ of the plaintiffs whilst those repairs were going on, and that they were liable to pay freight during that period.

BAYLEY, J. The construction contended for depends entirely upon the use [170] of the equivocal word *employment*. "The law would imply a stipulation on the part of the owner to keep the vessel in repair; and, therefore, the introduction of that undertaking into the charter-party does not affect the question. But the payment of freight is to commence from a certain day, *and so continue*, until her arrival into dock at the homeward port of discharge. That shows the understanding to have been, that the vessel should be considered in the employ of the plaintiffs, and that they should pay freight during the whole period of her absence from this country."

LITTLEDALE, J.,† concurred.

Rule refused.‡

† *Holroyd, J.*, was in the Bail Court.

‡ See *Havelock v. Geddes*, 10 East, 555.

BAXTER et al. v. The Earl of PORTSMOUTH.

Where a tradesman supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before and at the time when the goods were ordered and supplied: Held. that this was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders and supplied the articles, not having any reason to suppose that the defendant was a lunatic.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial before *Abbott, C. J.*, at the *Westminster* sittings after last *Michaelmas* term, it appeared, that the defendant, between the years 1818 and 1823, had hired carriages, &c. of the plaintiff, and had thereby incurred the bill for which the action was commenced. It was proved that the carriages were constantly used by the defendant, and were suitable for a person of his rank and station. For the defendant it was proved, that by an inquisition dated the 28th of February, 1823, taken under a commission of lunacy, it was found, [171] that the defendant then was, and from the 1st of January, 1809, continually had been of unsound mind, not sufficient for the government of himself, &c.; and it was then urged, that at the time when the carriages were hired of the plaintiffs, the defendant was incapable of making any valid or binding contract. The Lord Chief Justice was of opinion, that as the articles hired were suitable to the station and fortune of the defendant, and as the plaintiffs, at the time of making the contracts, had no reason to suppose him of unsound mind, and could not be charged with practising any imposition upon

him, they were entitled to recover; and under that direction the jury found a verdict for the plaintiffs, but the defendant had leave to move to enter a non-suit; and now

Brougham, moved for a rule *nisi* for that purpose. It is certainly laid down in *Beverley's* case, 4 Co. 123, that no man shall be, in any plea to be pleaded by him, received by the law to stultify himself. But in a subsequent part of the same case there is this passage: "Suppose, then, an idiot above the age of twenty-one years, makes a feoffment in fee of his inheritance, if you ask how and in what manner it may be avoided during his life? I answer, that if it is found by office at the king's suit that he was idiot, a nativitate, and that he has aliened his lands, then, upon a *sci. fa.* against the alienees, the land shall be seized into the king's hands." And afterwards it is said, "For in this case the idiot, in no plea that he can plead, shall disable or stultify himself; but all this is found *by office by the inquisition and verdict of twelve men at the king's suit, who are not concluded to speak the truth." And Co. Litt. 247 a. is to the same effect. If the party be found idiot, that relates to his birth; if lunatic, it relates to the time when he is found to be so; Com. Dig. Idiot, D. 4; 1 Cha. Ca. 113. In this case the defence set up was, the finding of twelve men under a commission to inquire whether the defendant were lunatic or not. [*Bayley*, J. Is there any instance in which lunacy has been admitted as a defence to an action for necessaries?] The cases do not warrant any such distinction, and in several an inquisition has been held admissible, although not conclusive evidence, to establish the lunacy of the defendant, as an answer to the action, *Sergeson v. Sealey*, 2 Atk. 412; *Fates v. Boen*, 2 Str. 1104; *Faulder v. Silk*, 3 Camp. 126.

ABBOTT, C. J. I was of opinion at the trial that the evidence given on the part of the defendant was not sufficient to defeat the plaintiffs' action. It was brought to recover their charges for things suited to the state and degree of the defendant, actually ordered and enjoyed by him. At the time when the orders were given and executed *Lord Portsmouth* was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would be cases of imposition; and I desired that my judgment *might not be taken to be that such contracts would bind, although I was not prepared to say that they would not. Upon further consideration, I find no reason for thinking that my direction to the jury was erroneous, or that the verdict should be disturbed.

The other judges concurred.

Rule refused.

STOCKDALE v. ONWHYN.

The first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition.

CASE, for publishing and exposing to sale, and selling, without the consent of the plaintiff, divers, to wit, five thousand copies of a certain work called *The Memoirs of Harriette Wilson*, copied from a book which the plaintiff had printed, and of which he was the first publisher. Plea, not guilty. At the trial before *Abbott*, C. J., at the *Westminster* sittings, after last *Michaelmas*

term, it appeared that the work in question professed to be a history of the amours of a courtezan, that some parts of it were libellous upon individuals, and other parts very licentious. The Lord Chief Justice, was of opinion that such a work was not entitled to the protection of the law, and directed a nonsuit ; and now

Brougham, moved for a rule *nisi* for a new trial. The doctrine that a publisher can have no property in such a work as that which the defendant is alleged to have pirated, rests entirely upon the *dictum* of *Eyre*, C. J., in a case tried before him at *Warwick*. In *Walcot v. Walker*, 7 Ves. jun 1. [174] and *Southey v. Sherwood*, 2 Mer. 435, Lord *Eldon*, relied upon it, when he refused to grant an injunction to restrain the sale of copies of what he considered immoral works. The cases in equity cannot weigh much against the present claim, they leave the question of law quite where it was before ; for it is one thing to refuse the special protection of an injunction, and another to say that there can be no property in the book. The case tried before *Eyre*, C. J., is not regularly reported, but an account of it is given by the counsel in *Southey v. Sherwood* ; and it is plain that the *dictum* of *Eyre*, C. J., was not well founded in law. Dr. *Priestly*, brought an action against the hundred for damages sustained by him, in consequence of the riotous proceedings of a mob at *Birmingham* ; part of the property alleged to have been destroyed consisted of unpublished manuscripts. On behalf of the hundred it was said, that the plaintiff was in the habit of publishing works injurious to the government ; but no evidence was produced. *Eyre*, C. J., said, if any such evidence had been produced he should have held it fit to be offered. Now it is quite clear that such evidence would not have been admissible ; at all events it ought to have applied to the works alleged to have been destroyed, and not to the general character of the plaintiff's writings. That *dictum*, therefore, is not entitled to much weight. There is another case, *Fores v. Johnes*, 4 Esp. 97, which may, perhaps, be considered as making against the present plaintiff, but in the first place there was no judicial decision in that case, for it terminated in a reference ; and, secondly, it could not be presumed that the defendant's order for *all caricatures* extended to those of an immoral tendency, and, consequently, he was not liable to pay for any of that description. It is impossible to say that the plaintiff cannot have property in this work for any purposes. There can be no doubt that stealing it would be larceny. [Littledale, J. There might be an actual property in the paper upon which it is printed, but the copyright is an ideal property.] In *Hime v. Dale*, 2 Camp. 27, it appears to have been the opinion of Lord *Ellenborough*, that in such cases an action is maintainable, although the plaintiff may be entitled to nominal damages only. The object with which the courts have been inclined to refuse their protection to such works, has been to put them down, but it seems clear that the sale must be increased by allowing the publication of pirated editions. And, accordingly, we find conflicting opinions as to the propriety of granting injunctions to restrain piracy. The *Beggar's Opera*, has never been considered a very moral production ; another opera, called *Polly*, was composed by the same author, but the performance of it was prohibited ; it must, therefore, be presumed to have been more immoral than the former, yet Lord Chancellor *Talbot*, granted an injunction to restrain the sale of a pirated edition. Upon the whole, therefore, it appears that there is not any decision of a court of law against the present action, and that in equity there are conflicting opinions of different Chancellors as to the expediency of granting injunctions in such cases :

Abbott, C. J. This was an action brought for the purpose of recovering a compensation in damages for the loss alleged to have been sustained by the plaintiff. At the trial, it was in proof that the work professed to be a history of the amours of a courtezan, that it contained in some parts matter highly

indecent, and in others matter of a slanderous nature upon persons named in the work. The question then is, whether the first publisher can claim a compensation in damages for a loss sustained by an injury done to the sale of such a work. In order to establish such a claim, he must, in the first place, show a right to sell; for if he has not that right, he cannot sustain any loss by an injury to the sale. Now I am certain no lawyer can say that the sale of each copy of this work is not an offence against the law. How then can we hold that by the first publication of such a work, a right of action can be given against any person who afterwards publishes it? It is said that there is no decision of a court of law against the plaintiff's claim. But upon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice, this action cannot be maintained. It would be a disgrace to the common law could a doubt be entertained upon the subject; but I think, that no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion. As to the cases in equity, it is admitted that they are no authority for us. One person of great authority and talents may think the publication of such a work will be most effectually restrained by granting an injunction. Another of equal authority and equal talents may think that the same object will be best attained by holding that there can be no property in the work; for the inducement to become the publisher ^{*177} will be less if other persons may copy and publish the book, gain being the object of the publisher. Which of these is the better opinion it is not for us to say; each learned person has acted upon his own judgment, each having in view the restraint of the publication. Each would act upon the rules of the common law, but would act upon them in such a manner as in his judgment was best calculated to effect that restraint.

BAYLEY, J. In *Southev v. Sherwood*, the Lord Chancellor says, that if a work be not innocent, in such a sense as that an action would not lie in case of its having been published by the author and subsequently pirated, the courts of equity will not grant an injunction. It was, therefore, plainly his opinion, that unless a work were innocent, no action at law could be maintained against a person pirating it. That opinion appears to me perfectly correct; I therefore, agree, that the nonsuit in this case was right.

HOLROYD, J. The ground of action upon which the plaintiff proceeds, is an alleged injury to his supposed right of publication. But I am at a loss to know how any such injury can be sustained, if the work be such that he has no right to publish it. In my judgment it would be preposterous for a court of law to say that a right of action is acquired by being the first publisher of a book, when that publication is liable to be punished as a grievous offence; and no one can doubt that the publication of the work in question was such an offence.

LITTLEDALE, J. It has been doubted whether the privileges of copyright are given by the common law, ^{*or} by the statute 8 Ann. c. 19. But however that may be, the foundation of the right is shown by the recital in that statute; "Whereas, printers, booksellers, &c., have of late frequently taken the liberty of printing, reprinting, and publishing books and other writings without the consent of the author or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: be it enacted, &c." Now it is plain that no such foundation for the right exists when the very publication of the book is an offence against the law.

Rule refused.

MURPHY v. DONLAN and MARSHALL.

After judgment by default against one of two defendants, the plaintiff may, upon the trial of an issue joined by the other defendant, elect to be nonsuited.

ASSUMPTION upon a bill of exchange. The defendant, *Marshall*, suffered judgment by default. The defendant, *Donlan*, pleaded the general issue. At the trial before *Abbott*, C. J., at the *London* sittings, after last *Michaelmas* term, the plaintiff elected to be nonsuited. It was objected, however, by the defendant's counsel, that as this was a joint action against several defendants, and one had suffered judgment by default, the plaintiff could not be nonsuited as to one of them only; but such defendant must have a verdict; *Tidd's Practice*, 6th edition, p. 908., *Hannay v. Smith*, 3 T. R. 662, *Weller v. Goyton, and Walker*, 1 Burr. 358, and *Harris v. Butterley*, Cwp. 483, were cited as authorities in support of that position. The Lord Chief Justice directed a nonsuit, but gave the defendant leave to move to enter a verdict for him, if the court should be of opinion that the plaintiff could not be nonsuited.

*179] **Gurney* now moved accordingly, and relied upon the authorities cited at the trial.

ABBOTT, C. J. When we consider the ground and foundation of the judgment of nonsuit, and the situation of a plaintiff, where one of several defendants suffers judgment by default, it will appear that there is no inconsistency in allowing a plaintiff to be nonsuited, as to the defendant who has pleaded, although the other defendant may have suffered judgment by default. The entry on the *postea* in the case of a nonsuit is as follows: "The jurors having withdrawn from the bar to consider of their verdict, after they had considered and agreed among themselves, they returned to the bar to give their verdict, upon which the plaintiff, being solemnly called, comes not, nor doth he prosecute his bill or writ against the defendant." This is the formal entry of a nonsuit on the *postea*. The ancient practice (which I remember to have prevailed in some places) was for the officer of the court to ask the jury, after they had considered of their verdict, if they were agreed in their verdict. If they answered in the affirmative, the officer then called the plaintiff by name to hear the verdict; and if he appeared the verdict was pronounced. If he did not appear to prosecute his suit he was nonsuited. Judgment by default is either by *non sum informatus*, or *nil dicit*. In the former case, the defendant's attorney having appeared, says, that he is not informed of any answer to be given to the action. In the latter the defendant himself appears, but says nothing in bar or preclusion thereof, and the judgment proceeds: "Whereby *180] the said A. B. remains "undefended, wherefore the plaintiff ought to recover his damages." Now that being the nature of the judgment by default, I cannot see that it is inconsistent for a plaintiff, who has obtained such a judgment against one of several defendants, to say that he will not further prosecute his suit against another defendant. That being so, I think the plaintiff was properly nonsuited in this case.

HOLROYD, J. I am of the same opinion. A verdict against a plaintiff cannot be taken but in his presence, but a verdict against a defendant may be taken in his absence. The rule has certainly been understood to be as it is laid down in *Tidd's Practice*; but it is a rule not founded upon any principle.

Rule refused.

† This practice prevailed at *Bristol* within these last twenty years.

WHITTINGTON v. GLADWIN.

Words of an innkeeper imputing insolvency are actionable, although at the time when they were spoken, an innkeeper was not subject to the bankrupt laws.

DECLARATION stated, that the plaintiff was an inn and tavern keeper, and carried on that trade and business with integrity, &c., always punctually paying and discharging his just debts : by means whereof plaintiff had acquired and was honestly acquiring great gains and profits in his said trade and business ; yet defendant, well knowing, &c., spoke of and concerning the plaintiff in the way of his said trade and business, the following words : " You have been a pauper ever since you have lived in the parish ; you are now a pauper. I have paid 20*l.* a year towards your maintenance : you will be in the bankrupt list in less than twelve months." The plaintiff having obtained a verdict,

**Marryat* now moved in arrest of judgment, on the ground that the words, at the time when they were spoken, were not actionable, inasmuch as an innkeeper was not then liable to the bankrupt laws. He cited *Collis v. Malin*, Cro. Car. 282, *Smedley v. Heath*, 1 Lev. 250, and *Viner's Abr.* tit. *Action for Words*, U. a. pl. 18. in margin, where it is said by *Wray*, C. J., that to call a man a bankrupt generally is not actionable, but to call a merchant so is actionable.

ABBOTT, C. J. The plaintiff's right of action in this case is founded on the principle, that the words alleged in the declaration are injurious to him in his special character of an inn keeper. The single question, therefore, is, whether words imputing an inability to pay debts, be injurious to a person who seeks his living by buying provisions upon credit and selling them again to his guests at a profit, he not being liable to the bankrupt laws. Now such an imputation is calculated to prevent him from having that credit which is at least useful, if not necessary, in his business ; the words, therefore, are likely to be injurious to him. In *Southam v. Allen*, Sir T. Raym. 231, the following words spoken of an inn keeper were held, after verdict and much debate, to be actionable : " Deal not with the plaintiff, for he is broke ; and there is neither entertainment for man or horse." According to all the principles upon which such an action for slander is maintainable, and upon that authority, I am of opinion that this action is well brought.

BAYLEY, J. *Read v. Hudson*, 1 Ld. Raym. 610, is an authority to show that words imputing to a tradesman insolvency and *not bankruptcy, are actionable. There, the words were spoken of a laceman, but it was not averred that he was subject to the bankrupt laws.

Rule refused.^t

^t See *Best v. Loit, Vis. Abr. Action for Words*, (U. a.) pl. 6.

The KING v. DOWNES.

Where a charter incorporated "the men, free burgesses of the borough of C.," and declared that for ever thereafter there should be within the borough to be chosen out of the free burgesses eighteen common councilmen, and then nominated eighteen persons to be the first common councilmen : Held, that this charter virtually made them free burgesses also.

QUO WARRANTO information, for usurping the office of a free burgess of the borough of Colchester. Plea, that his late majesty, by a charter, in the 58th year of his reign, at the humble petition of the burgesses of Colchester,

did will, grant, ordain, constitute and declare, that the said borough of *Colchester* might and should be and remain for ever thereafter a free borough of itself, terminated by all its ancient metes and bounds, and that the men, free burgesses of the same borough, by whatsoever name or names of incorporation, they had theretofore been incorporated and called, should and might be for ever thereafter one body politic and corporate in deed and in name, by the name of, The mayor and commonalty of the borough of *Colchester*, in the county of *Essex*. And his said majesty, by the said charter, declared, that for ever thereafter there should and might be, within the said borough, to be nominated and chosen out of the free burgesses of that borough, in manner after mentioned, one who should be called the mayor, eleven others who should be called aldermen, eighteen others who should be called assistants, and eighteen others who should be called the common councilmen of the borough, and which said mayor should likewise be *183] an alderman of the borough. That every *common councilman to be chosen in manner thereafter expressed, should take his corporal oath, before the mayor and two aldermen, faithfully to execute the office. The plea then set out part of the charter, nominating the first mayor, eleven aldermen, eighteen assistants, and eighteen common councilmen, of whom defendant was one, and averred that the charter was accepted, and that afterwards, and before the defendant took upon himself the office of common councilman, he took the oath prescribed by the charter, and then took upon himself the said office, by reason of which said several premises the said defendant then and there became and was, and from thence hitherto hath been and still is, a free burgess of the said borough, &c. Demurrer and joinder.

Jessopp for the crown. There is nothing upon the face of this record to show that the defendant is a free burgess of *Colchester*. The being nominated to the office of common councilman cannot make him also a free burgess, unless the charter contains some stipulation to that effect. But nothing of the kind is stated in the plea. [*Bayley, J.* Out of whom are the common councilmen to be elected?] *Thereafter* out of the free burgesses, and although persons thereafter elected common councilmen may not cease to be free burgesses, yet it by no means follows that the persons originally nominated to the former office, are to enjoy also the privileges of the latter.

Chitty, contra, was stopped by the court.

Abbott, C. J. I am of opinion, that the defendant has by his plea shown *184] a good title to the franchise of a "free burgess of this borough. It appears that his late majesty, at the petition of the burgesses of *Colchester*, ordained that it should thereafter be a free borough, and that the men, free burgesses of the borough, should be for ever thereafter a body corporate, by the name of the mayor and commonalty of the borough of *Colchester*. The corporation was, therefore, to consist of the men, free burgesses of the borough. By the same charter his late majesty declared, that for ever thereafter there should be within the borough, to be nominated and chosen out of the free burgesses, one mayor, eleven aldermen, eighteen assistants, and eighteen common councilmen. Nothing can more clearly indicate an intention that at least every future common councilman should be a free burgess. The plea then shows that the defendant was nominated one of the first eighteen common councilman, and that he took the oath prescribed by the charter. I think we are bound to suppose that his late majesty, by appointing the defendant to an office which it was his declared intention that no one but a free burgess should fill, at the same time virtually made him a free burgess. Were a different construction put upon the charter, it would follow, that, in a corporation consisting of free burgesses, not one officer of the borough could be entitled to exercise the franchise of a free burgess. This would be such an extraordinary state of things that we cannot imagine it was intended to exist. I therefore think we are bound to hold, that the defendant is entitled to the privileges of a free burgess and our judgment must be in his favor. Judgment for defendant.

*The Governor and Company of the Bank of ENGLAND v. DAVIS,
[2 Bing. 393.]

(In Error.)

In an action against the Bank of *England*, the declaration stated that the plaintiff was lawfully possessed of certain 3 per cent. annuities in the care of the defendants, and standing in their books in the name of the plaintiff, for the purpose, amongst other things, of paying him all the dividends which might accrue due in respect of the stock, whilst the same should not be transferred in the said books with the authority of the plaintiff, and that the plaintiff was entitled to the stock, and that it had not been transferred in the books to any person by his order or authority, and thereupon it became the duty of the defendants to pay to the plaintiff the dividends whilst the same was not transferred, yet the defendants, although requested, had not paid them : Held, upon error, that this declaration was bad, on the ground that it did not appear that the dividends had ever been issued by government to the Bank, and that until they were issued, it was not the duty of the Bank to pay them.

This was a writ of error upon a judgment of the Court of Common Pleas in a special action on the case, for breach of duty in permitting a transfer of stock without the authority of the plaintiff below, *Davis*, and for refusing to pay him the dividends thereon. The second count of the declaration stated, that before the time of the committing of the grievances thereafter next mentioned, the plaintiff was lawfully possessed of a certain other large sum, to wit, 10,000/. 3 per cent. consolidated annuities, which said last mentioned stock, before the time of the committing of the said last mentioned grievances, was in the care of the defendants, and standing in the public books of the defendants in the name of the plaintiff, for the purpose, amongst other things, of paying to the plaintiff, or to such person or persons as he should legally appoint for that purpose, all the dividends, interest, and produce which might and should accrue due for and in respect of the said last mentioned stock, whilst the same should not be transferred to any person or persons in the said books with the order and authority of the plaintiff; and that before *and at the time of the committing of the grievances thereafter mentioned, the plaintiff was entitled to the said last mentioned stock, and the same had not been nor was transferred in the said books to any person or persons, with the order or authority of the plaintiff ; and thereupon by reason of the premises in that count mentioned, the defendants became and were liable, and it became and was their duty to pay to the plaintiff, or to such person or persons as he should legally appoint for that purpose, all the dividends, interest, and produce which might and would accrue due, for and in respect of the said last-mentioned stock, whilst the same was not transferred in the said books to any person or persons, with the order or authority of the plaintiff. A request to pay the dividends on the 30th of September, 1820, and a refusal by the bank, was then averred. The fourth count was the same as the second, except that it applied to dividends due in respect of 178/. 18s. long annuities. The Court of Common Pleas having given judgment for the defendant in error on the second and fourth counts of the declaration, after argument upon a special case, the facts stated in that case were afterwards stated in a special verdict, and the record being removed by writ of error into this court, it was now objected by *Bosanquet*, Serjt., for the plaintiff in error, that it was not alleged in the declaration, nor found as a fact in the special verdict, that any money had ever been issued by government to the bank for the purpose of paying the dividends. [*186]

On the other hand it was urged by *Tindal*, who observed, that this point had not been made in the court below ; that it must be presumed that the government *had issued money to the bank for the purpose of paying the dividends. [*187]

Per Curiam. We can only decide upon the facts stated upon the record.

The second and fourth counts of the declaration upon which the Court of Common Pleas have given judgment in favor of the defendant in error, represent the duty of the bank to be to pay the dividends. Now it could not be the duty of the bank to pay the dividends until they had received them from government. There is no allegation in the declaration that the bank ever had received the dividends from government, nor is there any fact found by the jury to cure the want of that allegation. Without saying what would have been our decision if that fact had been alleged or found by the jury, we are of opinion, that the second and fourth counts of the declaration are not sufficient, and that the judgment must on that ground be reversed.

Judgment reversed.



(In Error.)

Where a declaration on a policy of assurance on goods, averred that it was effected in the names of the plaintiffs, as agents, and that *A.*, *B.*, *C.*, and *D.*, were interested in the goods to the full amount insured, and that the policy was effected on their account and for their sole use and benefit, *A.* being called as a witness for the plaintiffs, was objected to, and thereupon they gave in evidence a deed poll executed by *A.*, before the commencement of the action, whereby he released to the plaintiffs all actions which he might have by reason of the policy, or for any moneys to be recovered by them from the underwriters. They also gave in evidence an indenture, executed by *A.* after the commencement of the action, whereby (after reciting the plaintiffs had effected the policy; that *A.*, *B.*, *C.*, and *D.* were the persons interested; that actions had been commenced in the names of the plaintiffs; and that they being desirous of an indemnity against the costs, the Court of C. P. had ordered *A.*, *B.*, *C.*, and *D.* to indemnify, and that *L.* and *R.* had agreed to do it,) *A.*, *B.*, *C.*, and *D.*, in consideration thereof and of 10s. assigned to *L.* and *R.* all their interest in the policy, and all benefit to be derived therefrom, and all moneys to be recovered in the said actions, to and for their own exclusive use and benefit: " Held, that *A.* was, at all events, still liable to the attorney employed to bring the action, and therefore incompetent.

Sensible. That the assignment to *L.* and *R.* was illegal, as maintenance.

ASSUMPSIT on a policy of insurance on goods by the ship *Friendship*. Total loss by perils of the sea. The declaration averred that *Armet*, *Gibb*, *Robertson*, and *Wimble* were, at the time of making the policy, and thence until and at the time of the loss, interested in the said goods to the whole amount insured, and that the policy was made on the goods, to and for the use and benefit and on the account of *Armet*, *Gibb*, *Robertson*, and *Wimble*. Plea, *non-assumpsit*. At the trial before *Burrough*, J., at the *London* sittings after *Trinity* term, 1824, the plaintiffs (below) proved, amongst other things, the allegations above set forth, and then tendered *Armet* as a witness. He was objected to as incompetent, on the ground of interest, and thereupon the plaintiffs gave in evidence a deed-poll (executed before the commencement of the action,) whereby he released to the plaintiffs "all actions, claims, &c. which he had or might have against them by reason of the said policy of insurance, or for or on account of any moneys to be recovered by them from the underwriters."

*189] They also gave in evidence an indenture of the 11th of *June, 1822, (after the commencement of the action,) made between *Armet*, *Gibb*, *Robertson*, and *Wimble*, of the first part, the plaintiffs of the second part, and *Lachlan* and *Robertson* of the third part; whereby (after reciting that the plaintiffs had effected the policy in question, and that *Armet*, *Gibb*, *Robertson*, and *Wimble* were the persons interested in it, that actions had been commenced

against the underwriters in the names of the plaintiffs, the deed-poll before set out, executed by *Armet*; that plaintiffs being desirous of an indemnity against the costs of the actions, the Court of Common Pleas had ordered *Armet* and the other parties of the first part to indemnify the plaintiffs, they giving up all claim upon the assured for such costs, and that *Lachlan* and *Robertson* had agreed to enter into the covenants thereinafter contained, and the plaintiffs had agreed to accept such indemnity, and release the assured from all claim on account of such costs, it was witnessed, that, in consideration of the assignment thereinafter made by the assured, and of 10*s.* paid by the plaintiffs, they, *Lachlan* and *Robertson*, covenanted to indemnify the plaintiffs against all costs of the said actions; and further, that in consideration of 10*s.* paid by the assured to the plaintiffs, they released the assured from all claims on account of such costs. And the assured, in consideration of 10*s.*, did assign to *Lachlan* and *Robertson* all their right, title, and interest of, in, to, or under the said policy of assurance, and all benefit to be derived therefrom, for their own proper use and benefit, and that all moneys to be recovered in the said actions should be received for and on account of *Lachlan* and *Robertson*, and for their own exclusive use and benefit." *Armet* was then examined on the *voir dire*, and stated, that at the time of the voyage in the declaration mentioned, he was interested "in the ship and goods; that the accounts of the concern had not been settled but were still open; but that he did not know of any debt outstanding from the concern; that the plaintiffs were agents for the witness and the other part owners in effecting the policy, and that it was effected on their account. The learned Judge overruled the objection to the witness, and he was thereupon examined for the plaintiffs, and they obtained a verdict. A bill of exceptions was tendered and sealed by the learned Judge, and the record having been removed into this court by writ of error, the case was now argued by

Campbell, for the plaintiff in error. *Armet* was improperly admitted as a witness in the court below. He was incompetent on three grounds; first, he was substantially a party on the record; secondly, he had a direct interest in the event of the suit; and, thirdly, the verdict, if found for the plaintiffs, might be given in evidence for him; or if for the defendant, against him in another action. First, *Armet* was substantially a party on the record. The policy was effected by brokers, as agents for *Armet* and his co-assured, by their order, and at their expense. The brokers had no interest in the contract, and if the action had been in the names of the assured, the brokers might have been called as witnesses for them. Now wherever it clearly appears that an action is brought in the name of one person for the benefit of another, and that the latter is the contracting party, he must be treated as the real plaintiff, *Bell v. Ansley*, 16 East, 141; *Smith v. Lyon*, 3 Camp. 465. So also the lessor of the plaintiff in ejectment has been treated as the real plaintiff, and on that ground he cannot be compelled to give evidence for the defendant; nor can he be permitted to give evidence for the plaintiff, *Fenn v. Granger*. [191] 3 Camp. 177. Secondly, *Armet* had a direct interest in the event of the suit; for if by means of a verdict obtained by the plaintiffs the co-assured were put in funds, they would apply them in discharge of the debts of the concern, to which *Armet* would otherwise have to contribute. The assignment to *Lachlan* and *Robertson* will be relied upon as an answer to this; but that was made during the action, and can have no operation at law; and although the assignment is general upon the face of it, yet in equity *Lachlan* and *Robertson* would be accountable as trustees for the surplus received by them after indemnifying themselves. They were not purchasers of the policy, and the recitals in the deed show the real circumstances attending the assignment. Again, *Armet* was interested in the event of the suit, inasmuch as he was liable for the costs to the attorney employed to commence the action. The recitals in the indenture show that it was really brought by the assured. Thirdly, the

verdict and judgment in this action might have been evidence for or against *Armet* in another. If *Lachlan* and *Robertson* had re-assigned the policy, and *Armet* had sued for his own benefit, a verdict and judgment for the defendant in this case might have been given in evidence against him ; and in like manner it might, if in favor of plaintiffs, have been pleaded by *Armet* to any action by the underwriters for breach of any warranty in the policy.

Parke, contra. None of the objections made to *Armet's* competency are sustainable. He is not to be "considered as a party to the record." The action of ejectment is very different, it is the creature of the court, altogether founded on a fiction for the furtherance of justice ; and there the lessor of the plaintiff is rightly treated as the real plaintiff. In this case the names of the persons for whom the policy was effected were inserted, in order to show that it was not a wager policy. Where goods have been insured and sold together with the policy, in declaring upon the policy the names of the persons who ordered it are nevertheless inserted ; that circumstance, therefore, does not prove that they are parties to the record. Besides, there is no technical rule rendering parties to the record incompetent as witnesses, unless they are examined in support of their own interest, *Norden v. Williamson*, 1 *Taunt.* 378. Now *Armet* had no interest at the time when he was examined. By executing the deed poll he had released all claim on the plaintiffs for the fruits of the action, and therefore he cannot be benefited either at law or in equity. It is said that if the co-assured recover their shares *Armet* will have the benefit of that in account ; but his examination on the *voir dire* shows that there were no outstanding debts. The deed poll seems rather to make it *Armet's* interest that the defendant should succeed ; for if the plaintiffs obtain a verdict, *Lachlan* and *Robertson* being entitled to receive all the benefit of the policy, *Armet* would be liable to make good to them the share which he has released to the plaintiffs. At all events, it is by no means clear that *Armet* has any interest, and therefore whatever observations may be made as to his credit, he cannot be deemed "incompetent." Then as to his supposed liability to the plaintiffs' attorney, nothing of that kind was made out by the examination on the *voir dire* ; nor is there any thing to show by whose authority the action was commenced. Lastly, as to the verdict and judgment in this case being evidence in any other, *Armet* having assigned all his interest in the policy, cannot have any interest in another action upon it ; nor could a verdict and judgment for the present defendant be given in evidence in an action by *Armet*, for it would not be between the same parties.

ABROTT, C. J. I am of opinion that *Armet* was not a competent witness. There can be no doubt that originally he was substantially, although not nominally, a plaintiff in the cause ; and we ought not to be astute to give effect to that which makes the real plaintiff a witness. The action being for his benefit, although brought in the names of the brokers, it must, until the contrary is shown, be presumed that it was brought by him, and by his authority, rather than by those who had no interest in it. If the action was brought by his authority, either express or implied, he became liable to pay the attorney employed to bring it, and he is still under that liability, nothing having been done to deprive the attorney of his right to recover his costs from him. The machinery, therefore, (notwithstanding all the contrivances adopted,) has still left this objection open ; and upon this ground alone, without going further, I think that there is sufficient to warrant us in saying that *Armet* had an interest in obtaining a verdict for the plaintiffs. He was, therefore, improperly admitted to give evidence, and a *venire de novo* must be awarded.

**BAYLEY*, J. I am entirely of the same opinion. There is abundant proof that this action was not commenced at the instance of the nominal plaintiff, but of the assured. It appears by the indenture executed by *Armet* and the co-assured, that the names of the plaintiffs were used in the action ; that is, used for the benefit of the persons interested ; and the Court of

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DAVID v. ELLICE. H. T. 1896.

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Common Pleas accordingly made an order upon the assured to indemnify them. The attorney, therefore, employed to bring the action has a claim upon the assured for his costs. But I think that *Armet* was incompetent upon higher grounds. The action was brought at the instance of *Armet* and three others; it was then found that they had not sufficient evidence to support it, and machinery was resorted to, calculated to introduce all the evils of chancery and maintenance. First, *Armet*, without consideration, released all his interest to the nominal plaintiffs in the suit; that was not considered sufficient; and then, in consideration of £10, all the parties interested joined in an assignment to *Lachlan and Robertson*. It is difficult to put a stronger instance of maintenance or chancery. Those are unlawful, because they encourage and keep alive suits. Now that was the very object of the assignments in question; for each of the assured may be considered to have admitted, by the deed which he has executed, that without *Armet's* evidence the action was not maintainable. Upon these grounds, I think that he ought not to have been admitted to give evidence.

HOLMORO, J. I also am of opinion, that *Armet* was not a competent witness. The direct and express object of the assignments was, to support the action; the old law of maintenance is, therefore, applicable to the transaction. [*195] But besides that, *Armet* and his co-assured were really parties to the action, as appears by the record; and upon that ground he was originally incompetent, and he could not get rid of the objection in the manner attempted. The declaration avers, that *Armet* and three other persons were interested in the goods, that the policy was made to and for their use and benefit, and on their account; and the loss is alleged to be a loss to them. This is, therefore, alleged on the record, to be the action of *Armet* and those other persons. At all events the action was afterwards adopted by them, for they gave the indemnity required by the Court of Common Pleas. They are, therefore, liable to the attorney employed to bring the action.

LITTLEDALE, J. I do not go the length of saying that *Armet* is to be considered a party to this record, in the same manner as the lessor of the plaintiff in ejectment; and perhaps he would not be liable to pay the costs of the defendant in case the latter obtained a verdict. But I think he was so far a party as to be incompetent as a witness. The recitals in the deeds executed by him show that he was interested, not collaterally, in which case the objection may be obviated by a release, but directly, the action being brought for his benefit. I therefore agree that his evidence was improperly admitted, and that a *Venire de novo* must be awarded.

Venire de novo awarded.

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*DAVID v. ELLICE, J. B. INGLIS, and JAMES INGLIS, surviv-
ing Partners of JOHN INGLIS, deceased.

[*196]

A., B., and C. were in partnership in trade. *A.* retired from the firm, and notice of that fact was given to *D.*, a creditor of the firm, and that *B.* and *C.* continued the business, and assumed the funds, and charged themselves with the debts of the partnership. The balance due to *D.* was transferred to his credit by the new firm, and *D.* was informed of this transfer, and assented to it. He afterwards drew upon the new firm for a part of this balance, and they accepted and paid his bills. The new firm having become insolvent, it was held, that *C.* continued liable for the debt due to *D.* from the old firm.

ASSUMPSIT for money lent, with the usual money counts. The defendant, *Ellice*, pleaded the general issue, and the other two defendants their bank-

ruptcy. At the trial before *Abbott*, C. J., at the *London* sittings after *Trinity* term, 1824, a verdict was found for the defendants, *J. B. Inglis* and *James Inglis*, and the plaintiff obtained a verdict against the defendant *Ellice*, for 18,162*l. 5s. 8d.* In the following term a motion was made for a rule to show cause why the verdict obtained against the defendant *Ellice*, should not be set aside, when the court directed the facts to be stated for their opinion in the following case.

The plaintiff was a merchant residing in *Canada*. The defendants, and *John Inglis* deceased, carried on business as merchants in partnership together in *London*, under the firm of *Inglis, Ellice, & Co.* The plaintiff had had various dealings with that firm prior to the 30th of *April*, 1821. On that day the defendant *Ellice* retired from the firm, and the following circular letter was, in consequence, sent to the plaintiff and the other correspondents of the firm. "We beg to acquaint you that Mr. *Ellice* retires from our firm from the present date. The business of the house will be continued as heretofore by the remaining partners, who assume the funds, and charge themselves with the liquidation of the debts of the partnership." This circular was transmitted by *Inglis & Co.* to the plaintiff, in the following letter, dated 10th of *May*, 1821. "The circular herewith will inform you of the recent alteration in our firm. Our business continues in other respects as heretofore, our means of carrying it on unimpaired, and we beg to assure you that your concerns in our hands will still be equally an object of our attention." On the 28th of *June*, 1821, the plaintiff wrote to the new firm of *Inglis & Co.* as follows: "I am favored with yours of the 10th ult., with circular of the 30th of *April*, advising the change in your firm, which continues to have my full confidence. The accounts will be transferred so soon as I receive my account current, and an account opened for the new firm." Messrs. *Inglis, Ellice, & Co.* having been in the habit for many years of making up their *Canada* accounts to the 30th of *June*, annually, the account current of *Inglis, Ellice, & Co.* with the plaintiff was made up to the 30th of *June*, 1821, (and not to the 30th of *April* preceding, the time of the defendant *Ellice*'s retirement from the firm,) and was transmitted to the plaintiff, at *Montreal*, by the new firm of *Inglis & Co.*, in the following letter, dated the 17th of *July*, 1821. "We enclose herein your account current balanced 30th ult. by 18,905*l.* in your favor, and at your credit in new account with our present firm. We shall be glad to hear you have received it, and found it correct." *Inglis & Co.* did not open any new books of account, but continued to keep the account with the plaintiff in the same books and in the same manner after the 30th day of *June*, 1821, as it had previously been. On the 24th of *September*, 1821, the plaintiff wrote as follows: "The account current with your late firm is received, and with the exception of the outstanding debts of 1804, is perfectly correct, and have transferred in a new account with your present firm, whose confidence I hope I shall continue to merit." On the 3d of *November*, 1821, the plaintiff drew a bill for 5000*l.* on the new firm. This bill was advised in two letters which follow: "Montreal, 3d of November, 1821, Messrs. *Inglis & Co.* Sirs, I wrote you on the 15th and 31st ult., the former advising, if I did draw on you, it would be in favor of the *Montreal* bank. The present serves to advise of my having drawn on you of this date in favor of *Robert Griffin*, Esquire, cashier of the *Montreal* bank, at sixty days' sight, 5000*l.* sterling, which please honor. The late news of the failure of your crops will, no doubt, bring a number of bills into the market; and I expect shortly to replace this amount to advantage."— "Montreal, 12th December, 1821, Messrs. *Inglis & Co.* Sirs, when I drew on you for so large a sum as 5000*l.* I was in hopes of replacing it ere this to advantage, instead of which bills are now 10 per cent., and the money lies in the bank without interest, which is a bad speculation." The new firm of *Inglis & Co.* continued to act as the mercantile agents and correspondents in *London* of the plaintiff, and on the 1st of *July*, 1822, *Inglis & Co.* made up

and sent to the plaintiff the first account in their own names with the plaintiff to the 30th of *June* preceding. On the 7th of *August*, 1822, Mr. *John Inglis*, the senior partner in the new firm of *Inglis & Co.*, and who had been also the senior partner in the former firm of *Inglis & Co.*, died, and thereupon *Inglis & Co.* suspended their payments. On the 14th of *October*, 1822, the plaintiff wrote the following letter to *Inglis & Co.*: "Sirs, your sundry favors of the 23d, 27th, and 30th of *July*, 1822, 23d, 26th, and 29th of *August*, came [199] duly to hand; that of the 23d of *July*, covering account current, has been examined and found correct, with the exception of the outstanding debts of 1804, remarked every year. Yours of the 13th of *August*, conveying the melancholy tidings of the death of your senior, my old and much lamented correspondent, for whose loss I am truly sorry, and feel confident the survivors will do me every justice that my long confidence in that concern merits." On the 10th of *February*, 1823, the plaintiff wrote to *Inglis & Co.* another letter, as follows: "As the late firm of *Inglis, Ellice, & Co.* are bound to me for part of the heavy sums due me, I request you will send me a statement of that part of the amount, and also that part due me by *Inglis & Co.*" To which, *Inglis & Co.*, on the 3d of *April*, 1823, returned the following answer. "During the present unsettled state of the house, and particularly of the question respecting the respective liabilities of the old and new firms, we are advised not to attempt a separation of any accounts. You will, we doubt not, agree in this; but for your information in the meantime, we hand herewith a transcript of the account open, as it stands in our books." On the 27th of *May*, 1823, a commission of bankrupt issued against the defendants, *John B. Inglis* and *James Inglis*, under which they were duly declared bankrupts, and obtained their certificates. The new firm continued in credit, and carried on business to a great extent, from the time when the defendant *Ellice* retired, till the death of *John Inglis*, having made payments during that time to the amount of 1,847,000*l.* A witness, who had been a clerk in the house of *Inglis & Co.*, examined on behalf [200] of the defendant, said, that if the plaintiff had drawn upon the new firm for the balance of his account due at the time of the retirement of the said *Edward Ellice* at any time between such retirement and the death of Mr. *John Inglis*, he had no doubt the balance would have been paid. The sum of 13,162*l. 5s. 8d.*, for which the verdict passed, is the balance due upon the account of the 30th of *June*, 1821, after giving credit for all the payments made by the new firm of *Inglis & Co.* to the plaintiff, or on his account, without taking credit for any payments made by the plaintiff to the new firm. This case was argued at the sittings in Banc, after last *Michaelmas* term, by

Campbell for the plaintiff. The defendant *Ellice* is liable to pay the whole balance due from him and his co-partners in 1821, when he retired from the firm, except so far as that balance may have been reduced by subsequent payments made by the new firm. *Ellice* was originally jointly liable as a principal; he must continue liable, unless the debt appear to have been satisfied, and it lies on the defendant to show that he is discharged from his liability. There is no evidence of any promise by the plaintiff to release the defendant. There was a mere transfer of the balance to the debit of the new firm. That only shows that the plaintiff intended to look to them, but not that he meant to discharge *Ellice*. No new agreement was entered into between the plaintiff and defendant. Supposing that there was evidence of a promise to discharge *Ellice*, what consideration was there for such promise? There was no benefit to the plaintiff, nor prejudice to the defendant. No new partner was introduced into the firm, so that [201] the plaintiff acquired no new security. It may be said, that there was a prejudice to *Ellice*, for he might have withdrawn his funds. But it does not appear by the case that he had left any funds in the house. Besides, the prejudice, to be a consideration, must be at the request of Mr. *David*. It may be said that the account which was delivered, in which the new firm credited him for the balance due from the old firm, and

assented to by the plaintiff, shows that he consented to accept the new firm as his debtors ; but that would not have the effect of discharging *Ellice*. Even if a new security had been taken from the two partners, *Ellice* would still be liable. For where, upon the dissolution of a partnership, it was agreed that all the joint bonds should be discharged by one of the partners, to whom, after the dissolution, an application was made by a partnership bond creditor, and it was agreed between such bond creditor and partner that interest upon the bond should be increased ; and some of the increased interest was paid ; and the partner then became a bankrupt, and the creditor received a dividend under the commission, it was held that he might proceed against the assets of the other partner for the sum due, *Heath v. Percival*, 1. P. Wms. 682, Str. 403. In *Bedford v. Deakin*, 2 B. & A. 210, one of the three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills ; the separate *notes having proved unproductive, it was held that he might still resort [202] to his remedy against the other partners, and that the taking the separate notes, and afterwards renewing them several times successively, did not amount to a satisfaction of the debt. So where upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to a creditor, who was informed of this, and expressly agreed to exonerate the other partner from all responsibility, it was held, that these circumstances did not constitute any defence to the latter in an action by the creditor against both partners, *Lodge v. Dicas*, 3 B. & A. 611. In *Newmarch v. Clay*, 14 East, 239, the case turned entirely on the application of payments.

Tindal, contra. The facts stated in the case amount to a receipt by the plaintiff of the balance due from the old firm, and a subsequent loan of that balance to the new partnership, or at least to a satisfaction on a sufficient consideration. There can be no doubt that if the money had been handed over to the plaintiff, and he had again lent it to the new firm, the defendant *Ellice* would be discharged. It appears by the case that there was a transfer of the balance from the old firm to the new firm, with the assent of the plaintiff. He was informed that *Ellice* had retired from the firm, and that the new firm would assume the funds, and charge themselves with the liquidation of the partnership debts, and by his letter of the 28th of June, 1821, assented to the opening of [203] an account with the new firm. In July, 1821, *the plaintiff was informed that the balance of 18,905*l.* was placed to his credit in account by the new firm, and he assented to that transfer. The partners constituting the new firm, therefore, acknowledged themselves debtors to the plaintiff for the balance due from the old firm, and he agreed to accept them as his debtors for the same, when he might have withdrawn the balance, and he did in fact draw upon them for part of that balance, treating the new firm as his debtors for the same. This amounts substantially to the same thing as if the balance had been paid over to the plaintiff, and he had lent it to the parties constituting the new firm. It is clear that in order to constitute a loan it is not essential that the money should be handed over from the lender to the borrower. In *Surtees v. Hubbard*, 4 Esp. 203, Lord *Ellenborough* said, that although choses in action are generally not assignable, yet where a party entitled to money, assigns over his interest to another, although the debtor may refuse his assent, any thing like an assent on the part of the holder of the money will suffice to maintain an action against him for money had and received. And even in an action for penalties under the statute of usury, the transfer of a debt from *A.* to *B.*, with the assent of the debtor, has been held to constitute a loan. *Wade q. t. v. Wilson*, 1 East, 195. So where *A.* sold goods to *B.*, and he being unable to pay for them, transferred them to *C.*, who promised to pay for them, this was held to be a new sale to *C.*, and not a promise by him to pay the debt

of *B., Browning v. Stallard*, 5 Taunt. 450. If, therefore, there was any actual transfer of the debt from the old to the new firm, with the assent of the plaintiff, no consideration would be required. But here there was a [*204 sufficient consideration for a promise on the part of the plaintiff to release *Ellice*. There was a benefit to the plaintiff, and a disadvantage to *Ellice*. It was to the advantage of the plaintiff, for he was permitted to draw afterwards upon the new firm for a larger sum than *they* had in their hands belonging to him. If the plaintiff had sued *them* alone, they might have pleaded in abatement. At all events there was a prejudice to *Ellice*, unless he was released. For he might have withdrawn his money before the firm failed. [Abbott, C. J. It does not appear that *Ellice* left any funds in the house.] That must be collected from the case. For the plaintiff had notice that the new firm had funds to pay the creditors. These funds must have belonged to the old firm. As soon as the plaintiff was told that one partner was retiring, that was in effect the same thing as saying "you may have your money." The cases cited on the other side do not apply. In *Heath v. Percival*, Str. 403. 1 P. Wms. 682, there was an agreement to give up one, and take the other as the debtor. *Bedford v. Deakin*, 2 B. & A. 210, was decided on the ground, that the party had expressly reserved his right to sue on the original bills. In *Goff v. Davies*, 4 Price, 200, where there was no transfer of the balance or notice to the creditor that that had been done, *Wood* B. intimated a strong opinion that if the balance had been struck, and carried to the debit of the new partnership account, and the plaintiff had known of that and had assented to it, it would have operated as an agreement to release the old, and receive the new firm as his debtors. Here the balance was struck and *carried to the debit of the new firm, [*205 and that was assented to by the plaintiff.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the court, and after stating the facts of the case, proceeded as follows: Upon this state of facts, it was contended on behalf of the defendant *Ellice*, that he was discharged from the plaintiff's demand, and three cases were quoted on his behalf. In each of those cases, some new person, not originally a debtor, had consented to become so. In the present case there is no new debtor. The only ground of defence therefore is, that the plaintiff so far assented to the request contained in the circular letter, as to change the heading of the account from *Inglis, Ellice, & Co.* to the firm of *Inglis, & Co.*, and to draw a bill on the latter firm for a part of the debt, which was duly paid. Now, it is clear, that by all this the plaintiff gained nothing. But it was said that *Ellice* had sustained a prejudice, and on that account was discharged. And to support this allegation of prejudice, we were desired to presume that he had left funds belonging to himself in the hands of his former partners, which otherwise he would have withdrawn. This, however, being a matter of fact, should have been proved, and not left to presumption. And the first step in such proof would have been to show that *Ellice* knew what the plaintiff had done. Even this was not proved. It is not necessary to consider what the effect of such proof might have been in a court of law. In the absence of such proof, we are all clearly of opinion, that *Ellice* is not discharged, and consequently that the verdict was properly taken for the plaintiff. I will only *observe further, that the facts of the present case are much less favorable to the retiring partner than those of [*206 *Heath v. Percival*, 1 P. W. 682, in which a decree was made in a court of equity against the residuary legatee of the retiring partner. The *postea* is to be delivered to the plaintiff.

Postea to the plaintiff

EDWARDS v. BOWEN, et al.

A plaint in replevin cannot be removed from a county court in *Wales* into this court by *certiorari*.

RUSSELL had obtained a rule to quash a writ of *certiorari* and return, whereby a plaint in replevin had been removed into this court from the county court of *Carmarthen*, upon an affidavit stating that no cause had been shown to the court for the issuing of such writ.

W. E. Taunton and *Chilton* showed cause. It was unnecessary to lay any special ground for the issuing of the writ. The statute 5 G. 4, c. 106, s. 23, (*Welsh Judicature Act*,) is applicable only to the removal of causes from the court of great sessions. Lord Chief Baron *Gilbert* lays it down, that the plaintiff in replevin may remove the plea out of the county court without cause shown, and it is also laid down by him, and in *Lord Hale's Commentary on Fitzherbert*, that if a plaint be removed by *certiorari* when it ought to be by *pone* or *recordari*, it is well removed. *Fitzh.* N. B. 69 m. note a. cites 7 Ed. 4, 23

**ABBOTT, C. J.* It is laid down by Mr. *Tidd*, in treating of the means [207] by which causes are removed from the inferior courts, that they are by writ of *certiorari* or *habeas corpus* from inferior courts of record, or by writ of *pone*, *recordari facias loquendum* or *accedas ad curiam* from such as are *not* of record. The sheriff's court for the purposes of a replevin suit, is not a court of record. According to the rule laid down, therefore, a *certiorari* is not the proper mode of removing this record.

The case cited from *Fitzherbert* shows, perhaps, that if a plaint be removed by *certiorari*, the court may exercise its discretion whether or not to entertain it. Nothing has been urged to us to show the propriety of coming here as it were *per saltum*.† The proper course would have been to remove the plaint by *re. fa. lo.* into the court of great sessions, and then upon sufficient grounds the *certiorari* would issue to remove it thence into this court.

Rule absolute.

† This course was afterwards adopted. The plaint was immediately removed by *re. fa. lo.* from the county court into the court of great sessions, but the term being then too far advanced to allow of the seven days' notice of motion, required by the section of the *Welsh judicature act* above cited, the application for the *certiorari*, instead of being renewed in this court, was made at the last seal after *Hilary* term, before the Vice-Chancellor, upon an affidavit, disclosing the circumstances of the case, from which it was manifest that the title to the freehold must come in question.

It was urged, in support of the application, that the mischief intended to be remedied by the twenty-third section of the act, was the delay occasioned by defendants suing out writs of *certiorari*; that in every form of action, except replevin, the plaintiff is at liberty to commence his suit in whatever court he pleases, and that even in replevin he may remove by *re. fa. lo.* without cause shown, though the defendant cannot, (*Gilb. Rep.* 122.) That though the legislature has, where the matter to be litigated is of small amount, compelled the plaintiff to resort to the local jurisdiction, by "depriving him of, or visiting him with costs: yet it has in all instances, and in the present act, disclaimed any interference where the title to the freehold comes in question, and that, therefore, to show by affidavit that the title to the freehold was in question, was to show to the court sufficient cause within the meaning of the act.

On the other hand, it was contended that the affidavit only went to show that the plaintiff had a cause of action: and that the sufficient cause required by the legislature must be taken to point at some defect or partiality in the local jurisdiction.

The Vice-Chancellor made an order for the writ.

His order was appealed against, and, after a second argument, confirmed by the Lord Chancellor in *Trinity* term.

Knight and *Chilton* for the plaintiff.

Shadwell and *Wakefield* for the defendant.

TENANT v. BROWN, et al.

JONES v. BROWN, et al.

Where in trespass against parish officers for distraining for poor's rates, it appeared that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause, the court stayed the proceedings until he gave security for the costs.

THESE were actions of trespass against the parish officers of *Saint Mary's, Marlborough*, for taking the plaintiff's goods under distresses for poor's rates. Holt had obtained rules *nisi* for staying proceedings until the plaintiffs' attorney should give security for costs, upon affidavits stating that the plaintiffs' attorney was the landlord of the plaintiffs, and suggesting that the rates were not paid by his desire, and that the actions were commenced without the knowledge of the respective plaintiffs, and not for their benefit, and that the attorney had indemnified the plaintiffs for their costs. By affidavits of the plaintiffs and their attorney, it was admitted that the plaintiffs were the tenants of their attorney, and held their tenements at rents free of poor *rates, which were [209 to be allowed by the landlord; that the attorney had desired them not to pay the rates, and that in consequence of their refusal the distresses in question were made. The plaintiffs' affidavits further stated that they had sustained great inconvenience by their goods being detained from them for several days, and that the actions were brought by their desire, and for their benefit; that they wished the same should proceed, and were advised that they had good causes of action, but said nothing as to whether the attorney had indemnified them against the costs.

Halcomb now showed cause. This application is quite unprecedented; the only cases in which the courts will interfere to stay proceedings, until security is given for costs, are cases in which the plaintiff is out of the jurisdiction of the court, and other cases, enumerated 1 *Tidd's Practice*, p. 555. 6th edition, not being similarly circumstanced with the present. Admitting the plaintiff's attorney is the only party beneficially interested in the question of the legality or illegality of the rates, and that for anything which appears he has indemnified the plaintiffs against the costs, still the plaintiffs, having also independent causes of action for the injuries they have sustained by the wrongful taking and detention of their goods, are clearly entitled to prosecute their actions, and the court will not interfere to take away their rights, unless a third party, over whom they have no control, should give security for costs. There is no precedent for such a decision, and it would lead to great inconvenience. Besides, if the suggestions made in the affidavits in support of the rule are true, and these actions are in fact prosecuted without the *knowledge and against [210 the will of the plaintiffs, then the application ought to have been to set aside the proceedings altogether.

Holt, in support of the rule, was stopped by the court.

BAYLEY, J.† We are all of opinion that this rule must be made absolute. Without looking at the affidavits filed in support of the rule, we decide upon the plaintiffs' own affidavits, which admit that they refused to pay the rates by the desire of their landlord, the attorney in these actions.

HOLROYD and *LITTLEDALE, Js.*, concurred.

Rule made absolute, without costs.

† *Abbott, C. J., was absent at Nisi Prius.*

BOTTOMLEY v. BOVILL.

Upon a policy of insurance upon ship at and from *London* to *New South Wales*, and at and from thence to all ports and places in the *East Indies* or *South America*, with liberty for the said ship, in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship might proceed to, as well on this as on the other sides of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards: Held, that after the arrival of the ship at *New South Wales*, she was protected by the policy so long only as she was sailing on a voyage either to *South America* or to the *East Indies*, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to *South America* or to the *East Indies*.

THIS was an action on a policy of insurance on the ship *Brampton*, at and from *London* to *New South Wales*, and at and from thence to all ports and *places in the *East Indies* or *South America*, with liberty for the said ship, &c., in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship might proceed to, as well on this as on the other sides of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards. The premium was 80*s.* per cent. to return 28*s.* 6*d.* per cent. if the voyage ended at *New South Wales*, and 10*s.* per cent. if the ship proceeded to the *East Indies* and arrived. The loss in one count was averred to have been by barratry, and in another by perils of the sea. At the trial before Abbott, C. J., at the *London* sittings after *Hilary* term, 1825, the following appeared to be the facts of the case. The ship sailed from *London* with convicts to *New South Wales*. The captain had orders (unless he should receive contrary directions from the owner) to go to *New Zealand* and take in spars there, and proceed to *South America*. The ship arrived at *New South Wales* on the 23d of April, 1823, and did not leave that place until the 23d of July. She was detained there a considerable time, in consequence of several of the crew having been sent to prison for misconduct. On the 7th of July, the captain received a letter of instructions from his owner, directing him to proceed to the *East Indies* instead of *South America*, but before the arrival of that letter, he had entered into a contract to take out several passengers to *New Zealand*, and seventy tons of goods, and part of those goods were then actually laden on board the vessel. It was part of the *agreement with the owners, that the captain should have two-thirds of the profits arising from cabin passengers, and one half of the profit of steerage passengers taken in any of the voyages. After the captain had received this letter of instructions from his owner, he entered into a contract to bring back one of the passengers from *New Zealand* to *New South Wales*. The captain, on the 13th of July, notwithstanding the instructions received from his owner, proceeded to *New Zealand*, with the intention to return to *New South Wales*, and then to proceed to the *East Indies*, according to his instructions, and the ship was lost at *New Zealand*. The ship arrived at *New Zealand* on the 4th of August. The passengers were landed, and on the 7th the captain weighed anchor with the intention of returning to *New South Wales*, but the ship, in working out of the harbor in *New Zealand*, missed stays, and was lost. *New Zealand* lies in the course of the voyage from *New South Wales* to *South America*, but not in the course of the voyage from *New South Wales* to the *East Indies*. It was insisted at the trial, that the plaintiff was entitled to recover for a loss by barratry. Upon that point the Lord Chief Justice stated to the jury that barratry meant an act of the master in fraud of his duty to his owners. A mere mistake by the captain as to the meaning of the instructions,

or a misapprehension of the best mode of acting under the instructions, and carrying them into effect, would not amount to barratry; and he directed the jury to find for the plaintiff, if they were of opinion that the captain acted in fraud of his duty to his owner, when he went to *New Zealand* instead of to the *East Indies*; but if they thought, on the other hand, that he merely mistook the meaning of the instructions, or the best mode of acting *for the purpose of carrying them into effect, then to find for the defendant. [213] The jury having found for the defendant, the Lord Chief Justice then said, that he was of opinion that the plaintiff was not entitled to recover, inasmuch as at the time of the loss, the ship was not sailing on either of the voyages contemplated by the policy, and he directed a nonsuit, with liberty for the plaintiff to move to enter a verdict. A rule *nisi* having been obtained for that purpose,

Marryat, Gurney, and Maule now showed cause. The ship, at the time of the loss, was not pursuing a voyage protected by the policy. The liberty which it reserves "to trade and sail backwards and forwards, and forwards and backwards," is, indeed, expressed in terms of large and extensive import; but they are not sufficient to comprehend the voyage in question. The liberty is for the said ship "*in that voyage* to proceed, &c.," which shows that the "trading and sailing backwards and forwards, and forwards and backwards," was to be a trading and sailing, either in the voyage from *New South Wales* to *South America*, or in the voyage from *New South Wales* to the *East Indies*, consistent with and subordinate to a predominant intention of proceeding by the ordinary or proper course from *New South Wales* to one or other of those termini. A similar construction has been applied to analogous words, in the cases of *Rucker v. Allnutt*, 15 East, 278, *Langhorne v. Allnutt*, 4 Taunt. 511, *Hammond v. Reed*, 4 B. & A. 72, and *Solly v. Whitmore*, 5 B. & A. 45. It may be said, that the ship, at the time of the loss, having been in the proper course for proceeding from *New South Wales* to *South America*, the intention to deviate from that course by returning to *New South Wales* [214] will not discharge the underwriters, inasmuch as she was lost before that intention was carried into effect. It must be admitted, that an unexecuted intention to deviate will not discharge the underwriter; but with this qualification (which is always to be understood, and is sometimes expressed by the judges who lay down the rule,) that the ship, at the time of the loss, must be sailing on the voyage insured. Indeed it is not strictly a deviation or intention of deviating on which the defendant relies, but on the ship having sailed on a different voyage from the voyage insured. It does not follow that she was on that voyage because her course, as far as she pursued it, coincided with the course she would have pursued if she had sailed on it. In order to be on a voyage from *A.* to *B.* it is not sufficient that the vessel should be at *C.*, an intermediate point in the course from *A.* to *B.*: it is necessary, in addition, that the ship should have departed from *A.* with the intention to proceed to *B.* The nature of the risk may be very different before the ship arrives at the dividing point of two different voyages, having a part of their course in common. The risk does not depend on the local situation only of the ship; the state of repair, the crew, stores, &c., proper for one voyage may be very different from those for the other, and many other circumstances influencing the risk may be different in that part of the two voyages which is common to both; and the underwriter who accepts one risk might refuse the other. The case of *Woolridge v. Boydell*, Doug. 16, is in point. That was an *insurance at and from *Mary-land* to *Cadiz*; the ship sailed for *Falmouth*, and the loss took place in [215] the *Chesapeake Bay*, which is in the course of the voyage from *Maryland* to *Cadiz*, as well as to *Fulmouth*; but the court held, that she was not sailing on the voyage insured, and that the underwriters were not liable. Now, in the present case, the ship would be protected on a voyage from *New South Wales* to *South America*, or on a voyage from *New South Wales* to the *East Indies*; but she had not sailed on either of these voyages. There was no intention that

she should proceed to *South America*, and she, therefore, was not on that voyage, and she was not in the course of the voyage to the *East Indies*. The voyage on which she sailed was a voyage from *New South Wales* to *New Zealand* and back, and thence to the *East Indies*, and no such voyage is comprehended by the terms of this policy.

Scarlett, Campbell, and F. Pollock, contra. This is a policy on ship couched in very confused and contradictory terms. But, giving it a reasonable construction, it must be held to protect the ship on any intermediate voyage between *South America*, and the *East Indies*, before the master had determined upon his destination, and had actually proceeded on the voyage for his final destination. The policy is at and from *London* to *New South Wales*, and at and from thence to the *East Indies* or *South America*; and the risk is to continue until the ship shall arrive at her final port or place of destination in the *East Indies* or in *South America*. Then comes the liberty to touch and stay at all ports and places whatsoever. Now if the policy had stopped there, it [216] must be admitted that the vessel would not have been at liberty "to touch or stay at any port not in the direct line of the voyage. But here the liberty reserved is much larger, for it is to take in and discharge goods and passengers at all ports and places, &c., and for all purposes whatsoever, particularly to trade and sail backwards and forwards, and forwards and backwards. These latter words show that a trading voyage within the limits described in the policy was in the contemplation of the parties. The word *particularly* seems to have been introduced into the policy in order to give full effect to the intention of the parties; and that word applies to the sailing backwards and forwards, as well as to the trading. The principal object of the policy, therefore, was a trading voyage within the prescribed limits, and consequently the ship was protected whilst she was sailing backwards and forwards within those limits. Now the voyage from *New Zealand* to *New South Wales*, was within those limits, and therefore, the underwriters are liable. The cases cited on the other side are not in point, for in all of them the liberty was only to touch and stay at any ports and places in the voyage; but in this case the liberty is *particularly* to trade, and to sail backwards and forwards. In *Mellish v. Andrews*, 16 East, 312, the policy was at and from *London*, to any and all ports and places in the *Baltic Sea*, forwards and backwards, and backwards and forwards, from place to place, and from port to port, and until her safe arrival at her port of final discharge. It was held, that the ship after having once touched at a particular port for orders, was not warranted under this policy in going to the same port again; and there it was said by the court that [217] the "words 'backwards and forwards'" seemed to intend an inverted course; and that "until her safe arrival at her final port of discharge" meant not where it might be intended that the ship should discharge, but where her last port of discharge should be; *final* being used in contradistinction to elective port of discharge. In the case of *Armett v. Innis*, 4 B. Moore, 150, a similar construction was put upon a policy containing the words "backwards and forwards," but no permission was given by name to trade. The court, however, held, that under the words "to touch and stay at any ports and places whatsoever, and for any purposes whatsoever," it was not a deviation to stay for the purpose of trading. In *Langhorn v. Allnutt*, 4 Taunt, 518, the policy was at and from *London*, to any ports and places in the *Baltic*, backwards and forwards. *Gibbs*, J., there says the underwriters are as well acquainted with the nature and extent of the risks as the assured. Now what are the risks? To any port or ports, place or places in the *Baltic*. The ship is not bound to select her port before she commences her voyage, it is backwards and forwards, with liberty to touch, and stay, and trade at all ports had places, and for all purposes whatsoever. The permission to stay for any purpose whatsoever, must indeed be for some purpose within the scope of the adventure." Now here the taking of goods and passengers to *New Zealand*.

and back to *Port Jackson*, was within the scope of the adventure contemplated by the assured. The final port of destination was left, in some measure, undefined; as soon as the convicts were discharged from the vessel, it was the captain's duty to do the best he could for the benefit of "the owner"; and with that view he entered into a contract to carry passengers to *New Zealand*, with the intention of returning to *Port Jackson*. Now the policy clearly contemplated a trading voyage; and that being the principal purpose, the taking passengers from *Port Jackson* to *New Zealand*, was within the policy.

ABOTT, C. J. I am clearly of opinion, that the ship was not within the protection of the policy whilst she was on the voyage from *New South Wales* to *New Zealand*, and back to *New South Wales*. That was clearly the voyage upon which she was sailing at the time when she was lost. The voyage insured, is from *London* to *New South Wales*, and thence to *South America*, or the *East Indies*. Supposing the policy had stopped there it could not have been contended that this was a loss within those words. But the policy contains other words, viz. that it should be lawful for the ship, &c., to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, and *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship may proceed to, as well on this as on the other side of the *Capes of Good Hope*, and *Horn*, and for all purposes whatsoever, and particularly to trade and sail backwards and forwards, and forwards and backwards. These are words, certainly, of very large and extensive import; but, large as they are, they must receive that construction which has been given to similar words in other cases; and, giving them that construction, we must hold, that by this policy the ship would be protected by the policy so long only as she was sailing on an "intermediate voyage, undertaken with a view to the accomplishment of one or other of the voyages pointed out by the policy as the principal object in contemplation of the parties, viz. a voyage either to *South America*, or the *East Indies*. Unless the words of the policy be so construed, there can be no limit, either of time or place, to the risk described in this policy; but construing them in that limited sense which has been put upon similar words in other policies, in order to make this a loss within the terms of this policy, the ship, at the time of the loss, must have been upon a voyage from *New South Wales* to *South America*, or from *New South Wales* to the *East Indies*, or sailing backwards and forwards, upon some intermediate voyage, with the view and for the purpose of accomplishing a voyage either to *South America* or to the *East Indies*. In this case, at the time of the loss, the ship was on a distinct voyage, not subordinate to or connected with either of the voyages contemplated by the parties as the principal objects of the contract. That being so, she was not at that time on the voyage insured, and, consequently, the plaintiff is not entitled to recover.

BAYLEY, J. This is not a policy for time but for a particular voyage. The rule of construction which has been applied to policies couched in similar terms must also be applied to this. Now, a liberty to touch, stay, and trade at any ports or places whatsoever, has been held, to be confined to a staying or trading at any port for a purpose subordinate to the voyage insured, which is the principal object of the policy. I think the liberty to sail backwards and forwards, and forwards and backwards, must be construed so as to protect the ship so long only as she was sailing on a voyage having for its ultimate object the accomplishment of the principal voyage insured, which, in this case, was a voyage either to *South America* or to the *East Indies*. The question then is, whether this ship was upon the voyage insured, at the time when the loss took place. Now, what was the voyage insured? First, from *London* to *New South Wales*. That is one stage. When the ship arrived there, the owner was to have the option of sending her either to *South Amer-*

ics or to the *East Indies*; but he was then to make his option, and the vessel was then to sail either to some port in *South America*, that being the ultimate object, or to some port in the *East Indies*, that being the ultimate object. In order to be within the protection of the policy, the ship must either be on the way to *South America*, *South America* being the ultimate object, or to the *East Indies*, the *East Indies* being the ultimate object of the voyage. But here the vessel sailed on an intermediate voyage to *New Zealand* and back, and although *New Zealand*, is in the way from *New South Wales* to *South America*, yet that voyage was commenced without having for its ultimate object the voyage to *South America*, and *New Zealand*, was not in the way to the *East Indies*. The ship, therefore, at the time of the loss, was not on a voyage contemplated by the policy, and therefore, the underwriters are not liable.

HOLROYD, and LITTLEDALE, Js., concurred.

Rule discharged.

HEWLINS v. SHIPPAM.

Declaration stated, that one *A.* was seized in fee of a messuage or inn, and yard thereto adjoining, and by indenture demised the same to the plaintiff for a term of years, which was undetermined; that defendant was possessed of a certain other yard next to and adjoining the premises of the plaintiff, as tenant thereof, to *A. B.*; and that the defendant and his landlord granted to *A.*, his heirs and assigns, license and authority to make and construct, at the costs of *A.*, a certain gutter or drain from and out of the said messuage or inn, into and across, and out of a certain part of the yard of the defendant, unto and into the yard of the plaintiff; and that *A.*, his heirs, and assigns, and his farmers and tenants, occupiers of the messuage and yard, should have the foul water collected in the scullery of the said messuage or inn, to run and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the yard of the defendant, unto and into the yard of the plaintiff, for so long time as need and occasion should require for the convenient occupation of the messuage or its appurtenances. Breach, that defendant, without notice, obstructed the drain. Another count stated the grant to be for so long time as the defendant should be and continue in possession or occupation of the said last-mentioned land, or so long as the same should be requisite for the convenient occupation of the messuage. It appeared in evidence that the licence to construct and continue the drain was by parol: Held, that as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed.

DECLARATION stated, that on the 1st of January, 1820, at, &c., one *W. Humphrey* and one *E. Humphrey* were seized in their demesne as of fee, of and in a certain messuage or inn, and yard thereto adjoining, with the appurtenances, situate at *Chichester*, and being so seized, they the said *W.* and *E.*, by indenture, did demise the said messuage or inn, and yard, with the appurtenances, to the plaintiff, *habendum* for a term of years in the indenture mentioned, by virtue of which said demise the plaintiff entered and became possessed for the term, to wit, &c. It then stated, that defendant, to wit, &c., were possessed of a certain other yard, with the appurtenances, situate and being *Chichester* aforesaid, next to and adjoining the premises of the plaintiff, as tenant thereof, to one *R. Wills*, the reversion belong to *R. Wills*; and the said *William* and *Edward* being so as aforesaid seized, and the said defendant being so possessed of the said other yard, with the appurtenances, the reversion of ²²²³ and in the same belonging to said *R. Wills*, afterwards, &c., the said defendant did give and grant, and the said *Wills* did give, grant, and confirm unto said *William* and *Edward*, their heirs and assigns, license and authority to make and construct, at the proper costs and charges of said *W.* and

E., a certain gutter or drain from and out of the said messuage or inn, into and upon, over, across, and out of a certain part of the said yard of said defendant, unto and into the said yard of the plaintiff; and that said *W.* and *E.*, their heirs and assigns, and their farmers and tenants, from time to time and at all times in future, occupiers of the said messuage or inn, and yard, with the said appurtenances, should have the foul water (from time to time collected and being in a certain part, to wit, the scullery of the said messuage or inn,) at all times to drain, run, and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the said yard of the said *James Shippam*, unto and into said yard of plaintiff, for so long time as need and occasion should require, for the convenient occupation of the messuage or inn, with the appurtenances. That said *W.* and *E.*, confiding in the said license and authority of said *James Shippam* and said *Wills*, did duly make and construct, at their own proper costs and charges, such gutter or drain as aforesaid, from and out of the said messuage or inn, into and upon, over, across, and out of the said part of the said yard of said defendant, unto and into the yard of the plaintiff, according to the true intent and meaning of the said license and authority so given, granted, and confirmed; and said *W.* and *E.* necessarily expended, &c., a large sum of money in and about the making and constructing of the said gutter or drain, of which said *premises the defendant had notice. Breach, that the said defendant not having given any notice to the said *W.* and *E.*, or the plaintiff, or either of them, or made or offered any compensation in that behalf, or countermanded or revoked the said license and authority, wrongfully and injuriously stopped up the drain. Other counts stated the right to be for so long a time as the defendant should be and continue in the possession or occupation of the last-mentioned yard, or so long as it should be requisite for the convenient occupation of the plaintiff's house; some stated, as part of the consideration, that the defendant's landlord should do some repairs to the defendant's premises. Plea, not guilty. At the trial before *Graham*, B., at the Spring assizes for the county of *Sussex*, 1825, the following appeared to be the facts of the case. The plaintiff was a lessee of the *Swan Inn*, at *Chichester*, under *W.* and *E. Humphrey*. In *May*, 1819, *W.* and *E. Humphrey* rebuilt the *Swan Inn*, at *Chichester*, and being desirous to construct a drain in the adjoining premises (in the possession of the defendant) applied to *Wills*, the landlord, who said he had no objection if his tenant had not. The *Humphreys* further agreed to repair the defendant's premises, to raise his chimnies, and to pave his yard. The defendant assented to the making the drain upon these terms, and they raised the defendant's chimnies and paved his yard, and thereby incurred an expense of 100*l.* The drain was constructed, it was paved at the bottom, and covered with solid stone, and the sides were brick. Upon these facts, *Graham*, B., was of opinion that the right claimed under the license granted by the defendant and his landlord, to have the drain in the soil of another, was an uncertain interest in the land, within *the first section of the statute of frauds, and not being granted by any [*224] instrument in writing, the plaintiff acquired under it a right at will only, which was determined by the defendant's stopping up the drain. He therefore directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. *Taddy*, Serjt., in last *Easter* term, obtained a rule *nisi* for that purpose, and cited *Webb v. Paternoster*, *Palmer*, 71, *Wood v. Lake*, *Sayer*, 3, and *Godley v. Frith*, *Yelv.* 159, to show that the plaintiff acquired no interest in the land where the drain was situate, but a mere easement on the land, viz., the right of having the water run over it. This case was argued at the sittings in banc after last *Michaelmas* term.

Marryat and *Platt* showed cause. The plaintiff, by virtue of the license stated in the declaration, acquired an interest in the soil of another, and the license not being in writing, he had only an estate at will, and that was determined by the defendant's stopping up the drain. The plaintiff acquired the

exclusive use of that part of the land on which the drain was constructed. The owner of the inheritance, (so long as the right to have the drain continued,) was prevented from using the land for any purpose so as to interfere with the right of the plaintiff; he could not build a wall there. He therefore had parted with some interest in the soil which before belonged to him, and whatever that interest was, it had passed to the plaintiff. The latter then contracted for an interest in land; and it is a case, therefore, within the words of the statute, and clearly within the mischief against which the legislature intended to guard.

*225] *As to the cases cited on the other side, *Webb v. Paternoster*, Palmer, 71, was decided before the statute of frauds. *Wood v. Lake*, Sayer, 3, was decided after the statute of frauds, but that case cannot be supported. The plaintiff was to have for seven years the *sole* use of that part of the land upon which he was to stack his coals; it cannot, therefore, be distinguished from an actual demise for seven years, and that clearly would be within the statute. *Winter v. Brockwell* is not in point, because the defendant put up the skylight on his own land. *Fentiman v. Smith*, 4 East, 107, is directly in point. There the plaintiff declared, (in case for obstructing a water-course,) upon his possession of a mill *with the appurtenances*, and that by reason of such his possession he had a right to the use of the water running in a certain tunnel to the mill; it was held that such allegation was not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a certain consideration; but of which no conveyance was made by him to the plaintiff, and he had since refused assent; because the plaintiff had not the water by reason of his possession of the mill, &c. but by parol license or contract, which could not pass the title to the land, and as a license, was revocable, and revoked; Lord *Ellenborough* there said, the title to have the water flowing in the tunnel over the defendant's land could not pass by parol license without deed; and the plaintiff could not be entitled to it as stated in the declaration, by reason of his possession of the mill, but he had it by the license of the defendant, *or by contract with him; and if by license, it was revocable at any time.

*226] *Taddy, Serjt., and Long*, contra. The plaintiff, by virtue of the license did not acquire any interest in the soil through which the water was to flow, but a mere easement, viz. a right to have his water flow through that part of the soil. It is true, so long as that right continued, the defendant or his landlord could not build so as to obstruct the flowing of the water. Nor can the owner of the soil, subject to a right of way, build upon his land so as to obstruct that right. *Godly v. Frith*, Yelv. 159, is an authority to show that such a right is an easement only, and not an interest in the land. In *Parker v. Staniland*, 11 East, 362, a contract for the sale of potatoes not dug up was held to give the purchaser no interest in the land, but an easement only, viz. a right to come upon the land for the purpose of taking up and carrying away the potatoes. In *Webb v. Paternoster*, Palmer, 71, it was held, that a grant of a license to the plaintiff to stack hay upon land for a convenient time till he could sell it, did not amount to a lease of the land, the agreement being for an easement, and not for an interest in the land. In *Wood v. Lake*, Sayer, 3, a liberty to stack coals upon part of a close for seven years, and that during that term the person to whom it was granted was to have the sole use of that part of the close upon which he was to have the liberty of stacking coals, was held to give no interest in the land; and, therefore, notwithstanding the statute of frauds, it was good for seven years. That case was *cited with approbation by *Gibbs*, C. J., in *Taylor v. Waters*, 7 Taunt. 384. These authorities show that the plaintiff did not acquire any interest in the soil of the land through which his water was to flow, but whether he acquired an interest in the soil or a mere easement under the license, *Winter v. Brockwell*, 8 East, 309, is an authority to show that this license could not be recalled after it had been executed at the expense of the plaintiff, and *Taylor v. Waters* is an

authority to the same effect; and in that case *Gibbs*, C. J., after referring to *Webb v. Paternoster*, Palmer, 71; *Wood v. Lake*, Sayer, 3; and *Winter v. Brockwell*, 8 East, 308, expressly says, "These cases abundantly prove that a license to enjoy a beneficial privilege on land may be granted without deed, and, notwithstanding the statute of frauds, without writing."

Cur. adv. rult.

The judgment of the court was now delivered by

BAYLLY, J. This was an application to set aside a nonsuit. The action was for stopping up a drain leading from the plaintiff's premises through the defendant's yard. The ground of the nonsuit was, that the right to have the drain pass through the defendant's yard was an interest in the defendant's land, and under the first section of the statute of frauds, there being nothing in writing to create the right, but its foundation resting in parol only, was a right at will only. The points discussed upon the motion were, whether this was an interest in land or an easement only; and if it were an interest in land, whether the defendant could stop the drain without taking some previous step to determine "the estate at will; but when the state of the pleadings is adverted to, and the nature of the right there claimed considered, it will [*228] be clear that a decision upon either of these points is unnecessary, and that if the cause were to go down again to another trial, it must again terminate in a nonsuit. The declaration claimed the right as a license and authority granted to the plaintiff's landlords, *their heirs and assigns*, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard. One of the counts claimed it indefinitely, without fixing any limits; others restricted it either to the time the defendant should continue possessed of his yard or house, or so long as it should be requisite for the convenient occupation of the plaintiff's house; some stated, as part of the consideration, that defendant's landlords should do some repairs to the defendant's premises; others did not. Now, what is the interest these counts stated? A freehold interest. In Co. Litt. 42, it is said: "If a man grant an estate to a woman *dum sola*, &c., or as long as the grantee dwells in such a house, &c., or for any like uncertain time, which time, as *Bracton* saith, is *tempus indeterminatum*, in all these cases, if it be of lands or tenements, the lessee hath, in judgment of law, an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other things that lie in grant, he hath a like estate for life *by the delivery of the deed*, and in count or pleading he shall allege the lease, and conclude that by force thereof he was seised generally for the term of his life." Lord *Hale*, (note to Co. Litt. 42 a.), in his MS., specifies two or three other instances, but adds, that in pleading, the limitation ought to be pleaded and continuance averred; *and *Blackstone*, in his [*229] *Commentaries*, vol. ii. p. 121, lays it down, that a general grant, without defining the limits of the estate, passes an estate for life; and *Brewer v. Hill*, 2 Anstr. 413, is an authority to show that a lease from a vicar, so long as he should continue vicar, passes an estate for life. What, then, was the evidence to make out the grant of an estate for life? It appeared in evidence upon the trial that the drain was made in 1819, at the expense of the *Humphreys*, with the consent of the defendant and Mr. *Wills*, and that the *Humphreys* laid out some money in improving the defendant's premises, but nothing was said as to how long the drain was to continue, nor was any thing in writing between any of the parties; and when the inconveniences such a drain may occasion from smells, and the necessity of cleaning it are considered, it is almost impossible to suppose that *Wills* and the defendant meant to run all risks, and allow the parties an absolute interest so long as the defendant should continue in possession, or so long as it should be requisite, &c. But suppose this had been the intention, can such an interest be created by parol? A right of way or a right of passage for water, (where it does not create an interest in

the land,) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed, (even if a chattel interest may, which I think it cannot,) otherwise than by deed. *Terms de la Ley*, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbor hath of another by *character or prescription, without profit; and it instances, "as a way or sink through his land, or such like." In Co. Litt. 9 a., Lord Coke distinguishes between corporeal things which lie in livery, and incorporeal which lie in grant, and cannot pass but by deed, as advowsons, commons, &c., and it seems to be his opinion, that, (except in certain specified cases,) where livery is necessary as to the one, a deed is necessary as to the other. The same may be collected from the passage already cited from Co. Litt. 42 a. In Co. Litt. 169, the excepted case of parceners is mentioned, and there it is said, that though the common of estovers or pasture, or a corody, or a way lie in grant, they may, upon partition *between the parceners*, be granted without deed. So both *Littleton* and Lord Coke state, in the same part, that a rent may be granted in the case of parceners for owlty of partition without deed; and Lord Coke notices that rents, commons, advowsons, and the like, that lie in grant, though they cannot pass without deed, may be divided between parceners by parol without deed. Chattels, whether real or personal, may in general be granted without deed, Shepherd's Touchstone, 232; and in the case of things lying in livery, a demise thereof may be made for any number of years at common law without deed, but Lord Coke, in Co. Litt. 85 a., makes a distinction between original chattels and chattels created out of a freehold lying in grant, that the former may pass without deed, the latter cannot be created or pass without it; and whether there is a distinction in this respect between chattel interests created out of freeholds lying in livery and freeholds lying in grant, (which I think there is not,) it is not necessary to decide, because this is the case of a *freehold, not of a chattel interest. Shepherd, in his Touchst. 231, lays it down, that license or liberty, (amongst other things,) cannot be created and annexed to an estate of inheritance or freehold without deed. In 2 Roll's Abr. 62, it is laid down that a thing lying merely in grant cannot pass without deed. In 9 Co. 9, it is said, *arguendo*, that tenant for life cannot by word without deed have the privilege of being disipunishable for waste, and that position is adopted in Shepherd, Touchst. p. 231. In Gilbert's Law of Evidence, p. 96, 6th edition, this is laid down: "If a man shows title to a thing lying in grant, he fails if the seal be torn off from his deed, for a man cannot show a title to a thing lying in solemn agreement, but by solemn agreement; and there can be no solemn agreement without a seal, so that possession alone is not sufficient, since the thing itself does not lie in possession but in agreement; therefore a man cannot claim a title to a watercourse but by deed, and under seal. *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259, is at variance with the position laid down by Lord Chief Baron Gilbert, that the party fails if the seal be torn off the deed. It was decided in that case, that if the deed be destroyed, other evidence may be given to show that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in that case. In *Monk v. Butler*, Cro. Jac. 574, where the plaintiff in replevin answered an avowry for damage feasant by a plea of license from a commoner who had right for twenty beasts, it was objected that if the commoner could license, he could not do so without deed; and of that opinion was the whole court. In *Rumsey v. Rawson*, 1 Ven. 18—25, the objection to such a license on *the account of its not being stated to be by deed, after verdict for the plaintiff on a collateral issue, was overruled, because the license was only to take the profit *unice vice*, and because no estate passed by it. Yet in a subsequent case of *Hoskins v. Robins*, 2 Vent. 123—163; 2 Saund. 327, a similar objection was

overruled, not on the ground that a parol license would be sufficient, but on the ground that the objection to the mode of pleading the license was waived by an issue on a collateral point, and that after verdict on such issue it must be taken that the license was by deed; but, according to the report in *Saunders, Hale*, C. J., and the court, seemed to be of opinion that the license could not be granted without deed. In *Harrison v. Parker*, 6 East, 154, where liberty and license, power and authority were granted to the plaintiff and his heirs to build a bridge across a river, from plaintiff's close to a close of Sir *George Warren*, and liberty and license to plaintiff to lay the foundations of one end on Sir *G.*'s close, the grant was by deed. And in *Fentiman v. Smith*, 4 East, 107, where the plaintiff claimed to have passage for water by a tunnel over defendant's land, Lord *Ellenborough* lays it down distinctly: "The title to have the water flowing in the tunnel over defendant's land could not pass by parol license without deed." Upon these authorities we are of opinion, that although a parol license might be an excuse for a trespass till such license were countermanded, that a right and title to have passage for the water, for a freehold interest, required a deed to create it, and that, as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported. The case of *Winter v. Brockwell*, 8 East, 309, which was relied upon on the part of the plaintiff, appears clearly distinguishable [*233] from the present. All that the defendant there did, he did upon his own land. He claimed no right or easement upon the plaintiff's. The plaintiff claimed a right and easement against him, viz. the privilege of light and air through a parlor window, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was, that as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantees to use his own land in a way in which, but for an easement of the plaintiff's, such grantees would have had a clear right to use it. *Webb v. Paternoster*, Palm. 71; *Wood v. Lake*, Sayer, 3; and *Taylor v. Waters*, 7 Taunt. 374, were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. These, therefore, cannot be considered as authorities upon the point; and on these grounds, therefore, that the right claimed by the declaration is a freehold right, and that if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed; we are of opinion that the nonsuit was right, and that the rule ought to be discharged.

Rule discharged.



*GEARY v. PHYSIC.

[*234]

An indorsement upon a promissory note written with a pencil, is a valid indorsement within the custom of merchants.

ASSUMPSIT by the plaintiff as indorsee against the defendant as maker of a promissory note for the sum of 30*l.* payable two months after date to the order of one *Folder*, and indorsed by him, *Folder*, to one *Kemp*, who subsequently indorsed the note to the plaintiff. At the trial before *Abbott*, C. J., at the Lon-

don sittings, after *Hilary* term, 1825, it appeared that the indorsement by *Kemp*, to the plaintiff was in pencil, and it was thereupon objected that the plaintiff could not recover; an indorsement in *pencil* not being such an indorsement as the law and custom of merchants recognizes to be sufficient to pass the interest in a bill of exchange, and promissory notes being by the statute 3 & 4 Ann. c. 9, s. 1, assignable or indorsable in the same manner as unpaid bills of exchange are according to the custom of merchants. The Lord Chief Justice, thought it sufficient, and directed the jury to find a verdict for the plaintiff, reserving liberty to the defendant's counsel to move to enter a nonsuit, if the court should be of opinion that the indorsement of the promissory note in pencil, was not a good and valid indorsement. *F. Pollock*, in last *Easter* term, obtained a rule *nisi* to enter a nonsuit. He contended, first, that a writing in pencil, was not a writing recognized at common law; and he cited *Co. Lit.*, 229, a., where Lord *Coke*, speaking of a deed, says, "Here it is to be understood, that it ought to be in parchment or in paper. For if a writing *235] be made upon a piece of wood, or upon a piece of linen, "or on the bark of a tree, or on a stone, or the like, &c., and the same be sealed or delivered, yet is it no deed, for a deed must be written, either in parchment, or paper, as before is said, for the writing upon these is least subject to alteration or corruption." For the same reasons a writing ought to be made with materials least subject to alteration or corruption. Now, writing made with a pencil is easily altered or obliterated, and therefore, for the reasons given by Lord *Coke*, where the law requires a contract to be in writing, it ought to be in writing made with materials the least subject to alteration. Secondly, he contended, that it was not a writing according to the custom and usage of merchants. In point of practice bills of exchange were generally written in ink, and it lay upon the plaintiff in this case to show by evidence that this was a writing according to the custom of merchants.

Thesiger, now showed cause. The passage cited from *Co. Lit.* 229, a., regards only the materials upon which, not with which, a deed must be written; and even assuming that a deed written in pencil might not be good, it does not, therefore, follow that a bill of exchange so written may not be so. Deeds are more solemn instruments, and are intended permanently to go along with the inheritance, but bills of exchange are made to continue in force for a very short period. Letters and words traced on paper by a pencil, constitute writing in the ordinary acceptation of that term. In *Jeffrey v. Walton*, 1 Stark. 267, *236] a memorandum entered in pencil upon a card was "received as evidence of an agreement; and in *Rymes v. Clarkson*, 1 Phill. 22, Sir *John Nicholl*, was of opinion that a will written by a testator with a pencil would be valid, provided that the court could be satisfied that he intended so to execute his will. In *Green v. Skipworth*, 1 Phill. 53, a disposition made by a testator in pencil was carried into effect, and in *Dickenson v. Dickenson*, 2 Phill. 173, alterations in pencil on a regularly executed will were admitted to probate. Sir *John Nicholl*, said "there was no doubt that in point of law they must be considered as equally valid as if made in ink, provided the deceased intended them to take effect." Now, there can be no question as to the intention here. For here *Kemp*, not only wrote his name on the note in pencil, but he passed it from his hand to another, thereby clearly showing that he intended to transfer the property in the note. The authorities, therefore, show that this indorsement in pencil is an indorsement in writing within the legal meaning of that term. Secondly, it is an indorsement in writing within the usage and custom of merchants. That usage requires that the indorsement should be in writing; it refers to the act to be done, and not to the particular mode or the materials with which it is to be done. The argument addressed to the court on the part of the defendant goes to confound the usage with the practice. If the usage requires not only that the indorsement should be in writing, but that it should be written in a particular mode, it will be a matter

of enquiry whether the color of the ink, or the species of paper on which the bill is written, be such as is required by the custom.

**F. Pollock, contra.* The passage from *Co. Litt.* was cited to show that where the law required a contract to be in writing, it required that it should be written on materials which were the least subject to alteration; and from thence it was inferred that the law, for the same reason, would require that it should be written with materials having the same quality, general convenience certainly requiring that negotiable instruments should be written with materials more durable than pencil. It lay upon the plaintiff to show that such a writing was a writing within the custom of merchants, and that he has not done. Suppose the indorsement on the paper had been scratched with a pin, or with the inverted end of a pencil, would that have been a writing according to the custom of merchants?

Abbott, C. J. There is no authority for saying that where the law requires a contract to be in writing, that writing must be in ink. The passage cited from *Lord Coke*, shows that a deed must be written on paper or parchment, but it does not show that it must be written in ink. That being so, I am of opinion that an indorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent its being generally adopted. There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an indorsement of bills of exchange should be in writing,^t without specifying the manner with which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff.

Batley, J. I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials.

Holroyd, J., concurred.

Rule discharged.

^t See the custom stated in *Lutwidge*, 573.

*REX v. BRODERIP, Esq.

Whether a conviction of a waterman for carrying in his boat, upon the river *Thames*, more persons than are allowed by law, must be founded upon testimony given upon oath, *quare.*

That point being doubtful, the court refused a *mandamus* to compel a magistrate to enforce the conviction.

W. KIDNER was convicted in the penalty of 5*l.* before two of the overseers and rulers of the society or company of watermen, wherrymen, and lightermen, using, occupying, or exercising any rowing upon the river *Thames* between *Gravesend* in the county of *Kent*, and *Windsor* in the county of *Herks*, on the complaint of *Thomas Neal*, a waterman and wherryman rowing and working boats upon the river *Thames* between the limits aforesaid, and a freeman of the aforesaid society or company, for working a boat for hire and gain on the river *Thames*, at *Richmond*, in the county of *Surrey*, between the limits aforesaid, and receiving, taking, and carrying in the said boat more than eight passengers at one and the same time. The penalty not having been paid, an application was made to the defendant, a justice of peace, to issue his warrant against *Kidner*, but he refused, on the ground that the complainant had not been examined on oath. It appeared now to be a matter of doubt upon the construction of the statute, whether it were or were not necessary that the complainant should be examined upon oath. The 10 G. 2. c. 31. s. 8, subjects any waterman carrying any more than a limited number of passengers in his boat, on being convicted *by the oath* of one or more credible witness or witnesses, or by the confession of the party or parties before the Lord Mayor of the city of *London*, or one or more justices of the peace, to a penalty. The 34 G. 3. c. 65. s. 5, which gives a general mode of proceeding for the recovery of penalties inflicted [240] by the laws relating to watermen on the river **Thames*, before the Lord Mayor and justices of the peace, requires *them* to examine *upon oath* the complainant or any witness or witnesses. The ninth section of that statute gives jurisdiction to the overseers and rulers of the watermen's company in cases arising between waterman and waterman, to hear and determine concerning any such offence, and convict the offender; and enacts, "that it shall be lawful for them to summon the party accused, and he, being before them, to hear and examine the complainant, or any witness or witnesses touching such offence, and to determine concerning the same." It then enables them to impose a fine, and in case of non-payment of the same, that *it shall be lawful* for the mayor or justices, upon production of such conviction, to issue his or their warrant for apprehending the offender, and to commit him to prison unless such penalty be paid. The twelfth section enacts, that in every case in which any oath is by that act directed to be taken, the mayor and justices respectively before whom such oath is directed to be taken, shall have full power to administer the same. A rule *nisi* for a *mandamus* had been obtained, on the ground that the statute was imperative on the magistrate to issue his warrant on proof of the conviction and non-payment of the penalty.

The *Attorney General* and *Maule* were now heard against the rule, and *Bolland*, contra.

Per Curiam. It is not clear that it was the duty of the justice to issue his warrant in this case. The words of the ninth section are, "that it shall be lawful for the mayor or justices to issue the warrant;" not that they are required so to do. Besides, it is at least doubtful whether the conviction, not having taken place upon examination on oath, was legal: and this court will not compel a magistrate to do that which may subject him to an action of trespass.

Rule discharged.

THE KING v. THE JUSTICES OF SURREY.

The notices of holding a special sessions for the purpose of diverting a public highway, must be given to the justices of the peace of the county acting within the district, by the high constable of the hundred.

An order was made by justices at special sessions, for diverting and turning a certain part of a public footway called the *The Bishop's Walk*, in the parish of *Lambeth*, in the country of *Surrey*. The notice of holding the special sessions was served on the several magistrates of the division by the clerk of the magistrates and not by the high constable. There was no appeal against the order. The Court of Quarter Sessions were of opinion that the special sessions had not been duly convened, inasmuch as the notice of holding the sessions ought to have been served by the high constable, and refused to confirm the order. A rule *nisi* having been obtained for a *mandamus*, commanding the justices to confirm the order,

Nolan and *Barnewall* now showed cause. By statute 55 G. 3. c. 68. s. 2, justices may by an order made at some *special* sessions, divert and turn highways, bridleways, or footways. In *Rex v. The Justices of Worcestershire*, 2 B. & A. 228, it was held that the *special* sessions must be convened in the manner pointed out by the 13 G. 3. c. 78. s. 62, which enacts "that it shall be lawful for any two *justices of the peace within their respective limits [^{*242} to hold any special sessions for executing the purposes of that act, and to adjourn the same from time to time as they shall think fit, causing notice to be given of the time and place of holding such special sessions, and of the adjournments thereof, to the several justices acting and residing within such limits, by the high constable, or other proper officer within the same." The latter words "*other proper officer*," must mean officer *eiusdem generis* with the high constable. The latter is an officer known to the law, having certain public duties to perform, for the neglect of which he is liable to punishment. The clerk to the magistrates of the division is not an officer recognized by the law; he may be dismissed from his office, but he cannot be punished for not obeying the orders of the magistrate. The terms "*other proper officer*" apply to any officer of a town corporate analogous to a high constable in a hundred, for this statute gives the same power to justices in corporations as to justices of counties.

Scarlett and *Thesiger*, contra. That part of the clause which enacts that the magistrates shall cause notice to be given to the justices by the high constable or other proper officer, is merely directory. The object of the legislature was that the justices should have notice, in order that they might consider the propriety of making the order. If this object be attained, it is immaterial by whom the notices are given. In ordinary cases the high constable rarely serves the notices personally, but deputes some person to execute that duty for him. And if notices served by such a deputy are sufficient, much more ought they to be considered so when they are *given by the clerk to the magistrates, whose functions are probably known to them all, and who being clothed [^{*243} with an official character, may be fairly regarded as a proper officer within the intention of the act. The case of *Rex v. The Justices of Worcestershire*, 2 B. & A. 228, rather fortifies this view of the question, for it seems to regard as the primary object of the legislature that reasonable notice in point of time of holding a special sessions should be given, and that if the magistrates in that case had received such notice, the order would have been good. The act is imperative so far as it requires the justices to cause notice to be given; it is directory only so far as the mode of giving the notices is considered. This is the more reasonable construction of the act, especially when it is considered that the subsequent statute 55 G. 3. c. 68, requires notices of the intention of stopping up or diverting the way to be given, not only to the justices, but to all other persons residing in the neighborhood.

ABBOTT, C. J. By the stat. 13 G. 3. c. 78. s. 62, justices in corporations, as well as justices in counties, have power to act within the limits of their respective jurisdictions. I think the words, *other proper officer*, mean an officer of a corporation analogous to a high constable in a hundred; and if that be the meaning of those words, then it is very clear, that in a county the high constable of the hundred is the proper officer to give the notices; and as the notices in this case were not given by the high constable, I think that the special sessions were not duly convened, and consequently the Court of *Quarter Sessions were right in refusing to confirm the order. The enactment, as to the mode of convening the special sessions, is not to be considered a mere matter of form. It is obvious that the legislature intended that all the justices acting within the district should have an opportunity of being present to consider the propriety of making the order. That object will be best attained by having the notices of holding the sessions served upon the different magistrates by that officer, whose duty it is to execute the orders of the magistrates, and who is liable to punishment if he neglects his duty. The clerk to the magistrates might be dismissed from his office if he neglected to obey the orders of the magistrates, but I am by no means prepared to say that he would therefore be liable to punishment. Upon the whole, I am of opinion that notice of the time and place of holding the special sessions ought to have been given by the high constable, and that not having been done in this instance, the proceedings were irregular. The sessions, therefore, were right in refusing to confirm the order, and the rule for a *mandamus* must be discharged.

Rule discharged.

BROOKHOUSE v. The Sheriff of DERBYSHIRE.

Sheriff arrested A. B. on the 13th of November, upon a writ returnable the 15th, and suffered him to go at large without giving a bail-bond, and afterwards returned *cepi corpus*. Bail above were put in on the 17th of December, and on the same day A. B. was rendered, but notice of render was not given until the 13th of January. An action against the sheriff for the escape was commenced on the 19th of December. The court stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion.

On the 13th of November the defendant arrested A. B. at the suit of the plaintiff, under a writ returnable on the 15th, and suffered him to go at large without taking a bail-bond. On the 17th of November, the sheriff was ruled to return the writ, and returned *cepi corpus*, the party at that time being at large. No rule to bring in the body was ever served. On the 17th of December special bail were put in, and the defendant was rendered, but notice of the render was not given until the 13th of January. An action for the escape was commenced against the sheriff on the 19th of December, and a rule having been obtained for staying the proceedings in that action.

George showed cause, and contended, that as the action was commenced before any notice of render was given, the proceedings could not be stayed, and he relied upon the decision of the Court of C. P. in *Burn v. The Sheriff of Middlesex*, 2 Marsh. 261.

N. R. Clarke, contra, contended, that as the render was actually made before the commencement of the action for the escape, and no trial had been lost in the original action, the rule ought to be made absolute; and he cited *Pariente v. Plumbtree*, 2 B. & P. 35, and *Allingham v. Flower*, 2 B. & P. 246.

Per Curiam. Under the circumstances of this case, we think that the rule must be made absolute, upon payment of costs up to the time when notice of render was given, and the costs of this motion.

Rule absolute.

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*The KING v. STEVENS.

[*246]

Indictment for perjury alleged that on the trial of an indictment against *J. H.*, defendant, intending to injure *J. H.*, and to cause him to be wrongfully convicted, appeared as a witness, and was sworn, &c., "and then and there falsely and maliciously gave false testimony against *J. H.*, by falsely depositing" &c., and so the jurors say that defendant committed wilful and corrupt perjury : Held, in arrest of judgment, that this count was bad, for not alleging that defendant *wilfully or corruptly swore falsely*.

Another count alleged, that at the trial of *J. H.* he was found guilty, "by means of the false and material testimony of defendant in the first count mentioned;" that a rule nisi for a new trial was granted, and that defendant knowingly, falsely, wilfully, and corruptly made affidavit that the evidence given by him at the trial of *J. H.* was true, "whereas it was false in the particulars in the first count assigned and set forth:" Held, that this count also was bad; for that it should have averred distinctly that defendant was sworn as a witness, and deposed to certain facts at the trial of *J. H.*, instead of leaving it to be taken by intendment.

INDICTMENT for perjury. The first count stated, that on, &c., *J. H.* was in due form of law tried upon a certain indictment then depending against him in the Court of King's Bench ; that the defendant wickedly devising and intending to injure and aggrieve the said *J. H.*, and to cause him to be wrongfully convicted, did, at the trial of the said indictment, appear as a witness, and was then and there sworn, &c., and then and there *falsely and maliciously gave false testimony* against the said *J. H.* in support of the said matters charged against the said *J. H.* in the said indictment, by then and there deposing and giving in evidence, &c. (the evidence was then set out, materially averred, and perjury assigned upon each part of it.) And so the jurors say that *J. S.* did, in manner and form aforesaid, commit wilful and corrupt perjury. The fifth count, (the only one that differed materially from the first,) stated, that at the trial of the said indictment, the said *J. H.*, by means of the false and material testimony of the said *J. S.*, in the said first count of this inquisition mentioned, was unlawfully and untruly found guilty. That a rule nisi for a new trial was granted, and thereupon *J. S.* minding and wickedly imagining, devising, and intending, by falsehood and wicked means, to prevent and hinder the said rule from being made absolute, *and to prevent justice, &c., came before [247] *W. E. W. T.* a commissioner, &c., and was then and there duly sworn, (*W. E. W. T.* having full power to administer an oath in that behalf,) and being so sworn, knowingly, falsely, wickedly, wilfully, and corruptly did, then and there, before, &c., depose, swear, and make affidavit in writing, in substance that the evidence which he *J. S.* had given on the said trial was true. Whereas, in truth and in fact, the evidence which the said *J. S.* had given on the said trial was not true, but was false *in the particulars in the said first count of this inquisition assigned and set forth*, and which said particulars were then and there material in respect of the said indictment, and of the said rule, &c. Plea, not guilty. At the trial before *Burrough, J.*, at the Spring assizes, 1825, for the county of *Cornwall*, the defendant was found guilty, and in *Easter* term a rule was obtained for arresting the judgment, against which

Wilde, Serjt., and *Manning*, showed cause: Taking the whole of the first count of this indictment together, the fair construction of it is that the defendant

is charged with having knowingly given false testimony on the trial of *Halse*. The rule was obtained on the authority of *Rex v. Greepe*, 2 Salk. 513; and *Rex v. Harris*, 5 B. & A. 926. But the objection to the indictment in the former was, that the witness was alleged to have sworn that *A. B.* was at *Newnham, inuendo Newnham* in *Devon*; that *Newnham*, without more, was too vague, and that an *innuendo* could not make it good, and upon that ground the judgment was arrested: but that judgment was *afterwards reversed in the House of Lords. 1 Ld. Raym 256. The indictment in *Rex v. Harris* set out two contradictory statements, made on oath by the defendant, and concluded "and so the defendant committed wilful and corrupt perjury," without saying which statement was true, and which false. The indictment was held bad on the ground that it was in the alternative, and that a conviction upon it could not be pleaded to a subsequent prosecution for the same offence. It is not, therefore, an authority for this case. The cases mentioned in 3 Inst. 167, turned upon the particular words of the statute 5 Eliz. c. 9, in which the words "wilful and corrupt," are used to define the offence contemplated by the statute. *Cox's* case, 1 Leach, 71, shows that the word *wilful* is not necessary in an indictment for perjury at common law. In this indictment it is alleged that the defendant "*maliciously* swore falsely, intending to cause *Halse* to be wrongfully convicted," that is, equivalent to stating that he corruptly swore falsely. [*Holroyd*, J. Must you not add the epithets constituting the gist of the offence to the description of the offence itself, and not the intention?] In 3 Inst. 164, Lord *Coke* defines perjury in these words: "Perjury is a crime committed when a lawful oath is administered, by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and *falsely* in a matter material to the issue or cause in question, by their own act, or by the subornation of others." There, *falsely* seems to be used in the same sense as in attaint for false verdict, and there the writ directs jurors to be summoned to inquire whether the former jury have made a *false* oath, Fitz. N. B. 105. It is *difficult to understand, then, why the allegation in an indictment for perjury at common law, that a witness maliciously swore falsely, should not be sufficient. At all events this objection cannot be urged against the last count, but it will be contended that the reference to the first count is too vague. But this last count states that the defendant wilfully and corruptly made a false affidavit, that his evidence given on the trial of *Halse* was true; and then, instead of enumerating the particulars in which that evidence was false, it refers to the assignments of perjury in the first count. Had those assignments been repeated in the last count, it would clearly have sufficed, but by the reference they are virtually incorporated in it.

C. F. Williams, *Bayley*, and *Carter*, contra, were desired by the court to confine their observations to the last count. If the first count is bad on the grounds which have been argued on the other side, the last count must be also bad. It contains no assignment of perjury, save that in the first count, and if perjury is not well assigned in that count, it cannot be any better in the last. Again, the last count does not set out any particular evidence given by the defendant, it does not even contain any direct allegation that the defendant gave evidence on *Halse's* trial, with reference to which the affidavit is stated to have been afterwards made.

ARBOTT, C. J. I am of opinion that this rule must be made absolute. As to the first class of counts the objection is, that they do not charge that the defendant swore *wilfully* or *corruptly*. Every definition of perjury is swearing wilfully and corruptly that which is false. *Whether the word *maliciously* might supply the place of either wilfully or corruptly, it is not necessary to determine, for neither of those words is found in the counts in question, and *Cox's* case, which has been referred to, proves, at all events, that such counts are insufficient. I now come to the consideration of the last count. It is in a form perfectly novel. It was intended to allege perjury in an affida-

vit made in this court. In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false, and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But the fact of his having been sworn must be taken by intendment. Were we to do that, as we are desired to do, in support of this indictment, we should furnish a precedent for a very loose and insufficient mode of charging a very serious offence, which has always hitherto been required to be charged with great certainty and particularity. I think that these novel attempts in pleading are not to be encouraged, and that the judgment must be arrested.

The rest of the court concurring,

Rule absolute.

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*Ex parte PAIN.

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By the 6 G. 4, c. 108, s. 3, it was enacted, that vessels of a certain description found "in any part of the British or Irish Channels, or elsewhere on the high seas, within one hundred leagues of the coasts of the United Kingdom," having "in any manner attached thereto" casks of certain dimensions, "of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits, (unless such casks are really necessary for the use of such vessel, or are a part of her cargo, and included in the regular official documents of such vessel,) the casks, vessel, &c. shall be forfeited. By s. 49, certain persons found to have been on board such vessels liable to forfeiture, are subjected to certain punishments. A conviction stated that *A. B.* was convicted of having been found on board a vessel liable to forfeiture; "for that it was found in the British Channel, having in a certain manner attached thereto divers, to wit, twenty casks, (of the dimensions mentioned in s. 3.) and of the sort or description used, or intended to be used, for the smuggling of spirits, the said casks not being really necessary for the use of the vessel, and included in the regular official documents of the vessel;" Held, first, that the vessel being found in the British Channel, it was not necessary to allege that she was within one hundred leagues of the coast. Secondly, that the statement that the casks were "in a certain manner" attached to the vessel was sufficient. Thirdly, that it was not necessary to negative that the casks were part of the cargo, the conviction stating that they were not included in the official documents of the vessel. Fourthly, that the allegation that the casks were "of the sort or description used, or intended to be used, for the smuggling of spirits," being in the alternative, was bad.

PLATT moved for a writ of *habeas corpus* to bring up the body of *Pain*, in order to have him discharged. The prisoner had been convicted under the 6 G. 4, c. 108, s. 3. The conviction stated, that an information was exhibited against *Pain*, which charged that he was on, &c. discovered to have been on board a certain boat on the high seas, then liable to forfeiture under the provisions of a certain act of parliament relating to the revenue of customs.† "For that the boat *not being square-rigged, and belonging in the whole to his said majesty's subjects, on, &c., was discovered to have been in a

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† By the 6 G. 4, c. 108, s. 3, it is enacted, "That if any vessel or boat, not being square-rigged, belonging in the whole or in part to his majesty's subjects, or whereof one half of the persons on board, or discovered to have been on board the said vessel or boat, shall be subjects of his majesty, shall be found in any part of the British or Irish Channels, or elsewhere on the high seas, within one hundred leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board, or in any manner attached or affixed thereto, or conveying or having conveyed in any manner any brandy, &c., or any cordage, &c., or any casks or other vessels whatsoever capable of containing liquids of less size or content than forty gallons, of the sort or description used or intended to be used, or fit or adapted for the smuggling of spirits, &c. (unless such cordage or other articles as aforesaid are really necessary for the use of the said vessel, or are a part of the cargo of the said vessel, and included in the regular official documents of the said vessel,) then, and in such case, the said spirits &c., together with the casks, &c., and also the vessel, &c., shall be forfeited."

certain part of the *British Channel*, having in a certain manner attached to the said boat divers, to wit, twenty casks, capable of containing liquids, of less size and content than forty gallons each, and of the sort and description *used or intended to be used* for the smuggling of spirits, the said casks not being really necessary for the use of the said boat, and included in the official document of such boat, contrary to the form of the statute. The said *H. Pain* being discovered to have been on board the said boat at the time of her becoming and being so subject and liable to forfeiture, &c." The warrant of commitment followed the conviction. Four objections were taken to the conviction; first, that the offence was described in the alternative, viz., that the boat, on board which the prisoner had been, was discovered to have been in a certain part of the *British Channel*, having in a certain manner attached to her twenty casks, used or intended to be used for smuggling. Secondly, that the mode in which the casks were attached to the boat should have been alleged with more certainty. Thirdly, that the conviction did not state that the boat had been within one hundred leagues of the coast of the United Kingdom. Fourthly, that the exception in the statute was not sufficiently negatived, the ^{*253]} conviction merely stating that the casks were not necessary for the use of the boat, and were not included in the official documents of the boat. [Abbott, C. J. The first is the only objection in which there is any weight. The statute speaks of casks in *any manner* attached to the boat; the manner of attaching them forms no part of the offence. As to the third; if the boat be found any where in the *British* or *Irish Channels*, no question as to the distance from the coast can arise. The fourth objection fails, because the exception does not apply, unless the casks are both part of the cargo and included in the official documents of the boat. Here it is alleged that they were not so included, they could not, therefore, be within the exception.]

The *Attorney-General* and *Shepherd* opposed the motion, and contended that the first objection was also invalid; for, that whether the casks were of a description used in smuggling, or intended to be so used, they were equally within the words of the statute, and that consequently the description in the alternative was sufficient; and they relied upon the case of *Rex v. Middlehurst*, 1 Burr. 399, where an order of sessions confirming an order of two justices made in pursuance of the 11 G. 2, c. 19, s. 3, against *T. Middlehurst*, for "wilfully and knowingly aiding and assisting in fraudulently removing and conveying away five cows, &c., or in concealing the same," was held good. So also in Hale's P. C. 535, it is said, that an indictment for robbing in or near the king's highway is good.

^{*254]} *Per Curiam.* In *Rex v. Middlehurst*, the court appear to have proceeded upon a distinction between an order and an indictment; and it has always been held that matters of form must be as strictly observed in summary convictions as in indictments. In the passage cited from Hale's P. C. it is said that the indictment is good in the form there mentioned, because that which is in the alternative is not the substance of the offence. The enactment in question mentions three descriptions of casks which it is unlawful to have attached to any boat under certain circumstances. First, those of the sort or description used for the smuggling of spirits; secondly, those intended to be so used; and, thirdly, those fit or adapted for that purpose. This conviction does not allege that the casks attached to the boat on board which the prisoner was found, answered any one of those descriptions, but that they answered one or other of those descriptions. That allegation in the alternative is defective in form, and the prisoner is entitled to avail himself of the mistake. The writ must, therefore, be granted.

Writ granted.

The KING v. TREMEARNE.

Where, on the trial of an indictment for perjury, it being necessary to swear talesmen from the common jury panel to serve on the jury, and one *J. Williams* being called, his son, *R. H. Williams*, (at the request of his father, and without collusion with the prosecutor or defendant,) appeared for him, and was sworn and served on the jury, he not being of age, nor having a qualification by estate, nor being on any panel: Held, that there was a mis-trial, and that a rule obtained for a new trial must be made absolute.

INDICTMENT for perjury. Plea, not guilty. A special jury had been struck, but at the trial before *Burrough*, J., at the *Cornwall* Spring assizes, 1825, a full special jury did not appear, and it became necessary to swear [*255 talesmen. One *J. Williams*, on the common jury panel, being called, his son, *R. H. Williams*, appeared and was sworn, and served on the jury. *R. H. Williams* was not on the panel, was under age, and had not any qualification. He appeared, and served for his father, at his request, and without the knowledge or connivance of the prosecutor or defendant. The jury having found the defendant guilty, he obtained a rule nisi for a new trial, upon affidavits setting forth the facts above mentioned.

Manning and *Hill* showed cause. It is not a sufficient ground for a new trial that a wrong person answered as one of the jury and was sworn, *Hill v. Yates*, 12 East, 229; *Wray v. Thorn*, Willes, 488. In *Dovey v. Hobson*, 2 Marsh. 154, a new trial was granted because the objection was made before verdict. The want of qualification is a ground of challenge, Co. Litt. 156 b., and cannot, therefore, be urged in this stage of the proceedings. It is also there laid down, that infancy is a cause of challenge, and in 8 H. 6, pl. 16, it appears that one of twelve compurgators in a wager of law was challenged for infancy, which case is cited in Bro. Abr. tit. Coverture and Infancy, pl. 22. In Litt. s. 259, and the Commentary, 172 b., it is said, that an infant shall not be sworn in an inquest, *quod minor jurare non potest*; but that certainly is not law now as to swearing infants as witnesses.

C. F. Williams and *Bayly*, contra. The law has prescribed certain qualifications as necessary for persons "serving on juries. They must be of [*256 full age, and possessed of certain property. One of the jurors who tried this case had not either of those qualifications. The objection to him is, therefore, very different from that which was taken in *Hill v. Yates*, and the case from *Newcastle* then cited by Lord *Ellenborough*; in neither of which did it appear that the party who served was disqualified. Besides, by the 7 & 8 W. 3, c. 32, s. 3, no person can serve as a talesman who is not returned upon some other panel; the person objected to in this case was not upon any other panel. For these reasons there was a mis-trial.

ABBOTT, C. J. I am of opinion that we ought to grant a new trial. It appears that in *Hill v. Yates*, and in *Wray v. Thorne*, the court did not think it necessary to yield to an application of this nature. But in the present case, the person who appeared in the name of his father, and served on the jury, was not qualified by estate so to do, and had not arrived at that age which the law considers necessary to give competent knowledge to sit in judgment. I do not see how a challenge could be taken. Had the party been on the panel, perhaps the objection should have been made a ground of challenge, and in order to be properly sworn as a talesman he ought to have been on some other panel. I am quite aware of the difficulty pointed out by Lord *Ellenborough*, in *Hill v. Yates*, viz. that yielding to such an objection lays open a door to practice and collusion. It is necessary to guard against that as well as we can, but I think we should not be justified by the apprehension of mischief which may hereafter arise, in saying that a verdict shall *be binding where a person, [*257 without practice of either party, has appeared and served on the jury, not having the requisite qualification, either of age or estate. Looking at these

particular circumstances in this case, I think that we ought, in a sound exercise of our discretion, to make the rule for a new trial absolute.

BAYLEY, J. It appears by the cases *Fernor v. Dorrington*, Cro. Eliz. 222; *Hasset v. Payne*, Cro. Eliz. 256; and *Roe v. Devys*, Cro. Car. 563, that where one person is named in the panel, and another in the distringas, and the latter serves on the jury, it is a mis-trial, because none should serve save those in the panel.

HOLROYD, J. This defendant, without any fault on his part, was tried by a person, who by law was not competent to serve on the jury, and as that has been made apparent to the court, we ought not to proceed to give judgment upon a verdict so found.

LITTLEDALE, J. This person was not competent to serve on the jury, but as he was not in the panel, no challenge could be taken. The court are, therefore, bound to act upon the affidavits laid before them, and I think they disclose sufficient grounds for a new trial.

Rule absolute.

*METCALF v. BOWES.

Warrant of attorney and judgment for securing an annuity set aside, because the initials only of the Christian names of the witnesses were inserted in the memorial.

A RULE nisi had been obtained for setting aside the warrant of attorney given in this cause for securing an annuity, and the judgment signed thereon, on the ground that only the initials of the Christian names of the witnesses to the execution of the warrant of attorney by the defendant were stated in the memorial.

Scarlett and Tindal showed cause, and contended that it was not imperative on the court to set aside the warrant of attorney.

ABBOTT, C. J. We have no discretion upon the subject. It was decided in *Cheek v. Jefferies*, 2 B. & C. 1, and in other cases which have since occurred, that the statute 53 G. 3, c. 141, s. 2, requires that the Christian names of the subscribing witnesses to the securities should be inserted in the memorial. The warrant of attorney, therefore, in this case was not correctly memorialized, and the rule for setting aside the warrant of attorney and the judgment, must, therefore, be made absolute.

Rule absolute accordingly.

*HOWELL v. YOUNG, Gent. One, &c.^t

Declaration stated that the plaintiff had contracted with *A. B.* to lend him the sum of 3000*l.* at interest; the repayment, with interest, to be secured by a warrant of attorney and certain mortgages of freehold and leasehold premises, provided they should be found to be a sufficient security for the same; that the plaintiff retained defendant as an attorney, to ascertain whether they would be a sufficient security; that the defendant accepted such retainer, and that it became his duty to use due care and diligence to ascertain whether the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.* and interest. Breach, that defendant did not use due care and diligence in that behalf, but wholly neglected so to do, and, on the contrary, falsely represented to the plaintiff, that the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.* with interest, whereupon the plaintiff lent the 3000*l.* to *A. B.*, that they were not a sufficient security, by reason whereof the plaintiff had wholly lost the interest due and payable on the said sum of 3000*l.* amounting to a large sum, to wit, the sum of 1000*l.*, and was likely wholly to lose the said principal sum of 3000*l.* At the trial it appeared, that in the year 1814, the defendant had been retained by the plaintiff to ascertain whether the warrant of attorney and mortgages were a sufficient security for the 3000*l.* and interest, and that at that time he represented they were so. In the year 1820, (the interest to that time having been regularly paid,) it was discovered that the warrant of attorney and mortgages were not a sufficient security; held, that the misconduct or negligence of the attorney constituted the cause of action, and that the statute of limitations began to run from the time when the defendant had been guilty of such misconduct, and not from the time when it was discovered that the securities were insufficient.

DECLARATION stated, that before the committing of the grievance thereafter mentioned, the plaintiff had contracted with *J. Olive* and *R. Olive*, to lend them the sum of 3000*l.*, at interest, the repayment of that sum, with interest, to be secured by a warrant of attorney to confess judgment made by *J.* and *R. Olive*; the sum of 2000*l.*, with interest, to be further secured by a mortgage of certain freehold premises of the said *J.* and *R. Olive*; and the sum of 1000*l.* to be further secured by a mortgage of certain leasehold premises of *J.* and *R. Olive*, provided the said warrant of attorney and mortgages should be found to be a good, valid, and sufficient security for the same; and thereupon, on, &c. at, &c., the plaintiff, at the request of the defendant, retained and employed him for reasonable fees and reward to him in that behalf, to [**260] ascertain whether the said warrant of attorney and mortgages would be a sufficient security for the repayment of the said sum of 3000*l.*, with interest; and in case the same should appear sufficient, to obtain the proper deeds and writings to secure the repayment of the said sum of 3000*l.* Averment, that the defendant accepted such retainer and employment; that it became and was his duty to use due and proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a sufficient security for the repayment of the said sum of 3000*l.*, with interest; and in case the same should appear sufficient, to obtain the proper deeds and writings to secure the repayment of that sum. Breach, that the defendant, not regarding his duty, &c., but contriving, &c., did not, nor would use due or proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a sufficient security, but wholly neglected and omitted so to do; and on the contrary thereof, on, &c., at, &c., falsely and deceitfully represented and asserted, and caused and procured the plaintiff to believe, that the said warrant of attorney and mortgages would be a good, valid, and sufficient security for the repayment of the sum of 3000*l.*, with interest; whereupon the plaintiff, believing that the said warrant of attorney and mortgages would be a valid and sufficient security for the repayment of the said sum of 3000*l.*, with interest, did on, &c., at, &c., advance and lend to the said *J.* and *R. Olive* 3000*l.*, upon security of the said warrant of attorney and mortgages. The declaration then described

^t Three of the Judges of this court sat, as upon former occasions, from Tuesday, the 14th of February, to Saturday, the 18th of February, inclusive. During that period thus and the following cases were determined.

the warrant of attorney and the mortgages ; that they were prepared by the defendant ^{*261]} by virtue of his retainer and employment, and accepted by the plaintiff as a sufficient security for the repayment of the said sum of 3000*l.*, with interest, in consequence of such representation and assertion of the defendant, and that they were not a sufficient security. By means whereof the plaintiff had wholly lost the interest due and payable on the said sum of 3000*l.* amounting to a large sum, to wit, the sum of 1000*l.*, and is likely wholly to lose the said principal sum of 3000*l.* to wit, at, &c. Plea, Not guilty. 2dly, That the cause of action mentioned in the declaration did not accrue within six years. At the trial before *Burrough*, J., at the Summer assizes for the county of *Gloucester*, 1825, it appeared that the defendant, who was an attorney, had been retained by the plaintiff in the year 1814, to ascertain whether the mortgages mentioned in the declaration were a valid and sufficient security for 3000*l.* and interest. At that time the defendant represented that they were so. The mortgages in fact afterwards turned out to be an insufficient security for that sum, but that fact was not discovered by the plaintiff till the year 1820. The interest was regularly paid until that time. *Burrough*, J., was of opinion that the statute of limitations was a bar to the action, but it was insisted that there was fraud upon the part of the defendant, and that the statute of limitations only ran from the time when the fraud was discovered ; and *Bree v. Holbech*, Doug. 654, was cited. The learned Judge suffered the cause to proceed, and finally directed the jury to find for the plaintiff if they were of opinion that the plaintiff had been induced by the fraud of the defendant to advance the money, otherwise for the defendant. The ^{*262]} jury found a verdict for the defendant. *Curwood* in last *Michaelmas* term obtained a rule *nisi* for a new trial upon two grounds, first, that upon the question of fraud the verdict was against the weight of evidence ; and, secondly, that in this action the statute of limitations ran, not from the time when the insufficient security was taken, but when the special damage alleged in the declaration, viz., the loss of interest, accrued. The learned Judge having now reported that he was satisfied with the verdict found by the jury, the court called upon

Curwood, *Maule*, and *Carrington* to support the rule. In *assumpeit* the statute of limitations runs from the time of the breach of promise ; for that constitutes the cause of action, *Battly v. Faulkner*, 3 B. & A. 288 ; *Short v. Mae Carthy*, 3 B. & A. 626, but in a special action on the case, the wrongful act done, and the damage accruing therefrom, constitute the cause of action. The cause of action is not complete until the damage ensues. It is otherwise in trespass, where the cause of action accrues immediately upon the wrongful act done, and if there be any special damages ensuing from it, it merely is the measure of damages, *Fetter v. Beal*, Salk. 11. This distinction is illustrated in *Scott v. Shepherd*, Sir W. Blackst. 894, by *Blackstone*, J., who puts this case : "If I throw a log of timber into the highway, (which is an unlawful act,) and another man tumbles over it, and is hurt, an action on the case only lies, it being a *consequential* damage ; but if, in throwing it, I hit another man, he ^{*263]} may bring trespass, because it is an immediate wrong." "In this case it is the consequential damage which makes the cause of action complete. In *Gillon v. Boddington*, Ryan & M. 161, a question arose upon the *London Dock Act*, which enacted that no action should be commenced against any person for any thing done in pursuance of that act after six calendar months next after the fact committed. The *London Dock Company* had, two years before the commencement of the action, undermined the wall of a wharf in one undivided third part of which the plaintiff's father then had a life-interest, with remainder to his son in fee ; in consequence of this undermining the wall fell, but after the plaintiff's title accrued ; and it was held that the son might maintain an action, although the wall was undermined during the life-time of the father. So in *Roberts v. Read*, 16 East, 215, it was held, that

where an action is brought for consequential damages arising from an act done, the period within which the action is to be brought is not to be calculated from the doing of the act, but is to be calculated from the period when the consequential damage has been occasioned which is the foundation of the action. Assuming, however, that as soon as the defendant had been guilty of negligence by taking the insufficient security, the plaintiff acquired a complete cause of action, still he acquired a fresh cause of action by the non-payment of the interest, and that cause of action accrued within the six years.

BAYLEY, J. This is a case of no difficulty whatever. The only question is, what is the cause of action disclosed in this declaration? It appears to me that the misconduct of the defendant is the gist of the action. *If the allegation of special damage had been wholly omitted, the plaintiff [264 would have been entitled to a verdict for nominal damages. The plaintiff in this action is entitled to recover a compensation in damages for the injury resulting to him from the misconduct of the defendant. The special damage resulted from that misconduct; but it constituted part only of the injury sustained by the plaintiff, and it is not of itself a cause of action. The declaration is framed so as to show that the misconduct of the defendant is the cause of action. It states that the plaintiff had contracted to lend 3000 $\text{l}.$ at interest, to be secured by a warrant of attorney and mortgages of specific property there described, provided the warrant of attorney and the mortgages should turn out to be a valid and sufficient security for the same; that the plaintiff retained the defendant, (he being an attorney,) to ascertain whether they would be a sufficient security; and that it became the duty of the defendant to use due care and diligence to ascertain whether they would be so or not. It then states, that the defendant did not use due care and diligence in that respect, but omitted so to do; and, on the contrary, represented to the plaintiff that the warrant of attorney and mortgages would be a sufficient security, whereupon the plaintiff advanced the money; and that the warrant of attorney and mortgages were not a sufficient security, but were invalid and insufficient securities. Now, if the declaration had stopped there, a sufficient cause of action is stated. There is an acceptance of the retainer by the defendant, a duty resulting therefrom, and a breach of that duty. But the declaration goes on to state: "By reason whereof the plaintiff has wholly lost the interest due on the sum of 3000 $\text{l}.$, and is likely wholly to lose the said principal sum of 3000 $\text{l}.$ " [265 Now, does the introduction of that allegation vary the case? In an action for words which are actionable in themselves, a special damage is frequently alleged in the declaration, although it is not the ground of the action, and the plaintiff may recover without proving the special damage. In such case the allegation of special damage is a mere explanation of the manner in which the conduct of the defendant has become injurious to the plaintiff. So in this case, the purpose for which the allegation is introduced, is precisely similar. Where, indeed, words are not actionable of themselves, but become so by reason of the consequential damage, then it must be alleged and proved; because it constitutes the cause of action. In an action of *assumpsit*, the statute of limitations begins to run not from the time when the damage results from the breach of the promise, but the time when the breach of promise takes place. The case of *Short v. McCarthy*, 3 B. & A. 626, which is very analogous to the present, is an authority in point. There the declaration in *assumpsit* stated as a breach of the promise, that the defendant did not diligently and sufficiently make a search at the bank of *England* to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years. The statute of limitations having been pleaded, it was held that upon this form of declaration the plaintiff was not entitled to recover on the ground *that the cause of action accrued at the time of the [266

breach of duty or promise by the defendant, and not at the time of its discovery by the plaintiff; and that the statute began to run from the time when the defendant ought to have made the search, which it was his duty to do. It appears to me that there is not any substantial distinction between an action of *assumpsit* founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly upon a breach of duty. Whatever be the form of action, the breach of duty is substantially the cause of action. That being so, the cause of action accrued at the time when the defendant in this case took the bad and insufficient security, that was more than six years before the commencement of the action, which is consequently barred by the statute of limitations. The rule for a new trial must, therefore, be discharged.

HOLROYD, J. I am of opinion that the statute of limitations is a complete bar to this action. The cause of action is the misconduct or negligence of the attorney. The statute of limitations is a bar to the original cause of action, and to all the consequential damages resulting from it, unless, indeed, it can be shown that those damages, or any part of them, constitute a new cause of action which accrued within six years. I think it makes no difference in this respect, whether the plaintiff elects to bring an action of *assumpsit* founded upon a breach of promise, or a special action on the case founded upon a breach of duty. The breach of promise or of duty took place as soon as the defendant took the insufficient security. Whether the plaintiff, therefore,

*elect to sue in one form of action or another, the cause of action, which in either form is substantially the same, accrued at the same moment of time. The breach of duty, therefore, constituting a cause of action, it follows that the statute of limitations is a bar to this action, unless the special damage alleged in the declaration constitute a new cause of action. *Fetter v. Beal*, 1 Salk. 11, is an authority to show, that the special damage alleged in this case does not constitute any fresh ground of action, but that it is merely the measure of the damage which results from the original cause of action. There the declaration stated that the defendant beat the plaintiff's head against the ground, and that he brought an action of assault and battery for that and recovered; and that since the recovery by reason of the same battery, a piece of his skull had come out. The defendant pleaded in bar the recovery mentioned in the declaration; and averred it to be for the same assault and battery. The plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known; and it was compared to the case of a nuisance, where every new dropping is a new act. But *Holt*, C. J., said, "Every new dropping is a new nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." So, here the loss of interest does not constitute a fresh ground of action, but a mere measure of damages. There is no new misconduct or

*negligence of the attorney, and consequently there is no new cause of action. What is said by *Holt*, C. J., explains the principle of the decision in *Gillon v. Boddington*, 1 R. & M. 161, there, although the excavation was made in the life of the father, it was continued after his death, and after the title of the remainder-man had accrued. The continuance of the excavation was a continuing nuisance, and constituted a new cause of action. It was, therefore, properly decided in that case, that the remainder-man was entitled to recover damages for an injury to him arising from the falling of a wall after the death of his father, but here there was no new misconduct of the attorney. As the consequences of the battery in *Fetter v. Beal* did not constitute a fresh ground of action, so the consequential damage resulting from the misconduct of the attorney in this case does not constitute any new ground of action. In that case, Lord *Holt* was of opinion that the jury upon the trial in

the first action must have taken into their consideration not merely the actual loss which the plaintiff had then sustained, but the probable loss which the plaintiff was likely to suffer in consequence of the injury. So here, if the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security. It appears to me, therefore, that the subsequent special damage alleged in this declaration did not constitute any fresh cause of action. That being so, the cause of action did not accrue within six years, and the rule, therefore, must be discharged.

*LITTLEDALE, J., concurred.

BAYLEY, J., referred to *Brown v. Howard*, 2 B. & B. 73.

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Rule discharged.

Taunton, Ludlow, and Campbell, were to have shown cause against the rule.



WHITCHER v. JAMES HALL.

Declaration stated that the plaintiff agreed to let, and *A. B.* agreed to take, the milking of thirty cows, for the sum of 7l. 10s. per annum per cow, from the 14th of February, the rent to be paid quarterly, in advance, on the 14th of February, the 14th of May, the 14th of August, and the 14th of November, and the defendant agreed to pay the rent at the times therein mentioned. The plaintiff then averred performance of the agreement by him, and that *A. B.* took the milking of the thirty cows, and alleged as a breach the non-payment by the defendant of the rent, which became due on the 14th of November. It appeared in evidence at the trial, that in May it was agreed between the plaintiff and *A. B.*, the latter having then thirty-two cows, that the plaintiff instead of taking away two at that time, should be at liberty to take four at the fall of the year, and it appeared that between the 4th and the 20th of October the plaintiff did take away four cows, leaving *A. B.* after that period less than thirty. It was proved, that this alteration in the mode of using the cows made no substantial difference as to profit or loss: Held, by Bayley and Holroyd, Justices, Littledale, J., dissentient, first, that this was an entire contract for the letting of thirty cows, neither more nor less; and, secondly, that the plaintiff in this action, against a surety, was bound to prove a literal performance of that contract, that he had not done so, inasmuch as he had shown that during part of the year he had allowed *A. B.* to have the milking of twenty-eight cows only.

DECLARATION stated, that on the 4th of February, 1824, at, &c., by certain articles of agreement entered into between the plaintiff of the one part, and one Joseph Hall and the defendant of the other part, the plaintiff agreed to let, and Joseph Hall agreed to take the milking of thirty cows for the sum of 7l. 10s. per cow per annum, to commence from the 14th of February then instant agreeable to the conditions thereafter specified, that is to say, one quarter's rent to be paid down on or before the said 14th of February, the second quarter on or before the 14th of May then next, the third quarter on or before the 14th of August, and the fourth quarter on or before the 14th of November then next; and it was agreed that either party should be at liberty to give notice in writing to determine that agreement previous to the said 14th of November then next, otherwise it was agreed that the said Joseph Hall should continue to hold the same from year to year till such notice should be given; and the defendant thereby agreed with the plaintiff to pay or cause to be paid the said rent at the days and times thereinbefore specified for payment thereof; mutual promises were then stated, and there was an averment that after the making of the agreement, to wit, on the said 4th of February, in the year aforesaid, at, &c., the said Joseph Hall took the said milking, &c., and

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that the plaintiff had performed the agreement on his part; yet the defendant, not regarding, &c., did not pay $50\text{l. } 5\text{s.}$, being one quarter's rent, which became due on the 14th of November, 1824. Second count, *indebitatus assumpsit*, for the milking of divers cows and the feed and pasturage of certain lands, and the use of a certain dairy, yard, and premises, with the appurtenances, by *Joseph Hall*, at the request of defendant, and by the permission of the plaintiff, had held, used, occupied, and enjoyed. Plea, *non-assumpsit*. At the trial before *Littledale*, J., at the Summer assizes for the county of *Hants*, 1825, the plaintiff proved the execution of the agreement set forth in the declaration by *Joseph Hall* and the defendant as his surety, and that on the 14th of February next following the date of the agreement, *Joseph Hall* took possession of the dairy, which then consisted of thirty cows, but ten only of those cows had calved. At *Lady-day* the plaintiff put into the dairy two other cows which were *milked, and after that time the plaintiff and *Joseph Hall* from time to time exchanged cows, the plaintiff putting in those fit for milking, instead of others which had not come into milking. In May *Joseph Hall* had thirty-two cows, and it was then agreed between him and the plaintiff, that instead of the latter taking out the two additional cows, he should be at liberty to take out four at the fall of the year. It was proved by *Joseph Hall*, that this new arrangement, as to the number of cows which he was to have from time to time, made no difference as to profit or loss. Between the 4th and the 20th of October the plaintiff took away four, and thereby reduced the number to twenty-seven cows, one having died in the interim. On the 14th of November, *Joseph Hall* refused to continue in the dairy, and delivered up the possession. The plaintiff thereupon demanded from the defendant payment of the quarter's rent, which, by the terms of the agreement, became due on that day. The latter having refused to pay, the present action was commenced. It was objected at the trial, that as the defendant was a surety, he was bound only by the terms of the agreement to which he had become a party; that it was incumbent upon the plaintiff to show that he had performed *that* agreement; that he had not done so, inasmuch as he had not allowed *Joseph Hall* to have the milking of thirty cows during the whole year, but at one time only twenty-eight. The learned Judge was of opinion that the contract was in its nature divisible, that it had been substantially performed by the plaintiff, and that the plaintiff was entitled to recover from the defendant rent in proportion to the number of cows actually supplied to the defendant; and a verdict was found for the plaintiff for 40l. but liberty was reserved to the defendant to move *to enter a nonsuit. A rule nisi for that purpose having been obtained at last *Michaelmas* term,

Merewether and *E. Lawes* now showed cause. It was sufficient for the plaintiff to show that he had performed the contract substantially, and that he has done; for it was proved that the defendant during the whole period of his occupation had upon an average the milking of thirty cows. That was a substantial though not a literal performance of the original agreement. It is true, that in pursuance of a subsequent agreement between the plaintiff and *Joseph Hall*, the latter had at one time thirty-two cows, and at another only twenty-eight, but the alteration in the agreement was immaterial: it made no difference as to profit and loss: the surety not being prejudiced by it, is not discharged. But, secondly, the plaintiff is at all events entitled to recover rent *pro rata*, in proportion to the number of cows, because according to the true construction of the agreement, the permitting of the defendant to have the milking of thirty cows was not a condition precedent to his paying the rent of $7\text{l. } 10\text{s.}$ per cow. The rule laid down in *Boone v. Eyre*, 1 H. Bl. 273, and recognised in many subsequent cases, is that where a covenant goes to the whole of the consideration on both sides it is a condition precedent; but where it does not go to the whole, but only to a part, it is not a condition precedent. The promise to let *Joseph Hall* have the milking of thirty cows does not go to the whole of the

consideration agreed to be paid: it could not be intended, that if *Joseph* had twenty-nine cows only, he was to pay no rent at all. The very circumstance, of the rent being *reserved at so much per cow, shows that he was to be paid in proportion to the number of cows. The fair construction of the contract is, that the rent was to be paid *pro rata* for all the cows provided by the plaintiff. [**273]

C. F. Williams and *R. Bayly*, contra. The defendant, who is a surety, is only bound by the terms of the agreement to which he became a party. In order to entitle the plaintiff to recover on the count on the special agreement, he must show that he has performed that agreement. Now he has only shown that he has performed it in part. Assuming that it was sufficiently proved, that he had allowed *Joseph Hall* the milking of thirty cows until the 4th of October, it is equally clear that, between that and the 20th, he took away four, so that even if he was not bound to replace the one which had died, (which may be doubtful,) still *Joseph Hall* during that period had less than thirty cows. Assuming also that the new agreement between the plaintiff and *Joseph Hall*, by which it was stipulated that the latter was to have thirty-two cows at one time and twenty-eight at another, was equally beneficial to *Joseph Hall*, still the defendant was no party to it, and was not bound by it. *Nesbile v. Smith*, 2 Bro. Ch. Ca. 579; *Rees v. Berrington*, 2 Ves. Jun. 542, and *Samuell v. Howarth*, 3 Mer. 272, are authorities to show that any alteration in the contract without the consent of the surety discharges the latter, even where the alteration is beneficial to him. The same principle has been acted upon in cases of bonds, conditioned for the faithful services of a clerk. Thus where the condition was, that a clerk should serve faithfully, and account for all money to the obligee and his executors, it was held that the obligor *was not liable for money received by the clerk in the service of the executors of such obligee, who continued the business, and retained him in the same employment, *Barker v. Parker*, 1 T. R. 287. It is clear that the plaintiff cannot recover on the second count, because *Joseph Hall* had no use of the cows or dairy during the period in respect of which the rent is claimed. If due at all, it can only be by reason of the special agreement. [**274]

BAYLEY, J. I think that the rule for entering a nonsuit ought to be made absolute. By the agreement which is set out in the declaration, the plaintiff agreed to let, and *Joseph Hall* agreed to take, the milking of thirty cows, (not more nor less,) for the sum of 7l. 10s. per cow per annum, to commence on the 14th of February, 1824, and on the conditions therein mentioned. The agreement was, that *Joseph Hall* was to have the milking of thirty cows, and the benefit was to enure to *Joseph* not to *James*, but the latter stipulated that he would pay the whole rent. One question is, whether that is an entire contract as to the number of cows. If it be, *Joseph* was entitled to have the milking of thirty cows during the continuance of the term. If it was not an entire contract, but a contract to pay for so many cows as the plaintiff should supply, and the plaintiff supplied twenty-nine or any other number, he would be entitled to payment for so many. I am of opinion that this was an entire contract for the purchase of thirty cows; and if at the commencement of the term the plaintiff could not insist that this was a divisible contract, it must follow that it continued an entire contract during the term. I do not enter *into the question whether there was a performance of the contract at the commencement of the term. It is sufficient to say that there was a new agreement, without the knowledge of *James*; that *Joseph* was to have the milking of twenty-eight cows during one part of the year, and thirty-two during the other part. That, as it seems to me, was not a continuance of the original bargain, which was for the milking of thirty cows, but a new agreement. The new agreement was binding only on those persons who were parties to it. If it had been intended to bind *James* by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a

new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then *James* is bound by it, otherwise he is not. There is no hardship upon the plaintiff, for he knew that *James* stipulated to pay the rent upon his, the plaintiff's, fulfilling the terms of the original bargain, and that he, *James*, was not bound to consent to the substitution of a new contract. In *Heard v. Wadham*. 1 East, 619, and *Campbell v. French*, 2 H. Black. 163; 6 T. R. 200, it was held that the performance of a contract, substantially the same as that originally made, did not give a right of action against a surety who had not consented to the alteration. Here the plaintiff attempts to maintain his action by proving the performance not of the *contract declared on, but of a subsequent agreement. But he has averred, and was bound to prove performance of the original agreement. That he has not proved; and, upon that ground, I am of opinion that he was not entitled to recover, and that the rule for entering a nonsuit ought to be made absolute.

HOLROYD, J. I am also of opinion that this action is not maintainable, and that the rule for entering the nonsuit should be made absolute. The defendant stands in the situation of a surety, inasmuch as the plaintiff agrees to let, and *Joseph Hall* to take. If the agreement had stopped here, *Joseph Hall* would be liable to pay the rent, but then there is an additional agreement that *James* also should pay the rent. *Joseph* still, however, continues liable for the rent, and *James* is liable only by reason of his special agreement. This seems to me an entire agreement for the letting of the entire number of thirty cows, neither more nor less. The term *at so much per cow* is introduced only to measure the rent payable. Supposing there was no stipulation that the rent should be paid in advance, it would be incumbent on the plaintiff, if he sought to recover rent, to aver and prove that the rent had accrued due; and that could only be done by showing that *Joseph Hall* had had the milking of thirty cows during the period in respect of which the rent was claimed. It is stipulated in this case, indeed, that the rent should be paid before the quarter commenced. But still the plaintiff would be bound to aver and prove that he was ready at all times, during the time that the contract continued, to perform his part of the contract. It seems to me that the original agreement was at an end, and that a new *agreement was substituted in its stead, and that *James*, not being a party to it, is not liable for the breach of it. This is very similar to the case of a surrender of a lease by operation of law. In Comyn's Dig. tit. Surrender, (I. 1.) it is laid down, if a lessee for years accepts a new lease by parol when the first lease was by indenture, it operates as a surrender in law. So here, the new agreement by parol varying from the first entered into by the plaintiff and *Joseph Hall*, operated as an abandonment of the first agreement. The first agreement having been put an end to by the principal parties, the surety is discharged. For these reasons I am of opinion that the rule for entering a nonsuit ought to be made absolute.

LITTLEDALE, J. It appeared to me at the trial that the plaintiff was entitled to recover. I then thought that there had been a substantial performance of the contract by him; and, although there were some variations in the subsequent contract, it was a case to which the maxim applied, *de minimis non curat lex*. The case having now been fully discussed, I must say that my former opinion continues unchanged. I will first consider whether any action will lie on the original agreement against *Joseph Hall*, because I admit that if no action will lie against him on the original agreement, no action will lie against the present defendant. *James* is only bound by the original agreement. If a new agreement, varying substantially from the former, has been substituted for it, he is not bound by that. I consider the original agree-

not an entire, but a divisible agreement; and that although part of it has not been performed, the plaintiff is entitled to recover for that part *which has been performed, *Ritchie v. Atkinson*, 10 East, 295, is an authority [278] in point. There the master and freighter of a vessel mutually agreed that the ship should, with all convenient speed, proceed to *St. Petersburgh*, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same, on being paid freight, for hemp, 5*l.* per ton; for iron, 5*s.* a ton, &c., one half to be paid on sight delivery, the other at three months. It was held that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. Lord *Ellenborough* there recognized the rule laid down in *Boone v. Eyre*, 1 H. Black. 273, that where a covenant goes to the whole of the consideration on both sides, there it is a condition precedent; but where it does not go to the whole, but only to a part, there each party must resort to his separate remedy for the breach of the contract by the other. *Le Blanc*, J., after stating that rule, and observing that it was approved of in this court in *Campbell v. Jones*, 6 T. R. 573, and by the Court of Common Pleas in the *Duke of St. Albans v. Shore*, 1 H. Black. 278, proceeded, "Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight, because the failure of bringing home one ton less than the full quantity of four hundred tons would prevent the plaintiff from recovering for the three hundred and ninety-nine tons which he might have brought over. The loss on his part by such a construction would bear no ~~sort~~ proportion to *the injury suffered by the defendant. The fair construction, therefore, is, that the plaintiff should recover freight for what he has performed; and that the defendant should have a remedy against him for that which he has not performed, and which he ought to have done." It appears to me that this reasoning applies strongly to the present case. Here the allowing the defendant to have the milking of the entire number of thirty cows does not go to the whole consideration, viz. the rent; if it did, the neglect to furnish any one of the cows would prevent the plaintiff from recovering for the twenty-nine which he had provided; or if the contract had been for five hundred cows, he could not have recovered any rent if he had provided four hundred and ninety-nine. It appears to me that the fair construction of the contract is, that *Joseph Hall*, having had twenty-eight cows, ought to pay for them on the same principle as the freighter in *Ritchie v. Atkinson* was held liable to pay for that part of the cargo which was brought home. Upon the authority of that decision and the cases there cited, I am of opinion that an action on the original agreement was maintainable against *Joseph Hall*. This case has been compared to that of a surrender of a lease by operation of law, in consequence of the lessee's accepting a new lease. In that case the acceptance of the new lease puts an end to the old lease. But in Comyn's Digest, tit. Surrender, (I. 2,) it is expressly laid down, that if a lessee surrenders or accepts a new lease of *part* of the estate, that will operate as a surrender for that part only. Assuming that there is an analogy between the two cases, the new agreement related to two cows only, and the old agreement relating to the twenty-eight cows was *not put an end to, but remained as before. Supposing, therefore, that the plaintiff might have recovered against *Joseph Hall* upon the old agreement, it then becomes necessary to consider what is the effect of the new agreement, as to the surety. Now if the situation of the surety be substantially varied by the new agreement he is discharged. It has frequently been decided, that where time is given by a principal to his debtor the surety is discharged, because, by giving time, the surety is prevented from recovering against the other party. Thus, if the holder of a bill of exchange give time to the acceptor, he discharges the indorser. In *Eyre v. Bartrop*, 3 Mad. 221, where time was given to the grantee of an annuity, it

was laid down, that if by any arrangement between the creditor and the debtor the situation of the surety be *altered*, the surety is discharged. In *Davie v. Prendergrass*, 5 B. & A. 187, it was decided in this court, that it was no defence in a court of law, to an action on a bond against a surety, that by a *parol* agreement time had been given to the principal. That case afterwards went into a court of equity, (6 Mad. 124,) upon a bill filed by the sureties to restrain the action upon the bond, and to have it delivered up, on the ground that the creditor had given time to the principal without the surety's consent. Yet, inasmuch as the situation of the surety was not thereby made worse, it was held, that the surety was not discharged. There is another class of cases where the surety has been held to be discharged, on the ground of fraud; to that principle I agree. But fraud ought to be distinctly proved. Here it is clear that no fraud was intended. I think, that in order to "discharge" [281] a surety by a variation in the contract, it ought to appear, that the relative situation of the parties has thereby been altered. Here, it appears to me, that the situation of the surety has not been substantially varied. Suppose a person were to agree to supply to another twenty bales of cloth per week during the year, and there was a surety to that agreement, and that it was afterwards agreed between the two principal parties that during some weeks in the year only ten bales should be supplied, and during others thirty, so that at the end of the year the same quantity would be supplied; I think such an alteration in the mode of supplying the cloth would make no difference as to the liability of the surety. The situation of the parties would not thereby be substantially altered; and if that be so, I think the surety is bound, otherwise he is not. Or suppose there be an agreement between a landlord and tenant, to let the tenant one hundred acres of land, with a surety for payment of the rent, and it not being convenient for the tenant to take up the whole, he in fact had possession only of fifty. That being for the benefit of the surety, he would not be discharged. I think a surety has no right to complain, either in a court of law or equity, if there has been a substantial performance of the agreement entered into by him. Another way of trying the question is this: suppose the plaintiff had declared upon the original agreement for the letting of thirty cows for the year, and he had proved an agreement to let twenty-eight at one time of the year, and thirty-two at another period of the year, so that during the whole of the year, upon an average, the defendant would have had thirty cows, would that have been a variance? I think that the contracts are substantially the same, and that there would be no "variance. In *Hands v. Burton*, [282] 9 East, 349, proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff, for 31*l.* 10*s.*, and at the same time agreed, that if the plaintiff would take the horse at that value, he the defendant would buy another horse of the plaintiff's brother for 14*l.* 14*s.*; and that the difference only should be paid to the defendant, was held to support a count, charging only, that, in consideration that plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the 31*l.* 10*s.* There, the contract stated in the declaration and that proved, were held to be substantially the same; they certainly were not literally the same. So, in *Barbe, q. t. v. Parker*, 1 H. Black. 283, in an action for a penalty, under the statute 12 Ann. c. 16, the declaration stated a specific sum of money to have been lent, (in which the usury consisted,) but the evidence was, that the loan was partly in money, and the rest in goods of a known value, which the party receiving the loan agreed to take as cash, and this was held to be good evidence to support the declaration, on the ground that it was substantially a loan of money. These cases show, that where the contract proved and the contract declared upon are substantially though not literally the same, there is no variance. Here it appears to me, that the substituted contract was in substance the same as the original contract, and the performance of the former was a sub-

stantial performance of the original contract. It appears to me, that where there is a substantial performance of the contract, the surety does not get rid of his liability. I admit, that if the old agreement were put an end to entirely, the surety is not liable; but it appears to me that it was not put an end to in this case. The new agreement only related to the two cows. The old agreement continued as to twenty-eight cows; and I think that the plaintiff is entitled to recover *pro rata* as to that number; and that being so, that there ought not to be a nonsuit or new trial. But as my learned Brothers are of a different opinion, the rule for entering a nonsuit must be made absolute.

Rule absolute.

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*PERREAU, Executrix, v. BEVAN.

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Declaration stated that the plaintiff distrained certain goods for 97l. 10s. rent; that the tenant made his plaint to the defendant, then being sheriff of the county of C., praying that the goods might be replevied; that thereupon the defendant became sheriff took a replevin bond from the tenant, and two sureties conditioned for the appearance of the tenant at the next county court, and *for his prosecuting his suit with effect*, which he had commenced against the plaintiff and her bailiffs for taking the goods, and for making a return of the goods distrained, if a return should be adjudged. It then stated, that the sheriff replevied and delivered the goods to the tenant; that the latter appeared at the next county court of the sheriff, and there levied his plaint against the plaintiff and her bailiffs, for taking and detaining his goods and chattels, &c. which plaint afterwards, to wit, on the 25th of March, 1823, was duly removed out of the county court of the *said sheriff of the county of C.* into the court of great sessions, by a writ of *re. fa. lo.* It then stated the declaration in the suit in replevin, the execracy and cognizance for rent in arrear, and that such proceedings were thereupon had, that it was considered by the court that the tenant should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, and that the defendants in replevin should go thereof without day, and that they should have a return of the goods. And after reciting that it was the duty of the defendant as sheriff to take care of the replevin bond, the present declaration alleged that the tenant did not make a return of the goods according to the condition of the writing obligatory, but therein made default, whereby the bond became forfeited. Breach, that the defendant lost the bond, whereby the plaintiff was damaged. At the trial it appeared, that, in December, 1822, when the replevin bond was taken, the defendant was sheriff of the county of C., but that at the time when the plaint was removed out of the county court, he had ceased to be sheriff: Held, that this was no variance, the substance of the allegation being, that the plaint was removed out of the county court in which it was levied, and that having been proved by the record of the judgment in the replevin suit. It appeared that the jury, after finding that the rent in arrear was 97l. 10s., and assessing the damages besides costs, at the prayer of the plaintiff and her bailiffs, according to the statute 17 Car. 2, c. 7, proceeded to inquire of the arrears of rent, and the value of the distress, and found the arrears to be 97l. 10s., and the value of the distress to be the same. Besides the common law judgment, as stated in the declaration, there was a judgment under the statute 17 Car. 2, c. 7, that the defendants should recover against the plaintiff in replevin 97l. 10s., and another sum for costs, and that the defendants should have execution thereof. There was also a prayer by the defendants in replevin, for a writ of *f. fa.* to the sheriff, and averment that it was granted to them, and it was proved that a *f. fa.* in fact issued, to which the sheriff returned *nulla bona*, but it was not proved that *any writ de retorno habendo had been issued*: Held, that the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with success, that being a breach within the meaning of the words "*prosecuting with effect*," and, therefore, that the plaintiff in this action had sustained an injury, and was entitled to recover, although no *writ de retorno habendo* had been issued.

Held also, that although the plaintiff had elected to proceed under the statute 17 Car. 2, c. 7, still he was not confined to his execution under that statute, but might also proceed against the sureties upon the replevin bond, or against the sheriff for his negligence in the loss of it.

Held also, that assuming the plaintiff had not proved the breach alleged in the declaration, yet as it appeared that there had been a breach of the condition of the bond by reason of the plaintiff in replevin not having prosecuted his suit with effect, the plaintiff was entitled to recover, although a breach in that respect was not formally assigned.

The third count of the declaration stated that *Frances Keble Perreau*, ex-

cutrix of *S. Horton*, deceased, and *David Evans* and *Rees Jones*, as her bailiffs, *theretofore, to wit, on the 20th of December, 1822, aforesaid, in the parish of, &c., in the county of *Carmarthen*, in a certain close called *Whitehall*, took and detained certain cattle, goods, and chattels, (which were described,) of one *Evan Treharne*, then being on the said last mentioned premises, of great value, to wit, of the value of 200*l.*, for the sum of 97*l.* 10*s.* then due and owing to the plaintiff as executrix as aforesaid, for rent; that the said *Evan Treharne* afterwards, and within the space of five days then next ensuing, to wit, on the said 23d of December, 1822, to wit, at, &c., made his plaint to the defendant, then being sheriff of the said county of *Carmarthen*, out of the county court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said *Evan* by the plaintiff and the said *David* and *Rees*, and prayed that the said cattle, goods, and chattels might be forthwith replevied by the said sheriff, and delivered to him, the said *Evan*; and thereupon the defendant, so being sheriff of the said county of *Carmarthen* aforesaid, according to the form of the statute in such case made and provided, did take from the said *Evan* and two persons, to wit, *J. Haines* and *J. Treharne*, as two responsible sureties, a bond in double the value of the said cattle, goods, and chattels, to wit, in the sum of 184*l.* 17*s.* 6*d.*, bearing date, &c. 23d of December, conditioned for the appearance of the said *Evan*, at the next county court after the date of the said writing obligatory to be holden and kept for the county of *Carmarthen*, and for his prosecuting there with effect his suit which he had commenced against the said *F. Keble*, and the said *David* and *Rees*, for the taking and unjustly detaining the cattle, goods, and chattels in the said *condition mentioned, being the cattle, goods, and chattels so strained as last aforesaid, and for making a return of the said last mentioned cattle, goods, and chattels, if a return thereof should be adjudged; and thereupon the defendant so being sheriff, &c., at the prayer of the said *Evan*, replevied and made deliverance of the cattle, goods, and chattels to the said *Evan*, and he afterwards appeared at the next county court held for the said county of *Carmarthen*, and in the same court, without the writ of our lord the king, levied his plaint against the said *F. Keble*, *David*, and *Rees*, for the taking and unjustly detaining the said cattle, goods, and chattels of the said *Evan*, and found pledges as well for prosecuting his said plaint as for returning the said cattle, goods, and chattels, if return thereof should be adjudged by law; which said plaint afterwards, to wit, on the 25th of March, 1823, was duly removed, at the instance of the plaintiff and the said *David Evans* and *Rees Jones*, out of the county court of the said sheriff of the said county of *Carmarthen* into the court of great sessions for the said county of *Carmarthen*, by virtue of his majesty's writ of recordari facias loquela, returnable before the justices the first day of the next great sessions; and thereupon the said *Evan* afterwards, to wit, at the next great sessions held for the said county, to wit, on the 7th of April, 1823, at, &c. (The declaration in replevin, and the avowry and cognizance by the present plaintiff and her bailiffs for rent in arrear, were then set out.) The count then proceeded to state that such proceedings were thereupon had in the said plea in the court of great sessions; that afterwards, to wit, on the 14th of August, in the year 1824, to wit, at, &c., before the aforesaid justices, it was considered *in and by the said court, that the said *Evan* should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, and that the said *Frances Keble*, *David*, and *Rees*, should go thereof without day, and that they should have a return of the said last mentioned cattle, goods, and chattels as by the record, and proceedings thereof remaining in the said court of our said lord the king of great sessions, more fully appears. And whereas it was the duty of the defendant, so being sheriff as aforesaid, and having so taken the said writing obligatory, to have taken due and proper care thereof, so as to have been able to assign the same to the plaintiff, executrix as aforesaid; in case the same

should become forfeited, and she should be entitled to have the same assigned to her according to the form of the statute in such case made and provided, and should require the same to be assigned to her; and the plaintiff, executrix as aforesaid, in fact, says, that the said *Evan* did not make a return of the said cattle, goods, and chattels, or any of them, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but wholly neglected and omitted so to do, and therein failed and made default, whereby the writing obligatory became, and was forfeited to the defendant, and the plaintiff, as executrix as aforesaid, was entitled and was minded and desirous to have the same assigned to her, but she in fact says, that the defendant, not regarding his duty in that behalf, took so little care of the writing obligatory, that the same, by and through his negligence and default, was, after the giving thereof to the defendant as such sheriff, to wit, on, &c., lost; and by means thereof the plaintiff, executrix as aforesaid, was hindered and prevented from having or obtaining *an assignment thereof, and by means thereof [**288] she has been, and is, hindered and prevented from bringing an action or actions on the said last mentioned writing obligatory, and has been and is deprived of the means of recovering the said arrears of rent, and the costs of the said action, and has been otherwise greatly injured and damnified, to wit, at *Carmarthen* aforesaid. Plea, Not guilty. At the trial before *Burrough*, J. at the Summer assizes for *Herefordshire*, 1825, it appeared that in 1822, the defendant was sheriff of the county of *Carmarthen*, and that on the 23d of December in that year, he took the replevin bond mentioned in the declaration. The plaint in replevin was removed out of the county court on the 25th of March, 1823, the defendant at that time having ceased to be sheriff of the county. By the record of the judgment in the replevin suit in the court of great sessions, it appeared that the jury, after finding the tenancy, and that the rent in arrear was 97l. 10s., and assessing the damages besides costs, at the prayer of the present plaintiff, and her bailiffs, according to the statute 17 Car. 2, c. 7, proceeded to inquire of certain arrears of rent, and the value of the cattle, goods, &c., distrained, and they found the arrears to be 97l. 10s., and the value of the distress to be the same. The judgment of the court was first the common law judgment, that the plaintiff should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, and that the defendants in the replevin should go without day, and that they should have a return of the goods and chattels to hold them irrepleviable for ever. There then followed the judgment given by the statute 17 Car. 2, c. 7, that the defendants in replevin should recover against the plaintiff in replevin the sum *of [**289] 97l. 10s. the arrears of rent, and 139l. 17s. for costs, making together 237l. 7s., and that the defendants should have execution thereof. The record also contained a prayer by the defendants in replevin for a writ of *fieri facias* to the sheriff of *Carmarthen*, to levy the above arrears of rent and costs, and a grant thereof by the court. Proof was given that a *fi. fa.* issued, to which the sheriff returned *nulla bona*, but there was no proof that any writ *de retorno habendo* had been issued. An application was made to the agent of the defendant to assign the bond, and he admitted that it had been lost. Three objections were made upon the part of the defendants; first, that there was a variance, inasmuch as it was averred in the declaration, that the plaint was removed out of the county court of the *said sheriff* of the county of *Carmarthen*, and the defendant being the only person described in the declaration as sheriff, that allegation imported that the plaint was removed out of the county court of the defendant, he being sheriff, but the proof was, that he, at that time, had ceased to be sheriff. 2dly, That the action was not maintainable, inasmuch as the plaintiff had sustained no injury by the loss of the replevin bond, because the bond could not have been enforced upon the judgment, previously to the issuing of a writ *de retorno habendo*, and a return of *elongata* thereon. 3dly, The avowant in replevin having elected to proceed under the 17 Car. 2, c. 7, was

confined to her execution under that statute, and could not afterwards proceed, either against the sheriff, or against the sureties upon the replevin bond. The learned Judge was of opinion, first, that there was no variance, inasmuch as the substance of the allegation was, that the record was removed out of the county court and that it was wholly immaterial who was the sheriff at the time. 2dly, That the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with effect, and, therefore, that the plaintiff in this action had sustained an injury by his loss of the bond, although he had not sued out a writ *de retorno habendo*. 3dly, He was of opinion that the avowant, although he had proceeded under the statute 17 Car. 2, c. 7, was still entitled to proceed against the sheriff, or on the replevin bond, as the remedy given by that statute was cumulative. The jury, under the direction of the learned Judge, found a verdict for the plaintiff for 18*l.* 17*s.* 6*d.*, but liberty was reserved to the defendant to move to enter a nonsuit. A rule *nisi* for that purpose having been obtained in last Michaelmas term, the case was argued before Holroyd and Littledale, justices, at the sittings in banc before last Hilary term, when cause was shown against the rule by

Taunton, Campbell, Richards, and John Evans. There is no variance, inasmuch as the substance of the allegation in the declaration is, that the plaintiff had been moved out of the county court in which it had been levied, and that was proved. *Draper v. Garratt*, 2 B. & C. 2, is an authority in point. Assuming the allegation to be one of description, the words "said sheriff" may refer to the person filling the office at that time, and not to the individual who filled it before. At all events, the word "said" may be rejected as superfluous. Secondly, the plaintiff has sustained an injury by the loss of the replevin bond, inasmuch as the condition "was not only for a return of the goods dis-
trained, but also for the plaintiff's (in replevin) prosecuting his suit with effect. These are distinct and independent conditions, *Morgan v. Griffith*, 7 Mod. 380, and breach of any one of them is a sufficient cause of action, *Vaughan v. Norris*, Cas. Temp. Hard. 137; *Dias v. Freeman*, 5 T. R. 195; *Gwillim v. Holbrook*, 1 B. & P. 410. The legal meaning of the term "prosecuting with effect" is to prosecute with success, *Morgan v. Griffith*, 7 Mod. 380; *Duke of Ormond v. Hierly*, Carthew. 519; *Turnor v. Turner*, 2 Brod. & B. 107. Now, in this case it appeared that judgment was given against the plaintiff in replevin; he, therefore, did not prosecute his suit with effect, and there has been a breach of the condition in that respect, and the plaintiff has been damaged by the loss of the bond. Thirdly, the plaintiff would be entitled to proceed upon the replevin bond if it had been assigned to him, and he may now proceed against the sheriff for negligence, although he has previously proceeded under the statute 17 Car. 2, c. 7. The remedy given by that statute is cumulative. That point was expressly decided by the Court of Common Pleas in the late case of *Turnor v. Turner*, 2 Brod. & B. 107. The *dictum* of Bathurst, J., in *Cooper v. Sherbrooke*, 2 Wils. 117, and the passage cited from Tidd's Practice, 1088, 6th edit., were brought under the consideration of that court, and they determined that the sureties in a replevin bond were not discharged by the execution of a writ of inquiry under the statute 17 Car. 2, c. 7, and a judgment thereon for the avowant to recover the arrear of rent found, together with a sum for his costs and damages. The same point was decided by this court in Hilary term, 1820, in the case of *Dum v. Dunbar*; [†] *Combes v. Cole*, cited from Com. Dig., Pleader; 3 K. 31, was decided before the statute 11 Geo. 2, c. 19, s. 22. It forms no part of the digest as published by Lord Chief Baron Comyn, but was added by the subsequent editors.

Russell, Archbold, and Chilton, contra. The declaration states, that the

[†] This case was cited from a manuscript note.

plaint was removed out of the county court of the *said* sheriff. This is an allegation describing the court out of which the plaint was removed. It must, therefore, be strictly proved. Here the proof was, that the plaint was removed out of the county court, not of the defendant, but of another person, it therefore varied materially from the allegation, *Bromfield v. Jones*, 4 B. & C. 380; *Bevan v. Jones*, 4 B. & C. 403. Secondly, this action is not maintainable, because the breach assigned in the declaration is not proved. The declaration, after stating it to be the duty of the defendant to take care of the replevin bond, so as to be able to assign the same to the plaintiff, alleges that the tenant, the plaintiff in replevin, did not make a return of the cattle, goods, and chattels, according to the condition of the bond, but omitted so to do, *whereby* the bond became forfeited. The word *whereby* refers to the last antecedent matter, viz. the non-return of the goods. The allegation therefore imports, that the bond became forfeited by reason of there not having been a return of the goods, but inasmuch as the plaintiff did not do that which was necessary to obtain a return, viz. sue out a writ *de retorno habendo*, the breach assigned is not supported by the proof. [Holroyd, J. The word *whereby* refers to all the *antecedent matter, but assuming that the breach, in respect of the plaintiff's not having prosecuted his suit with effect, is not sufficiently assigned in point of form, yet if it appears to the court upon the declaration, that there has been a breach in that respect, the plaintiff is entitled to recover, *Charnley v. Winstanley*, 5 East, 266.] At all events the plaintiff is not entitled to recover to the extent of the damages assessed by the jury, inasmuch as the plaintiff in his declaration has not set forth the inquiry as to the arrears of rent, and the value of the distress, and the finding a judgment thereon. But, secondly, that part of the condition of the bond, which requires that the plaintiff in replevin should prosecute his suit with effect, is satisfied by showing that he prosecuted it to final judgment, without showing that he prosecuted it with success. The authorities cited on the other side show, that if by any default of the plaintiff in replevin the suit is not prosecuted to final judgment, the bond is forfeited. But there is no authority to show, that if the plaintiff prosecute his suit to final judgment, though not with success, the bond is forfeited. In *Morgan v. Griffiths*, 7 Mod. 380, there was judgment by default against the plaintiff in replevin. In *Turnor v. Turner*, 2 Brod. & B. 107, judgment was given against the plaintiff in replevin by reason of his not pleading in bar to the avowry. In *The Duke of Ormond v. Bierley*, Carthew. 519, the suit abated by the death of the plaintiff in replevin, yet the condition of the bond was held to be satisfied, although he did not there prosecute his suit with success. The stat. 11 G. 2, c. 19, s. 23, requires the sheriff to take a bond conditioned to prosecute with effect and without delay, and to return *the goods in case a return there- [294] of shall be awarded. Now, if the legislature intended that these words "with effect," should mean, "with success," they never would have added the clause relating to the return of the goods; for in all cases, where a return of the goods is ordered, the plaintiff must necessarily have failed to prosecute his suit with success. The legislature, by this statute, evidently intended to compel the plaintiffs in replevin, first, to prosecute their suits to a final determination without delay; and, secondly, to return the goods replevied, in case they should be unsuccessful in their suits, and judgment *de retorno habendo* should thereupon be given against them. [Littledale, J. Are the sureties in replevin analogous to pledges to prosecute at common law? Pledges to prosecute were required at common law in replevin as well as in other actions; but the plaintiff was only liable to be amerced if he became nonsuited, and not if judgment was given against him, Comyn's Digest, Pleader (C) 16. In Co. Litt. 145 b., it is laid down that the sheriff ought to take two kinds of pledges, one by the common law, viz. pledges to prosecute, and another by the statute *Westminster* 2, c. 2; 13 Ed. I, c. 2, s. 3, pledges to return the goods; and in *Blackett v. Crissop*, Ld. Raym. 278, it was held, that under that statute the sheriff might

take a bond from the plaintiff in replevin, to prosecute, &c. make return, &c. and indemnify the sheriff against the replevin. The sureties in replevin, therefore, were to be responsible for the return of their goods, and to indemnify.] All this is confirmatory of the argument. The sheriff at common law was bound to take pledges to prosecute ; the statute of *Westminster required [295] him also to take pledges for the return of the goods ; and the statute 11 G. 2, c. 19, required him to take both, with this difference merely, that it gives the penalty for not prosecuting, which at common law belonged to the king, to the defendant. If then the true meaning of the words, "to prosecute with effect and without delay," be to prosecute to a final determination of the suit without delay, the plaintiff in replevin, in this instance, has not been guilty of any breach of the condition of the replevin bond in this respect ; for he has prosecuted his suit to final judgment, and without delay. Nor has he been guilty of a breach of the other branch of the condition, namely, as to the returning of the goods, for no return of the goods has been awarded ; and even if a return had been awarded, the plaintiff in replevin could not be deemed guilty of a breach of the condition in this respect, until after a writ *de retorno habendo* had been sued out, and returned *elongata* by the sheriff, that being the only legitimate proof of the goods not being returned ; in like manner, as in proceeding against bail to an action, a *ca. sa.* must first be sued out and returned *non est inventus*, before the plaintiff can proceed by debt or *scire facias* on the recognizance. Inasmuch, therefore, as there has been no breach of the condition of the replevin bond, the defendant in replevin is not damnified by the sheriff's losing or not assigning the replevin bond ; and until she is damnified, she cannot maintain this action. Thirdly, the plaintiff having proceeded upon the statute 17 Car. 2, c. 7, for the arrearages of rent and costs, is confined to his execution under that statute. It is expressly laid down in *Tidd's Practice*, 1088, 6th edit., that he cannot, after having had a writ upon that statute, have [296] a writ of *retorno habendo*, nor proceed against the pledges on account of the plaintiff's not making a return of the cattle or goods, nor, as it seems, against the sheriff, for taking insufficient pledges. *Combes v. Cole* is an authority in point to the same effect.

HOLROYD, J. I am of opinion that there is no variance in this case. It seems to me that the averment, that the plaint was removed out of the county court of the said sheriff, is not an allegation of description, but of substance. It imports that the plaint was removed out of the county court in which it had been levied, and that has been proved. It was a matter wholly immaterial who the individual was who presided in that court at the time when the plaint was removed. *Draper v. Garratt*, 2 B. & C. 2, is an authority to show that it is sufficient. There the declaration against a sheriff for taking insufficient pledges in a replevin bond, stated that the party replevying levied his complaint at the next county court, to wit, at the county court held before *A. B.*, and *C. D.*, suitors of the court, which plaint was afterwards removed by *re. sc. lo.*; and by the record it appeared, that the plaint was levied at a court holden before *E. T.* and *G. F.* It was held that the variance was immaterial, because it was unnecessary to state or prove the name of the suitors, and they might be rejected as surplusage. So here in describing the removal of the plaint out of the county court, it was unnecessary to describe the individual who held the office of sheriff at the time. It was sufficient to aver and prove that the plaint was removed out of the court in which it had been levied. As [297] to the principal points discussed in this case, our decision *must be governed by the case of *Turnor v. Turner*, 2 Brod. & B. 107, unless that case be distinguishable upon the grounds stated in argument. Upon those points we will take time to consider before we pronounce our judgment.

LITTLEDALE, J. Assuming that this be an allegation describing the court out of which the plaint was removed, it appears to me that the word *said* may be rejected as surplusage. The object of the allegation must have been to

describe the court not as the court of the individual, but as that of the sheriff. If that word be rejected, the allegation will then be consistent with the fact. For the plaintiff was removed out of the court of the sheriff of the county of Carmarthen.

Cur. adv. vult.

Judgment upon the other points was afterwards delivered by Holroyd, J. This was an action against the late sheriff of Carmarthenshire, tried before Burrough, J., at the last Summer assizes for Herefordshire. A verdict was found for the plaintiff, damages 184*l.* 17*s.* 6*d.* The action was for negligence in the execution of his office. And the questions made at the trial, and upon which a rule was granted to show cause why the verdict should not be set aside, and a nonsuit entered or new trial granted, arose upon the third count. That count was for negligence in the defendant as sheriff in losing a replevin bond taken by him upon a distress for rent due to plaintiff, executrix, &c., by which she was prevented from having an assignment thereof, and from suing thereon as she would have been entitled to do. One of those questions was a question of variance, which the *court, (my brother Little-
dale and myself,) disposed of and overruled, upon the argument when [298] cause was shown against the rule for a nonsuit or new trial. The other question was, whether upon that third count, as framed, and the proof in support thereof that was given at the trial, the action was maintainable. (The learned Judge, after stating that count, proceeded as follows:)

When the record of the above proceedings in replevin was produced and proved at the trial, it appeared by it that upon the jury giving their verdict in favor of the present plaintiff and her bailiffs, the three defendants in that suit, the jury at the prayer of those defendants, according to the statute of 17 Car. 2, having proceeded to inquire concerning the arrears of rent and the value of the distress, found the arrears to be 97*l.* 10*s.*, and that the true value of the distress was also 97*l.* 10*s.*; and, therefore, not only the common law judgment was given against the plaintiff in replevin of *nil capiat per breve*, and his pledges to prosecute being in mercy, and the defendants in replevin thereof going without day, and the judgment *pro retorno habendo*, but also judgment, according to the above statute of Car. 2, for the said arrears of rent (97*l.* 10*s.*) and 139*l.* 17*s.* costs, in the whole, 237*l.* 7*s.*; and that the defendants in replevin have execution thereof. The record also contained the entry of a prayer by the defendants in replevin of a *fi. fa.* to the sheriff of Carmarthenshire to levy the above arrears of rent and costs, and that it was granted to them returnable before the justices of the said court of great sessions on the first day of the then next great sessions to be holden in and for the said county. Besides this award of execution, it also was proved at the trial that a *fi. fa.* issued, which was returned by the sheriff *nulla bona*; and there was no proof that any *writ *de retorno habendo* had been issued upon the judgment. And it [299] was objected at the trial that the action therefore was not maintainable, on the ground that the replevin bond could not have been enforced upon the judgment, as set forth in the third count above stated, previous to the issuing of a writ *de retorno habendo*, and a return of *elongata* thereon; and, consequently, that the plaintiff had sustained no injury on which to maintain an action against the sheriff for the loss of the replevin bond. And, secondly, that the avowant having elected to proceed under the statute 17 Car. 2, c. 7, could neither proceed against the sheriff nor upon the replevin bond, but was confined to his execution under the statute.

With regard to the first of these two grounds of objection, the want of a writ *de retorno habendo*, and a return of *elongata* thereon, it appears to us that a writ *de retorno habendo*, and a return of *elongata* thereon, were not necessary, to enable the plaintiff to put the replevin bond in suit against the obligors, in case the same had not been lost, but had been assigned to her; and that the

judgment, as stated in the third count, with and even without the averment in that count, that the plaintiff in replevin did not make a return of the cattle, &c., pursuant to the condition of the bond, and without any averment of a writ *de retorno habendo*, and a return of *elongata* thereon, showed sufficiently a breach of the condition of the bond, on which the plaintiff in this suit might maintain an action against the sureties, in case the replevin bond had been assigned to her, and, consequently, an action against the sheriff for his negligence in the loss of the bond. This is fully established by the several cases that have *300] been decided upon the subject. If the bond in question had been simply conditioned for a return of the distress (if a return thereof should be adjudged,) without more, there might have been something in the objection ; but this is a case in which the bond was taken pursuant to stat. 11 G. 2. c. 19. s. 23. (as all others ought now to be) and conditioned not merely for making such return, if it should be adjudged, but also for *prosecuting the suit with effect* ; and the condition of the bond is broken and the bond forfeited, as well by not prosecuting the suit with effect, as by a default of making a return of the distress on such return being adjudged, each part of the condition being independent of the other, and the bond forfeited by a failure in either. The failure of prosecuting the suit with success is we think, a failure of prosecuting the same with effect. And this was so even before the statute 11 G. 2. c. 19. In *Chapman v. Butcher*, Carthew, 248, in an action on a similar bond, the defendant pleaded that he had prosecuted the suit with effect in the court below, but that a writ of error was brought in B. R., where the judgment was reversed ; to which plaintiff replied that the judgment in B. R. also was that the plaint in the court below should abate, and that there should be a return irrepleivable. On demurrer to this replication, on which other objections were made, (viz. the unlawfulness of the bond, because it was alleged that pledges ought to have been taken, and not a bond, and that the condition did not extend to any judgment of *retorno habendo* in any court but only in the court below where the plaint was levied, and the judgment of that court was then reversed,) judgment was given for the plaintiff in the suit on the replevin bond, although it would seem *that 301] the replication contained no allegation that no such return was made, (consequently there was no breach of the condition shown but the not prosecuting with effect,) nor was there any allegation that any writ *de retorno habendo* issued, or that there was any return of *elongata* thereon, which, if necessary, ought to have been alleged ; but there was only an allegation that the suit was not prosecuted with effect in the court above, that is, with final success, and that a return irrepleivable was there adjudged. And in a later case, since the statute 11 G. 2., *Gwillim v. Holbrook*, 1 B. & P. 410, where, in like manner, nothing more appeared on the pleadings beyond the judgment *de retorno habendo*, on demurrer, judgment was given for the plaintiff. It is true that no objection appears to have been made on that account in either of those cases. So in *The Duke of Ormond v. Bierley*, Carthew, 519, in a similar action, where it appeared on the pleadings that the plaintiff in replevin died before the suit was determined, by which the suit abated ; but where he had by injunction from the Exchequer, hindered the proceedings till his death, so that it was alleged "he did not prosecute his suit with effect," upon demurrer, the defendant had judgment ; for per *Holt*, C. J., "this was a prosecution with effect, because there was neither a nonsuit or verdict against E. C. (the plaintiff in replevin;) and so it is on a recognizance on a writ of error, which is also to prosecute with effect, if the plaintiff is not nonsuit, nor the judgment affirmed, the recognizance is not forfeited." This shows that Lord *Holt's* opinion was, not merely that a nonsuit or non pros for not following up the suit to judgment, but that a judgment against the plaintiff in replevin, without his default of following up the suit to judgment ; that is, that his not prosecuting his suit with final success and judgment accordingly, whether with or without judgment *de retorno habendo*, is a breach of the condition. So in *Wuterman v. Yea*, 2 Wils. 41,

which was since the statute 11 G. 2. c. 19., it appears the replevin bond was sued upon without any previous writ *de retorno habendo*, but no objection was made to the action thereon upon that account. But prior to that case, (but whether prior or subsequent to the statute 11 G. 2. does not appear,) it seems in *Morgan v. Griffiths*, 7 Mod. 380, (n), *Lee*, C. J., said that in all replevin bonds there are several *independent* conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any distinct parts of the condition. And it is material that this should be the case, for though a return of the distress may have been actually made, as well as adjudged, yet the avowant may and will still be damaged by reason of his costs of suit, where the distress so returned is not of sufficient value to pay him his costs, as well as his arrears of rent. And in *Dias v. Freeman*, 5 T. R. 195, in an action by the assignee of the sheriff on a replevin bond, on a declaration stating that plaintiff, as bailiff of *J. W.*, dis-trained, &c. on *J. Lacey* in the usual form, where the breach was that *L.* did not appear at the county court next after giving the bond, according to the condition; and did not then and there, or in any manner, or at any place or time, prosecute his suit with effect against the plaintiff; and on a special demurrer thereto, the declaration was adjudged good, *and the plaintiff had judgment thereon, although *non causa* that the suit in replevin was legally determined, or what the judgment was, if any, that was given therein, or whether there was any judgment or writ *de retorno habendo*, and return thereof or not. But the late case of *Turnor v. Turner*, 2 Brod. & B. 107, is decisive that the not prosecuting the suit with effect, is a breach of the condition, and that an action is maintainable on the replevin bond, although it appeared that the judgment was *pro retorno habendo*; and although it did not appear that any writ *de retorno habendo* had issued or been returned, and although there was no allegation that a return had not been made.

That case, too, is also decisive on the other point, and has established, and we think has rightly established, that the avowant, by having elected to proceed under the statute 17 Car. 2. c. 7, is not confined to his execution under the statute, but might proceed upon the replevin bond, if it had been assigned, and may proceed against the sheriff for his negligence in the loss of it, notwithstanding what is stated to have been said by *Bathurst*, J., in *Cooper v. Sherbrooke*, 2 Wils. 117; that "by statute 17 Car. 2, the legislature intended that the proceeding upon that statute by writ of inquiry, *fieri facias*, and *et alij*, should be final for the avowant to recover his damages, and that the plaintiff should keep his cattle, notwithstanding the course of awarding a writ *de retorno habendo*, which is a right judgment, for the statute has not altered the judgment at common law, but only gives a further remedy to the avowant." The Court of Common Pleas, however, had that case urged to them as in point to that effect; but after taking time to consider, upon deliberation and reasons stated at length in the report, decided contrary to that doctrine of *Bathurst*, J.; and it may be observed, that on advertizing to the preamble, as well as to the provisions of that statute, the legislature meant only to facilitate the landlord's remedy against his tenant, and gave him additional aid, without in any respect depriving him of the benefit of any remedy or of any proceeding he was entitled to pursue before; and the very circumstance of the old judgment *de retorno habendo* remaining (which *Bathurst*, J., allows, and which is allowed on all hands to be the right judgment) notwithstanding the avowant has upon the verdict, and before the giving of that judgment elected to proceed, and actually proceeded upon that statute, seems to show, that as the old judgment of the common law was not gone or taken away by that election, so the consequences resulting from it still remained, if the avowant should have occasion, or should still choose to crave them in aid. A subsequent case of *Dunn v. Dunbar*, in this court, in Hilary term, 1820, was cited. That was stated to be an action against the surety in a replevin

bond, after judgment in the replevin suit for the arrears of rent under the statute. On a motion by Mr. *Marryat*, to set aside the proceedings on the bond, because the surety is discharged by proceeding under the statute, and on citing *Tidd's Practice*, 1088, where there is a *dictum* to that effect, but no reference to authority, *Abbott*, C. J., is stated, in a note of that case to have said, that the statutable remedy has not taken away the surety's responsibility, and in the absence of authority the rule was refused; but if authority was found, it might be mentioned again; *Holroyd and Best*, J.'s, were "present." It does not appear to have ever been mentioned again. Supposing this to be a correct note of that case, and that it did not come on again, it is in support of our present opinion. The case, indeed, of *Combes v. Cole*, Rep. temp. Hardw. 352, was cited, but that case was not only before the stat. 11 G. 2, when the avowant had no right to have the replevin bond assigned or delivered over to him, as he has since that statute; and that case, though it determined that the only mode of proceeding against the sheriff, before the statute 11 G. 2, was in the mode there pointed out, does not establish that the proceeding under the statute 17 Car. 2, without avail, would have been a defence to an action on the replevin bond, if the sheriff had permitted the avowant to sue on it in his own name, or that, if it would, it would be so now, since the statute 11 G. 2, c. 19; but if it would go to this extent, it has in effect been since overruled.

But it has been urged, that upon the declaration in this cause, it must be taken, that the breach assigned of the condition of this replevin bond, by which the plaintiff is damnified, is the not making a return of the distress as adjudged, and that he has proved no such breach, without showing a writ *pro returno habendo*, and a return of *elongata* thereon; as the declaration avers, that, by the default of making such return, the bond became forfeited. But though it be true, that immediately after stating such default, it says, *whereby* the writing obligatory became and was forfeited; yet that word *whereby* is not confined, we think, to that immediately preceding allegation, but extends, also, to the prior averment of not prosecuting the suit with effect, "so as to enable the plaintiff to recover upon the declaration, upon proof of facts sufficient to establish that as a breach, which, without going on to further proof which might have been necessary to establish the not returning the distress as a breach, in case no other breach than such non-return had been shown by the declaration. The case of *Charnley v. Winstanley and Ux*, 5 East, 266, is applicable to this point. It was an action for breach of a covenant made by the wife *dum sola*, in non-payment of money, pursuant to an award which she had covenanted to abide by and perform. It being alleged in the declaration that the arbitrator made his award *after the intermarriage of the defendants*, it was moved, in arrest of judgment, that the award was void, the submission being revoked in law by the marriage, consequently that no action would lie for the breach of the award, but the court held that the declaration (showing a breach of the covenant by a revocation of the submission by the intermarriage between the submission and the award) was valid and sufficient to support the action, though it was a breach of covenant informally and only impliedly alleged, and the declaration was evidently framed upon the idea that the award was good, and meant to charge the nonpayment of the money awarded as a breach of covenant, and the plaintiff had judgment. So in the present case, though the non-return of the distress may have been the thing intended, or mainly intended in the declaration as the breach of the condition, yet if a breach of condition sufficiently appears by the declaration in another respect, viz. in not prosecuting the suit with effect, as we think it does, that is sufficient to support a verdict "for the plaintiff, and entitle him to judgment thereon, though he fails in proving sufficient to establish the breach more prominently set forth."

But then it has been urged, that the plaintiff upon the proof has recovered

greater damages than he was entitled to recover upon the form of the declaration, which, in setting out the proceedings and judgment in replevin, omitted to set forth the inquiry as to the arrears of rent, and the value of the distress, and the finding and judgment thereon; but that point does not appear to have been mentioned at the trial, nor was the rule, that I am aware of, moved on that ground. However, it is clear, that the plaintiff is entitled to recover damages upon the merits, if the declaration had stated the whole judgment, or if it should be amended in that respect on a new trial being granted, to the amount she has recovered, supposing her entitled to recover at all, and the objection, if it be one, arises only on the omission to state those parts of the proceedings in the declaration which are omitted. It is a mere objection of form, therefore, but supposing the defendant's counsel were not now too late to urge it, we think the declaration is sufficient to entitle the plaintiff to recover the damages she has recovered, upon the proof given at the trial, which are less than the penalty of the bond, or the damages recovered by the judgment in replevin, inasmuch as the declaration states, that "by means of the loss of the bond, the plaintiff was prevented from obtaining an assignment of the bond, and from suing thereon, and deprived of the means of recovering the arrears of rent, and the costs of the action of replevin, and has been otherwise greatly injured and damaged." And the amount of that loss to the extent of the damages given by the jury was proved by the judgment in replevin given in evidence [308 at the trial, though the whole of that judgment was not, and, we think, need not, be stated in the declaration. The rule, therefore, must be discharged.

Rule discharged.



DOE on the Demise of ANN LLOYD v. C. POWELL, J. DAVIES, and J. THOMAS, Assignees of THOMAS LLOYD, a Bankrupt.

A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the license of the lessor. The lessee in January, 1825, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In April, 1825, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of January, 1825, was an act of bankruptcy and void, that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture.

EJECTMENT to recover possession of a farm, messuages, and lands in the parish of Winslalow, in the county of Salop, formerly occupied by Thomas Lloyd the bankrupt. At the trial before Garrow, B., at the Salop Summer assizes, 1825, it appeared that Ann Lloyd, the lessor of the plaintiff, by deed bearing date the 20th of November, 1795, covenanted with Thomas Lloyd that she would, when thereunto requested by the said Thomas Lloyd, demise, lease, let, and to farm let unto him the premises for which this ejectment was brought, for the term of forty-one years at the rent of 200*l.* a year. Provided always, and upon condition, that if the rents thereby reserved, or any part thereof, should be unpaid for twenty-one days next after either of the days appointed for payment thereof, or if the said Thomas Lloyd, his executors, or administrators, should grant, assign over, pass away, or depart the messuages, mill, lands, tenements, and premises, thereby agreed to be demised, or any part thereof, for all or any part of the said term to any person or persons whomsoever, without the consent of the said Ann Lloyd thereto first had and obtained in writing, that then and in either of the said cases it should

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and might be lawful to and for the said *Ann Lloyd* into the said premises to re-enter, and from thenceforth that deed, and every thing therein contained should cease, determine, and become void, any thing therein contained to the contrary notwithstanding. In pursuance of this deed, *Thomas Lloyd* entered on the premises therein mentioned, and continued to occupy them up to the time of his bankruptcy in *April*, 1825, and paid the rent of 200*l.* a year up to *Michaelmas*, 1824. *T. Lloyd* having become distressed in his circumstances, in *January*, 1825, executed an assignment of all his property real and personal to certain trustees therein named. The trustees acted upon the assignment till *April* following, when a docket was struck against the said *T. Lloyd*, and on the 16th of *April*, 1825, a commission of bankrupt was issued against him, and he was thereupon declared a bankrupt, and a messenger under the usual warrant of seizure took possession of the premises in question, and sold the effects upon them, and has remained in possession ever since. Upon these facts it was contended upon the part of the lessor of the plaintiff that there was a forfeiture of the lease by reason of the tenant's interest having been assigned by the deed of *January*, 1825, to the trustees therein mentioned. On the part of the defendant it was contended that that deed was wholly null and void, being itself an act of bankruptcy, and that it never had the legal effect of an assignment, and, "consequently, that the tenant had never, by any voluntary act of his, assigned his interest in the lease." The learned Judge was of this opinion, and nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict. A rule *nisi* for that purpose having been obtained in last *Michaelmas* term, cause was shown against the rule at the sittings in Banc before *Hilary* term by

Campbell and *Russell*. The personal property of a bankrupt vests in his assignees by the assignment from the time when the act of bankruptcy is committed. The conveyance to the trustees for the benefit of creditors was wholly null and void. Nothing passed by it, and it never operated as an assignment of his interest in the lease. From the instant that the bankrupt executed it there was an act of bankruptcy committed, and at the same instant all the bankrupt's interest in the premises in question, vested in the defendants, not as assignees under the deed, but as assignees by operation of law and by force of the bankrupt statutes. It is clear that such an assignment by operation of law does not work a forfeiture of a lease, *Doe d. Hutchinson v. Carter*, 8 T. R. 57; *Doe v. Bevan*, 3 M. & S. 353. Besides the law leans against forfeitures; now the assignment, if it be allowed to operate, will work a forfeiture, but the defendants may take, without working any forfeiture.

W. E. Taunton and *G. R. Cross* contra. Assuming first, that the deed of *January*, 1825, never operated as a valid conveyance of the property to the trustees, the "persons to whom it was intended to pass it, still it did operate, and had the legal effect of divesting *T. Lloyd* of his interest in the lease, and of forcing the assignees of the bankrupt, as tenants on the lessor, without her assent: that is the very effect which it was the object of the lessor to prevent. It, therefore, was a breach of the proviso. But, secondly, this deed did as against the bankrupt operate as a conveyance of his property to the trustees. It so operated the moment it was executed in *January*; and it continued so to operate until the 16th of *April*, when the commission issued. By the terms of the proviso a right of entry is not only reserved for a breach of the conditions, but the lease thereby becomes not voidable, but absolutely null and void. The lease, therefore, having once become void by the breach of the promise, ceased to exist. If no commission had ever issued, there would have been a forfeiture. Is it then to depend upon a subsequent contingency, viz. the issuing of a commission, whether the lease is to be void or not? It is surely absurd to say, that a lease once forfeited by a breach of a condition should again exist as a valid lease upon the happening of a contingency. A commission of bankrupt may rescind what would otherwise be valid, but it cannot set

up what once is at an end. Besides, the statutes do not make all deeds conveying away the property of the party an act of bankruptcy, but only fraudulent conveyances. A deed passing away all the property of the bankrupt has been held to be fraudulent as against creditors, and for that reason it is an act of bankruptcy; but if the argument used by the defendants be valid, it may as well be said, that as the deed is therefore absolutely void, nothing passes by it, and that it does not operate "as a conveyance at all, and therefore it is [312 not an act of bankruptcy.^t

Cur. adv. vult.

The judgment was afterwards delivered by

HOLROYD, J. This was an ejectment for a forfeiture committed by the lessor of the plaintiff's son, who had entered and paid rent, and so became tenant from year to year to the lessor of the plaintiff, under an agreement between them, for a lease to him for a long term of years, that lease never having been executed, but being to be granted subject to a proviso for re-entry, and that the lease should be void on (*inter alia*) the lessee's assigning or demising the whole or any part of the premises without license in writing. The tenant holding under that agreement made an assignment of his property by deed, (including his estate and interest in these premises,) to trustees for the benefit of his creditors, which assignment was void in law, and avoided in fact, as an act of bankruptcy, by a commission of bankruptcy, and the tenant being found and declared a bankrupt thereon, and an assignment to the assignees chosen under the commission; which commission, declaration of bankruptcy, and assignment under the same, were prior to any act or proceeding done or instituted by or on the behalf of the lessor of the plaintiff, either of re-entry or otherwise to avoid the term or tenancy. Consequently the bankrupt's assignment to the trustees not only became void and a nullity *ab initio*, but was actually avoided by the bankruptcy, and the proceedings ^{*}under the same, before [313 any advantage was attempted to be taken of the supposed forfeiture. Under these circumstances, for want of the deed's operating in law as an assignment, it was not in consideration of law an assignment by the bankrupt; but in that respect the same as if no such deed had ever been executed by him; and we think that the answers given to this by the lessor of the plaintiff's counsel, viz. that it would then depend on a subsequent contingency, (viz. the issuing of a commission, &c., whether the bankrupt's deed would operate a forfeiture or not, and that it would be good in the interim,) is no sufficient answer to this objection against the forfeiture, the bankrupt's deed being void and avoided *ab initio*, and the title of the assignees of the bankrupt's estate and effects commencing by relation from the time of the execution of that deed. This is no uncommon thing, there are many cases in bankruptcy depending on the like contingency, where the thing done is valid or effective in the interim, but is avoided by the subsequent commission and proceedings. In consequence of that contingency, (viz. the proceedings under the bankruptcy,) having taken place, no assignment, (the event on which the forfeiture was to arise,) has in effect happened, and that event must be fully established, in order to incur and enforce a forfeiture, which is a matter *stricti juris*. The rule for a new trial must be discharged.

Rule discharged.

^t Some other points were discussed at the bar, but have been omitted in the report, as the judgment of the court did not proceed upon them.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
EASTER TERM,
IN THE
SEVENTH YEAR of the REIGN of GEORGE IV., 1826.

BRYAN v. WAGSTAFF.

(In Error.)

Where in error to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *ex*equi facias** the plaintiff in error was beyond seas; and defendant pleaded that before the awarding and issuing of the *ex*equi facias**, plaintiff in error, of his fraud and covin, and in order to defeat defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of *England*, and, of such his fraud and covin, voluntarily remained in parts beyond the seas until after the outlawry; whereupon issue was joined and found for the defendant: Held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error *non obstante veredicto*.

This was a writ of error brought to reverse an outlawry in an action of *assumpsit*, and the error assigned was, that before and at the time of the awarding and issuing the writ of *ex*equi facias** upon which the outlawry was pronounced, the defendant was in parts beyond the seas. To this assignment the defendant pleaded, that before the awarding and issuing of the writ of *ex*equi facias**, the plaintiff in error of his fraud and covin, and in order to defeat the defendant in error of the means of recovering his just debt, and for the purpose of avoiding the said outlawry when the same should be pronounced, voluntarily left the realm of *England* and went into parts beyond the seas, and of such his fraud and covin did voluntarily stay and remain in parts beyond the seas until after the awarding of the *ex*equi facias** and pronouncing of the outlawry. Upon this, issue was joined and a verdict was given for the defendant in error. A rule nisi had been obtained for rever-

ing the outlawry, notwithstanding the verdict found for the defendant upon the issue joined, upon the ground that a departure from the realm before the awarding of the *exi*gi facias**, though for the purpose of defeating the defendant in error of the means of recovering his debt and of avoiding the outlawry, did not preclude the defendant from reversing the outlawry upon the ground of his being beyond seas at the time when the *exigent* issued, and *Hesse v. Wood*, 4 Taunt. 691, was relied upon as an authority in point.

Scarlett and *Chitty* showed cause. It certainly appears to have been a settled rule that an outlawry is to be considered erroneous when awarded against a party who is absent from the kingdom. That is perfectly reasonable if the party outlawed is not aware of the process, but it is altogether otherwise if he has absented himself in order to avoid the process. The present application was founded upon the decision in *Hesse v. Wood*, 4 Taunt. 691, but the facts then before the court did not establish any contumacy in the plaintiff in error; it is merely suggested that he went abroad to avoid the action, not to defeat the outlawry. Here it has been found by the jury that he went abroad to avoid the outlawry, and "remained there until the awarding of the *exigent* and [316] the pronouncing of the outlawry." In *Co. Litt.* 259, a., it is laid down: "Albeit imprisonment be a good cause to reverse an outlawry, yet it must be by process of law in *invitum*, and not by consent or covin; for such imprisonment shall not avoid the outlawry, because upon the matter it is his own act."[†] This view of the subject appears to have been taken by the court in *Matthews v. Erbo*, 1 Ld. Raym. 349, where a motion was made to reverse an outlawry upon the ground that the defendant was an alien merchant who was resident abroad during the whole of the proceedings towards the outlawry. "But it was denied by the whole court; because by such means any person might contract debts and then go beyond sea, and so he would be out of the reach of the law." In *Ashley v. Stockwell*, Barnes, 324, the outlawry pronounced when the defendant was abroad was reversed, because it did not appear the defendant went abroad to prevent the outlawry, and the court could not say when he began to remain abroad with that object. In *Serecold v. Hampshey*, 12 East, 624, n, the court said: "If the fact were that the party was within the realm during the process of outlawry, and went abroad by way of covin at the time of the *exigent*, that should be replied." Now that warrants the distinction pointed out between the present case and *Hesse v. Wood*, and the court would never have said that such a fact should be replied, unless they thought it would, when replied, be sufficient to sustain the judgment of outlawry.

**Campbell* and *Patteson*, contra. This question depends entirely on [317] the validity of the plea. Now, it admits that the plaintiff in error was abroad at the time when the *exigent* was awarded, it is therefore bad, according to *Comyns' Dig. Ultagary* (C 1.) If this case can be brought within any exception to that general rule, it is for the other side to point it out. The rules as to outlawry are the same in civil and criminal cases, and if this outlawry be good, it follows that a person having gone abroad to avoid a charge of felony may be outlawed and rendered liable to be attainted, without the possibility of afterwards taking his trial for the offence. This consequence is so serious, that the court will pause before they hold the plea in this case a sufficient answer to the writ of error. *Matthews v. Erbo*, 1 Ld. Raym. 349, is in truth an authority in favor of the present plaintiff in error; the court indeed refused to reverse the outlawry on motion, but said, "the party might bring error and reverse it if he pleased," plainly showing their opinion that he had a right to reverse it in that mode. The passage cited from *Co. Litt.* 259, does not apply to absence beyond seas, and it is only by analogy that any argument can be

[†] This is a comment upon *Litt.* s. 437, which says: "And also if he which is in prison be outlawed in an action of debt or trespass, or in an appeal of robbery, &c., he shall reverse this outlawry against him;" whence it would appear that the commentary was intended to apply to cases of a criminal nature as well as others.

drawn from it. In *Richardson v. Robinson*, 5 *Taunt.* 309, the error assigned was, that the outlaw was beyond seas when the writ of exigent issued, and thence continually until the outlawry pronounced. Upon traverse of the whole allegation and issue joined thereon, it was held to be sufficient to prove that the outlaw was in parts beyond the seas at the time when the writ of exigent issued. Then *Hesse v. Wood* is expressly in point for the plaintiff in error ; the affidavits in that case showed beyond all doubt, that the party went abroad to *318] "avoid the process ; that point was strongly pressed upon the court, and yet the outlawry was reversed upon motion ; the party was not even put to his writ of error. In *Graham v. Henry*, 1 *B. & A.* 131, it appeared that the party was abroad when the process issued, the court reversed the outlawry upon motion, and required that bail should be given in the alternative, to render the defendant or satisfy the condemnation money, inasmuch as the party had not gone abroad to void the process. Whence it must be inferred that if he had gone abroad with that view, bail would have been required absolutely, not that the outlawry could not be reversed.

Cur. adv. vult.

In the course of the term the judgment of the court was delivered by *Bayley*, J. This case came before the court upon a rule *nisi* to enter a judgment for the plaintiff in error, *non obstante veredicto*. The writ of error was brought to reverse an outlawry in an action of *assumpsit*, and the error assigned was, that before and at the time of the awarding and issuing the writ of *exigifacias*, upon which the outlawry was pronounced, the defendant was in parts beyond the seas. To this assignment the defendant pleaded, that *before the awarding and issuing of the writ of exigifacias*, the plaintiff in error, of his fraud and covin, and in order to defeat the defendant in error of the means of recovering his just debt, and for the purpose of avoiding the said outlawry when the same should be pronounced, voluntarily left the realm of *England*, and went into parts beyond the seas, and of such his fraud and covin did voluntarily stay and *319] "remain in parts beyond the seas until after the awarding of the *exigifacias*, and the pronouncing of the outlawry. Upon this plea issue was joined, and a verdict was given for the defendant in error. The question, therefore, is, whether a departure from the realm before the awarding of an *exigifacias*, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid an outlawry (should any be pronounced) will preclude a defendant from reversing that outlawry, on the ground of his being beyond the seas at the time of the exigent, and from thence until after the time of the outlawry ; and we are of opinion it will not. An outlawry, even in a personal action, occasions a forfeiture of goods and chattels (2 *Roll's Abr.* 806. l. 40.) and a disability to sue ; and where the consequences are so penal, and the outlawry is *prima facie* erroneous, the court ought to be cautious before it sanctions a new bar to its reversal. *Rolle*, in his *Abbr.*, vol. ii. 804., puts many cases of outlawry where there is an absence from the realm at the time of the outlawry, but he puts none where the *exigent* is not awarded before the departure. One of the cases there is : " If a man goes over the sea, of his good will, for his pleasure, or for his own private business, and not for the king's or that of the realm, and then the exigent is awarded against him (for felony,) and he is outlawed, the outlawry is erroneous, as well as if he had been abroad for the business of the realm ; for he being there cannot take cognizance of the proclamations : but if, *after the exigent pronounced*, he departs voluntarily, without any business of the king or the realm, he shall never avoid the outlawry, inasmuch as he was *here* at the time of the *exigent* pronounced, by which he had cognizance of the matter with which he *was charged ; for otherwise, every one might defeat the course of justice by his own act, and remain beyond sea till the witnesses who are to prove him guilty are dead. In this case, however, he may assign for error, that he was beyond sea at the time of the *pro*

nouncing of the outlawry : for if he were within the realm after the *exigent* pronounced, and departed after, this shall come of the other side." This case, which is also in *Cro. Jac.* 484, makes the award of the *exigent* the *terminus*, after which a departure will be penal ; but neither this nor any other case attributes any penal consequences to a departure *before the exigent*. In *O'Kearny's* case, Skinner, 16, in an outlawry for treason, the error assigned was, that he was out of *England* from *December* till *November* following, within which periods the *exigent* was awarded, and the jury was charged to inquire whether he was beyond sea or in *England at the time of the award of the exigent*; and it being proved that he was abroad from the time of the award of the *exigent* to the time of the outlawry, though he was not abroad the whole time he had alleged, the court said *the time of the exigent* was the substance, and the rest of the time immaterial, and the outlawry was reversed. In *Serecold v. Hampsey*, M. 16. G. 2. cited 12 East, 624, the error assigned upon outlawry in a civil suit was this, that the plaintiff in error was beyond sea at the time of *the promulgation of the exigent* ; and the court said, it has been determined that as to the whole process of outlawry, it is not material in the assignment of error to show that the party was out of the realm during the whole time ; if he were abroad *at the time of the exigent* that is sufficient ; for that is the *substance. If the fact were that he was within the realm during the [*321 process of outlawry (i. e. as I apprehend, whilst the writs of *capias* were in progress,) and went abroad by way of *covin at the time of the exigent*, that should be replied. All these cases speak of *the award of the exigent* as the period upon which the right of reversal depends ; and we are not aware of any case to the contrary ; and in *Hesse v. Wood*, 4 *Taunt* 691, where a reversal upon motion was opposed upon the ground that the defendant below went abroad to avoid the action, the court said they had never heard that either the going abroad or the staying abroad with a view to avoid process, was a reason why the defendant should not reverse an outlawry when he returned ; and as a plaintiff may proceed by distress infinite to compel an appearance, and is not compelled to make the election of proceeding by *exigent* and outlawry, we see no ground upon principle why it should. The passage from *Co. Litt.* 259 b., that imprisonment, if by consent or covin, will be no ground for reversing an outlawry, does not appear to us to bear upon the question, for that must be taken to be an imprisonment not merely before the award of the *exigent*, but during the time that *the exigent is in operation, and the process of demanding the appearance of the party is going on*, and the non-appearance by fraud and covin during that period, the party being *within the realm at the time*, and wilfully, and of his own act, neglecting to appear when he is capable of doing so, is very different from the case of an absence beyond sea. We are not aware that any distinction has been hitherto made in the proceedings to outlawry, between civil and criminal cases ; and it would *be very [*322 dangerous to lay down a rule in the former which might be urged as a precedent for the latter, even in cases affecting the life of the outlaw. Upon the ground, therefore, that the plaintiff in error does not appear to have been within the realm after the *exigit facias* was awarded, and that a departure before, though for the purpose of avoiding a suit and delaying a creditor, has never yet been deemed a sufficient ground to prevent the reversing an outlawry, we are of opinion the rule should be made absolute ; and we have the satisfaction to know, that if we are mistaken in our judgment, the objection is upon the record, and may be reconsidered by a court of error.

Rule absolute.^t

^t This case, and that of *Marsh v. Horne*, were argued in the early part of this term. The judgments were not delivered till Saturday, May 7th.

MARSH v. HORNE.

A common carrier gave public notice that he would not hold himself accountable for any parcel above the value of 5*l.* if lost or damaged, unless the same were entered as such, and paid for accordingly when delivered. A person who knew that the carrier had given this notice, delivered to him a parcel containing goods, (much exceeding the value of 5*l.*) to be carried from *L.* to *B.*, and the carrier accepted them for that purpose. The price of the carriage was not then paid. The carrier knew that the parcel contained goods much exceeding the value of 5*l.* The parcel was lost: Held, that the carrier was not responsible.

Assumption against the defendant, a common carrier, to recover a compensation for the loss of two boxes of silk goods which had been delivered to him for the purpose of being conveyed from *London* to *Bath*. Plea, *non-assump-*
sit. At the trial before *Abbott*, C. J., at the *London* sittings after *Michaelmas* term, 1823, the jury found a special verdict, stating the following facts: The defendant before and on the 21st of *January*, 1823, was the proprietor of a stage-coach *for the carriage of passengers and goods for hire, from an inn called the *Cross Keys*, in *Wood Street*, in *London*, to *Bath*, in *Somersetshire*. The defendant before that day, and while he was proprietor of the said coach, published an advertisement, and gave public notice that he would not hold himself accountable for any parcel above the value of 5*l.* if lost or damaged, unless the same should be entered as such, and paid for accordingly, when delivered to the defendant. The plaintiff on the 21st of *January*, at two different times, delivered to the defendant two boxes of the plaintiff containing silk goods, being of a value greatly exceeding the value of 5*l.*, viz. of the value of 22*6l. 8s. 8d.*, to be by the defendant carried and conveyed by his said coach from the said inn to *Bath*, and there to be delivered to the plaintiff, and till so delivered to be kept by the defendant, for a certain reasonable reward to be therefore paid by the plaintiff to the defendant, which two boxes containing silk goods therein, the defendant accepted and received from the plaintiff for those purposes accordingly. The plaintiff paid the defendant two-pence for each of the boxes, for the booking thereof. At the time they were delivered to and accepted by the defendant, the plaintiff knew that the defendant had given such public notice and published the said advertisement, and the defendant knew that each of the boxes with the silk goods contained therein was of a value exceeding 5*l.*, but neither of them was entered by the plaintiff as being of such value, nor paid for accordingly; nor was any such payment demanded by the defendant. The defendant did not safely convey or deliver the same, but the boxes and silk goods, during the progress of the coach in its journey to *Bath*, were lost or stolen from *the hind boot of the coach, wherein they had been placed by the defendant, but without their being exposed to any greater than ordinary risk, and the same had not since been recovered, whereby the plaintiff had wholly lost the same.

R. Bayly, for the plaintiff. By common law, carriers were answerable for all losses except such as were occasioned by the act of God or the king's enemies. Notices limiting the responsibility of carriers were introduced and sanctioned by courts of law in order to protect them against the frauds of the owners of goods. The carriers, however, soon attempted to protect themselves by their notices in cases where the loss was occasioned by their own fraud or negligence. In *Beck v. Evans*, 16 East, 244, it was decided that such a notice would not protect a carrier who had been guilty of gross negligence, and *Le Blanc*, J., there expressed an opinion that the notice would not apply to goods of a large bulk and known quality, where the value must be obvious; and in *Wilson v. Freeman*, 3 Camp, 527, Lord *Ellenborough* seems to have acted upon that principle. By the contract found by the special verdict, the carriage was not to be paid before the final delivery of the goods. The notice does not apply to a case of that description, for the terms of it are that the carrier will

not be answerable unless the goods are entered *and paid for* accordingly; but here nothing was to be paid till the end of the journey. The jury find that the carrier was to have a reasonable reward; was that a fixed reward or not? If it was fixed, then he was bound to carry securely for that sum; if it was not fixed, then he was *to have what was a fair remuneration for carrying a parcel of great value. Here, by accepting the goods the carrier had undertaken to carry them from *London* to *Bath*: it is found that he knew the value of the goods to be more than 5*l.*, and yet did not demand to be paid for them according to the value: his conduct in that respect amounted to a waiver of the notice. He cannot now be permitted to say that, although he promised to carry the goods, he did not promise to deliver them.

Curwood, contra. It is clearly settled that a carrier may limit his responsibility, and here he has done so by public notice. He has therefore made a special contract, and that contract must be rescinded either by words or acts. Here there are no words sufficient to rescind the contract. Unless the true value of the goods were stated, no contract consistent with the notice could be made. Then, as to the acts, the carrier by accepting the goods did nothing inconsistent with the notice. The notice did not say that he would not carry parcels of greater value than 5*l.*, but that he would not be responsible for them. In *Gibbon v. Paynton*, 4 Burr. 2298, *Yates*, J., said, "that if the plaintiff was apprised of the defendant's advertisement, that might be equivalent to personal communication of the carrier's refusal to be answerable for money not notified to him." Now here the plaintiff was acquainted with the advertisement. In *Tylly v. Morrice*, Carth. 485, 400*l.* sealed up in a bag was delivered to a carrier: he was told it contained only 200*l.*, and it was held that he should be answerable only for 200*l.*, because his reward extended no further.

Cur. adv. mult.

*The judgment of the court was afterwards delivered by

ARBOTT, C. J. This case came before the court on a special verdict. It is an action against the proprietor of a stage coach, for the loss of two boxes, containing silk goods of very considerable value, sent by the defendant's coach from *London* for *Bath*. The declaration is in the usual form in *assumpsit*. (The Lord Chief Justice then stated the special verdict, and proceeded as follows.) Upon these facts it was contended on behalf of the plaintiff, that as the defendant knew the goods to exceed the value of 5*l.*, it lay upon him to demand payment of the insurance, and not having done so, he was to be considered as having waived the benefit of his notice: and that there was an incongruity in allowing a carrier to receive goods for the purpose of carrying them, and yet to say that he was not answerable if he did not carry them: and that as the price of the carriage in this case was to be paid on the delivery of the goods, the defendant might then have charged such a reasonable sum as would remunerate him for his labor and risk. We think, however, that there is not any such incongruity as was suggested. A person may engage to place goods in a course of conveyance and delivery, and yet declare that he will not be answerable for their loss. Indeed, this argument would altogether defeat the notices given by carriers, which have now prevailed in practice for so many years, and been recognized by so many decisions. And considering the notice given in the present case, we think the defendant could not upon the delivery of the goods have maintained a charge for any sum beyond the reasonable price of carriage, exclusive of the responsibility of the risk for loss. And as to the first point made in the argument, it may with equal propriety be said that the plaintiff, who *was informed of the defendant's advertisement, and did not offer to comply with its terms, chose to stand his own insurer, [326] as that the defendant, who knew the value of the goods to exceed 5*l.* and did not demand to be paid for insurance, engaged, nevertheless, to take a responsibility upon himself and indemnify the plaintiff. This case differs materially

from *Wilson v. Freeman*, 3 Campb. 527, for there the carrier was not only informed that the goods were valuable and liable to accident, and he might charge what he pleased, but he actually declared his intention to charge at a higher rate than for ordinary goods.

There are two decisions in conformity with our present opinion. The first is *Harris v. Packwood and another*, 3 Taunt. 264. In that case the goods were silk: the carrier had circulated an advertisement, declaring his charge for the carrying of silk goods to be at the rate of 9s. 4d. per cwt., while for ordinary bulky articles he charged only 6s. But he was held to be protected by an advertisement like that which has been published by the present defendant. It is not, indeed, distinctly stated that the carrier at the time he received the parcel knew that it contained silk, but that fact can hardly be doubted, because the parcel was to be conveyed to *Coventry*, where the plaintiff lived; and the defendant had sent a copy of his notice to him there. In this case it was also held that it was not incumbent on the defendant to prove affirmatively that he had used reasonable care, but that the proof of negligence lay on the plaintiff. In the case of *Levi v. Waterhouse*, 1 Price, 280, it was proved that the carrier's servant, who received the parcel, knew the value of its contents, but [328] *Gibbs*, C. J., "before whom the cause was tried, held that the mere knowledge of the value did not take the case out of the general rule: and his opinion was confirmed by the Court of Exchequer after argument and consideration, and a rule which had been obtained for setting aside the verdict was discharged. For these reasons, and upon these authorities, we think judgment must be entered for the defendant."

Judgment for the defendant.



FOSTER v. BLAKELOCK, Executor of L. BLAKELOCK.

A bailiff employed by an attorney to execute writs, may maintain an action against him for the fees usually paid on such occasions. A probate stamp is *prima facie* evidence that the executor has received assets to the amount covered by the stamp.

ASSUMPSIT for fees due and payable from the testator to plaintiff as a sheriff's officer, for work and labor in making divers captions and executing divers writs for the testator at his request, and the common money counts. Some counts alleged the promises to have been made by the testator, others by the defendant, as executor. Pleas, general issue, statute of limitations, and *plene administravit*. At the trial before *Cross*, Serjt., at the *Lent* assizes for *Yorkshire*, 1826, the plaintiff proved that he had been employed by the testator, an attorney, to execute various writs for him, and from time to time delivered an account to him, that he saw the account in question shortly before his death, when he said, "Let it wait awhile," but did not object to the items. Most of the business in question was done more than six years before the commencement of the action, but after the death of the testator, and within the six years, the plaintiff delivered an account to the defendant, who promised to settle it, [329] and it was admitted "that this took the case out of the statute. The account so delivered contained a statement of various arrests, for each of which the plaintiff charged 1*l.* 1*s.*, and several sums were charged at the rate of 1*s.* per mile for taking the parties arrested to jail, and it was proved that on taxation of costs those sums are always allowed by the master. The

account also contained two items for poundage upon levies under two writs of *fi. fa.* It was further proved, that the probate granted to the defendant had a stamp of 30*l.*, which is sufficient to cover assets to the amount of 1000*l.* Upon this evidence it was objected, first, that the plaintiff could not maintain an action for fees against the attorney suing out writs; and, secondly, that the evidence did not prove assets in the hands of the defendant as executor. The learned Judge overruled both these objections, and the plaintiff obtained a verdict.

Wightman now moved for a rule *nisi* for a new trial, on the ground of misdirection, by the learned Judge. In *Dew v. Parsons*, 2 B. & A. 562, and *Bilke v. Havelock*, 3 Campb. 374, it was decided that a sheriff cannot maintain an action for such fees as are claimed in this case. The sheriff was at common law bound to execute process without reward; certain statutes have since provided a compensation, but the sheriff is for that compensation bound to provide officers to execute the various duties of his office. There is not any reason why the bailiff should have a right to make a claim which cannot be supported by the sheriff, nor is there any case in favor of the present action. [Abbott, C. J. By employing a particular bailiff, do you not make him your servant?] If that were so, an action would lie against the bailiff for negligence in the execution of his duty, but such actions are always brought against the sheriff. But even if the bailiff could maintain an action for fees of this nature, he should sue the party in the cause and not the attorney, *Hartop v. Juckles*, 2 M. & S. 438. There it was held that the messenger, under a commission of bankrupt, could not in the first instance maintain an action for his fees against the solicitor under the commission. At all events, neither the sheriff nor his officer can sustain a demand for poundage. But, perhaps, it will be unnecessary for the court to decide these points, as the plaintiff, in order to answer the plea of *plene administravit*, merely proved the amount of the stamp upon the probate, and gave no evidence of assets having actually come to the defendant's hands.

ABBOTT, C. J. That was presumptive evidence which might have been rebutted, but in the absence of any answer I think it was sufficient. And upon the whole I am of opinion, that we ought not to grant a rule for a new trial in this case. I perfectly agree with what has been stated to show that the sheriff cannot maintain an action for fees beyond those which are given by statute. Here, the bailiff could claim no fee beyond the 4*d.* allowed by the 23 H. 8. against the party arrested, but the prohibition extends to him only. This question is therefore open, whether, if an officer be specially employed to make an arrest, it may not be presumed that the party so employing him, gives him to understand that he will pay such sum as the court upon the taxation of costs is in the habit of allowing. I think that such an understanding may very fairly be presumed. *Then of whom is the officer to receive this sum? Undoubtedly he may claim it from the attorney by whom he is employed, and is not bound to look to the party in the cause of whom he knows nothing. The very circumstance that an account was kept in this case, and from time to time rendered to the testator, is abundant evidence to show that he was the party understood to be primarily liable.

BAYLEY, J. Where a party leaves it to the sheriff to execute a writ by his own officer nominated by himself, the question is very different from that which exists in the present case. Here the attorney has selected an officer, and perhaps cast a burthen upon him which otherwise might have fallen upon another. As far back as living memory goes, an officer has always received a fee wherever he is employed to execute a writ at the instance of a plaintiff or his attorney, and that being so, the presumption in this case must be, that the attorney employed the plaintiff upon an undertaking to pay what was usual in such cases. The claim of poundage might not have been tenable, had any objection been made to it in the first instance, but as the testator saw the account wherein

it is inserted and made no objection, we must presume that the officer accounted to the sheriff for it, and that the attorney was to reimburse him. I therefore agree that the verdict ought not to be disturbed.

HOLROYD, J., concurred.

Rule refused.^t

^t Littledale, J., had gone to chambers.

Tenant from year to year, at a rent payable half yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year. Before the next half year expired, the landlord let the premises to another tenant, who occupied the same : Held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant.

Assumpsit for use and occupation of a set of chambers in *Clifford's Inn*. Plea, the general issue. At the trial before Abbott, C. J., at the Westminster sittings after last term, it appeared, that the defendant had been tenant to the plaintiff of the premises from year to year, at a rent payable half yearly. At Michaelmas, 1824, that being the expiration of the current year, the defendant, without giving any previous notice, quitted the chambers and sent the key to the landlord's agent, who at first refused to take possession, but before the expiration of the next half year, without any express communication with either party, he let the premises to another tenant, who entered and took possession thereof ; and this action was commenced to recover rent from Michaelmas, 1824, up to the time when the chambers were let to the new tenant. The Lord Chief Justice left the case to the jury with a direction in favor of the defendant, for whom they accordingly found a verdict.

Denman now moved for a new trial, and contended, that, as the defendant had not given a notice to quit, he remained liable to the landlord for rent afterwards accruing, and that the landlord was not barred of his right to recover, against the defendant for the period during which the chambers were unoccupied, by having afterwards, during the half year, let them to another person, inasmuch as the defendant had before that letting expressly refused to occupy any longer.

*BAYLEY, J. A landlord suing for rent must proceed either upon an express contract made with his tenant, or upon a contract which the law will imply from the relation subsisting between them. Here there was an express contract for rent payable half yearly, none therefore would be due until the expiration of half a year from Michaelmas, 1824. As the landlord had not received any notice of the tenant's intention to quit at that time, he had a right to consider him as his tenant for another year. But by letting the premises to another person, the landlord showed that he did not choose to consider the defendant as his tenant any longer, and as no rent was at that time due, he must be considered as having abandoned any claim which he might otherwise have acquired in respect of the time which had elapsed between Michaelmas, 1824, and the subsequent letting of the chambers.

HOLROYD, J. Before the 11 G. 2, c. 19, the landlord's remedy by action for his rent must have been upon the demise, and he could only recover according to it. The tenant's endeavor to give up the premises in this case was unavailing, and the possession was not altered until the subsequent letting by

the landlord. That letting was therefore an eviction of the tenant, and had this action for rent been brought upon the demise, the defendant might have pleaded the eviction as a bar. The statute 11 G. 2, c. 19, gave to landlords the action for use and occupation, in order to avoid the difficulties of suing upon a demise, but it never was intended that the new action should be maintainable where the former was not.

*LITTLEDALE, J. Under the contract between these parties, the rent was payable half yearly for a half year's occupation. That was an entire contract, and could not be apportioned without the assent of both parties. Had this declaration been framed specially according to the terms of the contract, it must have contained an averment that the plaintiff allowed, or was willing to allow, the defendant to occupy during the half year, but that averment would have been negatived by the letting to a third person before the expiration of that period. I am therefore of opinion, that the verdict was rightly found for the defendant.

Rule refused.



The KING v. BOLTZ.

Where a defendant, convicted upon an indictment for a libel, was committed to prison at the instance of the prosecutor, who would not afterwards bring him up for judgment, the court, at the prayer of the defendant, passed judgment in his absence.

The defendant having been tried at the *Norfolk* Spring assizes before *Abbott, C. J.*, and found guilty of publishing a libel, was apprehended and committed to prison under a warrant granted by the Lord Chief Justice. Upon an affidavit stating these circumstances, and that the defendant was unable to procure bail, and that he believed the prosecutor did not intend to bring him up for judgment, but to suffer him to remain in prison, a rule *nisi* was granted, calling upon the prosecutor to show cause why judgment should not be pronounced upon the defendant in his absence, unless the prosecutor would undertake to bring him up for judgment during the term. After hearing *Storks* against the rule, and *F. Kelly* in support of it, the court made it absolute, and judgment was afterwards passed upon the defendant in his absence.



*DOE, on the demise of WOOD et al. v. TEAGE, et al. [335]

Where, in ejectment against a devisee, the question turned upon the sanity of the testator at the time of making the will: Held, that an executor, who took a pecuniary interest under the will, was a competent witness to support it.

THIS was an ejectment brought to recover the possession of lands and premises in the parish of *Stoke Fleming*, in the county of *Devon*. At the trial before *Burrough, J.*, at the last Spring assizes for that county, it appeared that the lessor of the plaintiff claimed the premises in question in right of his wife, as the heir at law of *Dixon Nicholas Laud*. The defendants claimed under his will, and the question was, whether at the time of making that will the tes-

tator was sane or not. The testator by that will appointed *W. L. Hockin* his executor, who at the time of the death of the testator was indebted to him. Upon his being called as a witness in support of the will, it was objected, on the part of the plaintiff, that the executor was not a competent witness, inasmuch as the testator by appointing him executor had released the debt, and therefore that he had an interest in supporting the will ; for if the verdict were found against the sanity of the testator, it would destroy the will altogether. The statute 25 G. 2, c. 6, where legatees attest the will, avoids the legacy and makes them competent witnesses. This was not a case within that statute, because *Hockins* was not an attesting witness ; but that statute shows clearly that at common law a legatee would not be a competent witness, on the ground of interest. The learned Judge overruled the objection, and the jury found a verdict for the defendants.

*^{336]} *Wilde, Serjt.*, now moved for a new trial, on the ground that the testimony of the executor had been improperly admitted.

Per Curiam. The verdict in this case would only have the effect of establishing the will as to the real property. It would not be any evidence in the ecclesiastical court upon a question whether it were a good will as to the personality ; nor would the probate granted to the executor have been any evidence in this cause of the sanity of the testator. In any proceeding to establish the will as to the personality, this suit would be treated as *res inter alios acta*.

Rule refused.

DEAN v. BROWN, et al.

A woman before her marriage carried on trade, and being lame, kept a horse and gig for the purpose of going round to her customers. In contemplation of marriage, she, by deed, conveyed to a trustee all her household furniture, goods, and chattels, enumerated in a schedule, and the stock in trade, materials and other articles then belonging to her *in and about her said business*. The horse and gig were not included in the schedule, but after her marriage were used by her as before. In an action against the sheriff for taking the horse and gig under an execution against the husband, the jury found, that at the time when the deed was executed, the horse and gig belonged to the woman "*in and about her business*." Held, that it was the property of the trustee

TRESPASS against the defendants for seizing under a *f. fa.* against *W. Hall*, a horse and gig alleged to be the property of the plaintiff, as trustee for *M. A. Hall*, the wife of *W. Hall*. Plea, not guilty. At the trial before Abbott, C.J., at the London sittings after *Trinity* term, 1825, it appeared that before the marriage of *W. H.* with *M. A. H.* the latter carried on the business of a feather and flower maker ; and, being lame, kept the horse and gig in question for the purpose of going round to her customers to receive orders and carry home ^{*337]} goods. In contemplation of the marriage, she "executed a deed conveying to the plaintiff, as trustee for her, "all and singular the several articles of household furniture, plate, linen goods, chattels, and effects particularly specified and enumerated in a schedule indorsed on the deed. And also the stock in trade, materials, and other articles then belonging to the said *M. A. in and about her said business*." The horse and gig were not included in the schedule, but, after the marriage, were used by Mrs. *Hall* as before, and occasionally by her husband also. For the defendants it was contended, that as the property in question was not inserted in the schedule it could not pass by the words "goods, chattels, and effects ;" and that it could not be considered as stock in trade. The Lord Chief Justice left it to the jury to say, whether

at the time when the deed was executed the horse and gig belonged to *M. A. Tyler* "in and about her business." They found that it did, and thereupon a verdict was entered for the plaintiff; and in *Michaelmas* term, a rule *nisi* for entering a nonsuit was granted.

Scarlett and *Comyn* showed cause, and contended that the question was entirely one of facts and was properly left to the jury. That the deed conveyed to the plaintiff every thing that belonged to *M. A. Tyler* in and about her business; and that as the jury found that the property in question did so belong to her, the plaintiff was entitled to retain the verdict which had been found for him.

Gurney and *Holt*, contra, contended that the question depended upon the construction of the deed. That it could not pass under the first class of property *mentioned, because it was not included in the schedule; and that it could not pass under the second, not being stock in trade. The variable nature of stock in trade renders a schedule of it useless; and that is the reason for not adding one. The words "materials and other articles" following "stock in trade," must, therefore, mean articles *cujusdem generis*; but the property in question was of a permanent nature, and ought to have been mentioned in the schedule, if it had been intended to convey it to the trustee.

Per Curiam. The settlement included all things "belonging to *M. A. Tyler* in and about her business;" and the jury have found that the property in question did so belong to her. It is true that such things are not peculiar to that business; but if kept really and *bona fide* for the purpose of the trade, and not for pleasure, they would pass by the deed. The jury have in effect found that the horse and gig were kept for the trade, and not for pleasure; and it does not appear that there was any other property to satisfy the words "other articles," which follow "stock in trade," in the deed. The rule for a nonsuit must therefore be discharged.

Rule discharged.

*EDWARDS v. LUCAS, et al.

[339]

In case against the sheriff for a false return to a *f. fa.*, the declaration stated, that by the judgment of the court, the plaintiff recovered against *A. B.* 39*l.*, which were adjudged to him for his damages by him sustained, as well by occasion of his not performing certain promises and undertakings, as for his costs, &c. At the trial, it appeared by the judgment produced in evidence, that as to all the counts in the declaration, except the first, a *remitititur* was entered, and that the damages were given for the non-performance of the promise and undertaking in that count mentioned; Held, that this was a fatal variance.

CASE against defendants, late sheriffs of *London*, for a false return to a *testatum fi. fa.* issued against the goods of one *J. B.*, on a judgment recovered against him by the plaintiff. Plea, the general issue. The declaration in setting out that judgment stated, "that by the consideration and judgment of the court he recovered against *J. B.* 39*l.* 10*s.*, which were adjudged to him for his damages, by him sustained, as well by occasion of the not performing certain promises and undertakings, before then made by *J. B.* to plaintiff, as for his costs, &c., *prout patet*," &c. At the trial before *Abbott*, C. J., at the *London* sittings after last *Trinity* term, the record of the former judgment being produced in evidence, it appeared that as to all the counts in the declaration except the first, a *remitititur* was entered, and that the damages were given for the non-performance of the promise and undertaking in that count mentioned. The counsel for the defendants thereupon objected that there was a fatal vari-

ance between the judgment set out in the declaration and that produced in evidence, and *Baynes v. Forrest*, 2 Str. 892, was cited. The Lord Chief Justice reserved the point, and the plaintiff having obtained a verdict, a rule *nisi* for entering a nonsuit was granted in *Michaelmas* term; and now

*340] *Hutchinson* showed cause. The objection upon which *this rule was granted depends upon the decision in *Baynes v. Forrest*. But that case is distinguishable from the present in two particulars. That was a proceeding by *sci. fa.*, upon a judgment which was alleged to be for damages by reason of the non-performance of a certain promise and undertaking; the judgment was for non-performance of several promises. In that case, therefore, the allegation was not proved, for the damages could not be severed. There, too, the former judgment was the foundation of the proceeding; here, it was only inducement, and the proof supported the allegation, that a judgment for a certain sum was recovered, and that sufficed, *Hamborough v. Wilkie*, 4 M. & S. 474. It makes no difference in such a case that the record is pleaded with a *prout pate*, *Stoddart v. Palmer*, 3 B. & C. 2.

Gurney and *Chitty*, contra, were stopped by the court.

ABBOTT, C. J. I am of opinion that the rule for entering a nonsuit in this case must be made absolute. The former judgment was an essential part of the plaintiff's ground of action. He was bound to set out a judgment warranting the writ of *sc. fa.*, and, in so doing, he alleged that judgment to be for damages for the non-performance of several promises, whereas the judgment produced appeared to be for the non-performance of one promise. It is certainly immaterial, as far as these defendants were concerned, whether the judgment was for the breach of one or several promises, but it was material *341] that the plaintiff should state that judgment *correctly. If this declaration were held sufficient, it might be urged with some force, that a judgment alleged to be in *assumpsit* would be satisfied by proof of a judgment in *tort* or in debt. It, therefore, appears to be the safer course to hold that the variance is fatal.

Rule absolute.

GREGORY v. HURRILL.

In December, 1811, *G.*, then abroad, being indebted to the sum of 1000*l.* to the estate of *W.*, a bankrupt, the assignees of *W.* issued against him writs of special *ca. alias* and *pluries*, in *Mich.* term, 1812, and *Hil.* term, 1813, which were delivered to the sheriff of *London*, and by them duly indorsed, *non est inventus*, but the writs remained in the sheriff's office. In 1814, *G.* being on board a ship in the *Dowes* waiting for fair wind, went several times to *Deal*, but *W.*'s assignees had not notice of his being there. In 1819, *G.* returned to reside in *England*. In 1821, the debt of 1000*l.* being still unpaid, the assignees of *W.* struck a docket against *G.*, and upon their petition a commission issued against him, and on the 21st of March in that year he was declared a bankrupt. *G.* petitioned to have the commission superseded, and by an order of the Vice-Chancellor, made May, 1821, it was ordered that *G.* should be at liberty to bring trever against his assignee to try the validity of the commission; which action he accordingly commenced the 19th of May, 1821. Two days afterwards the attorney for the petitioning creditors took away the writs of *sp. ca. alias* and *pluries*, from the sheriff's office; and on the 11th of July, 1821, the last day of *Trinity* term, a roll of the proceedings, with the continuances on the writ of *pluries* brought down to the term next preceding the date of the commission issued against *G.*, was docketed and carried in, and on the same day the three writs were filed of record. Upon a case stating these facts: Held, that the assignees of *W.* had not, at the time of suing out the commission, awarded and issued against *G.*, or on the 21st of March, 1821, when he was declared a bankrupt, a valid debt as petitioning creditors to support the commission.

THE following case was sent by the Lord Chancellor for the opinion of this court:

In the year 1811, one *R. L. Hopkins*, (since deceased,) and *G. B. Gregory*

having entered into a commercial speculation or adventure, in shipping goods on board the ship *Irvine*, bound on a voyage to the coast of *Barbary*, a partnership agreement was drawn up, and signed by both parties. On entering into that agreement, *R. L. Hipkins* and his wife transferred 3000*l.* bank annuities into the name of *Benjamin Walsh*, a broker, to answer the purposes of the speculation, who thereupon agreed to become the agent of the concern upon the *usual terms of interest, and a commission of two and a half per cent. being allowed upon the amount of all advances and payments made by him in the course of such agency, and that the proceeds of the cargo were to be remitted to *Walsh* for the payment of such advances. Various goods were purchased, and the different merchants and tradesmen were referred to *B. Walsh*, who either paid in cash, or accepted bills of exchange for the amount. The goods were shipped on board the ship *Irvine*, bound to *Algiers*. The said *G. B. Gregory* soon afterwards sailed with the said cargo for *Algiers* in the *Irvine*. *B. Walsh* continued to pay the bills so accepted by him on account of the goods so shipped on board the *Irvine*, down to the month of December in the said year 1811, when he became a bankrupt, at which time there was a balance exceeding 1000*l.* due from *Gregory* and *Hipkins* to *B. Walsh* on account of such adventure, and which balance has not at any time since been reduced. On the 24th of June, 1812, while *Gregory* was abroad, *J. T. Taylor* and *J. Parker*, as assignees of *B. Walsh*, commenced an action by special original in his majesty's Court of King's Bench against *Hipkins* and *Gregory* for the recovery of a debt then claimed to be due and owing from *Hipkins* and *Gregory* to the estate of *B. Walsh*, and for that purpose sued out a writ of special *capias*, directed to the sheriffs of *London*, returnable on the morrow of *All Souls* in *Michaelmas* term in the aforesaid year 1812, and indorsed for bail for the sum of 1000*l.* and upwards. The said *R. L. Hipkins* being at the time of suing out the said writ a prisoner in the King's Bench prison, was detained in custody at the suit of the said assignees of *B. Walsh* for the aforesaid debt of 1000*l.* A commission of bankrupt was on or about the *18th of August, 1812, upon the petition of the said *J. T. Taylor* and his then copartner *J. Taylor*, awarded and issued against *R. L. Hipkins* as the copartner in trade of *Gregory*, and under which commission he, *Hipkins*, was duly adjudged a bankrupt. At a meeting under the commission, held at *Guildhall, London*, on the 5th of September, 1812, the said *J. T. Taylor* was duly chosen sole assignee of the estate and effects of *Hipkins*, and an assignment of such estate and effects was executed to *J. T. Taylor* by the major part of the commissioners in the commission named. *Hipkins* died in September, 1813. In November, 1812, *Gregory* being then abroad, an alias writ of special *capias* was sued out against *Hipkins* and *Gregory*, at the suit of the assignees of *B. Walsh*, directed to the sheriffs of *London*, returnable in fifteen days of *St. Martin*, in *Michaelmas* term, 1812; and on the 11th day of the following month of December, 1812, a pluries writ of special *capias* was sued out by the assignees of *Walsh* against *Hipkins* and *Gregory*, also directed to the sheriffs of *London*, and returnable in eight days of *St. Hilary*, in *Hilary* term in the following year, 1813; and both the said last-mentioned writs were also indorsed for bail for 1000*l.* All the said writs of *capias alias* and *pluries* were lodged at the secondaries or sheriff's office for *London*, in and between the beginning of *Michaelmas* term, 1812, and the end of *Hilary* term, 1813, and were severally duly returned *non inventi* by the then sheriffs, before the end of *Hilary* term, 1813. The said action was so commenced by special original in the Court of King's Bench, and such several writs of *capias alias* and *pluries* sued out thereon, with a view to outlaw the said *G. B. Gregory*, but no outlawry ever took place, the *completion of such intended outlawry having been subsequently suspended by reason of the commission of bankrupt having been so awarded and issued against *Hipkins*, as before mentioned. At the trial of the action hereinafter mentioned

such evidence of the return of *Gregory* to *England* in the month of *April*, 1814, was given as is hereinafter also mentioned. *Gregory* afterwards returned to *England* in *July*, 1819. The assignees of *Walsh*, on the 15th of *February*, 1821, commenced a new action in the Court of King's Bench against *Gregory* as the surviving partner of *Hipkins*, and sued out a bill of *Middlesex* against *Gregory*, returnable on *Wednesday* next, after fifteen days of *Easter*, in *Easter* term in the aforesaid year, 1821; and which bill of *Middlesex* was indorsed for bail for 133*l.* 6*s.* 10*d.*, being the same identical debt, with an accumulation of interest thereon, as that for which the former action was brought against *Hipkins* and *Gregory* jointly. A warrant on the said bill of *Middlesex* was made out and delivered to an officer of the sheriff of *Middlesex* for the purpose of executing the same, and that such officer went with it to the house or residence of the said *Gregory*, in order to arrest him, and made several attempts to effect it, which having failed, the assignees of *Walsh*, (the plaintiffs in that action,) on the 17th of *March*, 1821, proceeded to strike a docket, and on the 22d of the same month of *March*, 1821, issued a commission of bankrupt against *Gregory*, and he was thereupon adjudged and declared a bankrupt. *Aaron Hurrill*, Esq. was duly chosen sole assignee of the estate and effects of *Gregory*, at the second meeting of the commissioners held at *Guildhall*, on the 21st of *April*, 1821. *Gregory* *having opposed the said commission, [345] on the 12th of *April*, 1821, preferred his petition to the Lord Chancellor, thereby praying that the same might be superseded.

By an order of the Vice-Chancellor made on hearing the said petition on the 9th of *May*, 1821, it was ordered, that the said *G. B. Gregory*, should be at liberty to bring and prosecute an action of trover against the assignee of his estate and effects, who on the trial was to admit possession of goods to the value of 5*l.*, in order to sustain the said action, and the petitioning creditors under the said commission were to defend the action in the name of the assignee, upon their indemnifying the assignee, and the same was to be tried in his majesty's Court of Common Pleas in *London*; and it was ordered, that all proceedings under the said commission should be stayed until further order. *Gregory*, in pursuance of and in obedience to the order, did, on the 17th of *May*, 1821, commence an action of trover against *Hurrill*, his assignee, in his majesty's Court of Common Pleas accordingly. On the 19th of *May*, 1821, two days after the commencement of the action of trover to try the validity of the said commission, the attorneys for the petitioning creditors under the commission so issued against *Gregory*, fetched away from the secondaries or sheriff's office for *London*, the said three several writs of capias, alias, and pluries so issued out against *Hipkins* and *Gregory*, in the year 1812, as aforesaid, with the returns so as aforesaid indorsed on the said three writs. The said three writs were all filed together in the record office of the Court of King's Bench, on the 11th of *July*, in the aforesaid year, 1821, being the last day of *Trinity* term, *in that year, and a roll of the proceedings, with the continuances on the writ of pluries brought down to the term next preceding the date of the commission so issued against *Gregory*, was docketed and carried in, and on the same day the said three writs were so filed of record, which, in point of fact, was the day next before the day appointed for the trial of the action of trover, and only two days before such trial actually took place. The action of trover came on for trial before the Lord Chief Justice, of the Court of Common Pleas, and a special jury, at *Guildhall*, on the 13th of *July*, 1821, when the said *J. T. Taylor*, and *J. Parker*, as such petitioning creditors as aforesaid, proved the trading and act of bankruptcy of *Gregory*; and when they also, by the production of certain documents and the testimony of *Walsh*, established a debt of 1477*l.* 11*s.* 6*d.*, due to them as such assignees as aforesaid, for and on account of the several advances so as aforesaid made by *Walsh*. Whereupon *Gregory*, adduced as evidence *S. Hatch*, the clerk of Mr. *Iggulden*, the vice-consul of *Sweden*, resident at *Deal*, who identified *Gregory*, as

being a person, who, in the month of *April*, 1814, had called at the office of the said vice-consul at *Deal*, several times, whilst waiting for a passage in the ship *Hazard*. He left a letter with the witness to be delivered to the captain of a ship called the *Aurora*, and *Gregory*, waited there several days, which letter was given in evidence at the trial, and is as follows, viz. "Downs, 21st of April, 1814. Captain M. F. Bohl. You will proceed from hence with all dispatch for the port of *Amsterdam*, with your cargo, waiting my further orders in regard of the same. Your obedient servant, G. B. Gregory. P. S. As all privateers are *called in, there is no occasion for convoy." Addressed, "Captain M. F. Bohl, Swedish schooner *Aurora*, care of E. Igglelden, Esq., Deal, (expected in the *Downs* hourly from *Portsmouth*.)" The testimony of the said *S. Hatch*, was the only evidence offered by the said bankrupt of his having been in *England*, from the year 1811, till the year 1819; whereupon *Taylor* and *Parker*, the assignees of *Walsh*, produced one *Mertha Salter*, as a witness, who stated that she knew the said *G. B. Gregory*, in *Sweden*, in 1815, and that she had seen him in *England*, at the house of Mr. *Pattwick*, in the year 1819, when he said that he had sailed from *England*, in the year 1811, and returned in 1819; and that she had also heard him say, in the presence of his sisters, that he had never been in *England*, during the whole seven years, and that she thought she had heard him say so more than once. And the assignees of *Walsh*, also produced, and put in evidence at the said trial, examined office copies of the aforesaid writs of capias, alias, and pluries, and returns indorsed thereon, and also an examined office copy of the roll of the proceedings, with the continuances so entered thereon. The Lord Chief Justice, thereupon directed the jury to find a verdict for the plaintiff, *Gregory*, reserving the point for the consideration of the Court of Common Pleas, as to the effect of the continuances so as aforesaid entered on the roll, and whether the same were sufficient to take the case out of the statute of limitations. (The cases of *Taylor v. Hipkins*, 5 B. & A. 489, *Gregory v. Hurrill*, 3 B. & B. 212, and *Gregory v. Hurrill*, 1 Bing. 324, were then briefly stated.)

*On the 8th of July, 1823, *Gregory*, preferred another petition to the Lord Chancellor, thereby stating that, notwithstanding the opinion of the Judges of the Court of Common Pleas, he was advised that the debt of the petitioning creditors (if any) was really and actually barred by the statute of limitations, and was not a valid debt at the time of issuing the said commission against him to support such commission. Upon the hearing of the last-mentioned petition, his Lordship was pleased to order that a case should be stated for the opinion of his majesty's Court of King's Bench, upon the following question, "Whether under the circumstances stated, the said J. T. *Taylor*, and J. *Parker*, as assignees of the estate and effects of *Walsh*, who were the petitioning creditors under the commission of bankrupt awarded and issued against *Gregory*, had at the time of suing out the said commission of bankrupt, viz. on the 22d of March, 1821, and on the 9th of April, 1821, when *Gregory* was declared a bankrupt, a valid debt as petitioning creditors, to support the said commission as well as upon any trial to be had at law, as upon any criminal proceeding by information or indictment that might have been preferred against the said bankrupt under the statute of the 5 G. 2, c. 30, s. 1., relating to offences therein charged against bankrupts (if any such had been necessary,) regard being had in both cases to the time, viz. the 11th of July, 1821, when the entry of the continuances on the roll was made; and in the latter case, considering that such criminal proceeding had been commenced at any time after the adjudication of the said bankruptcy, but before the entry of the said continuances on the roll."

**Campbell*, for the plaintiff. There was not any good petitioning creditor's debt in this case at the time of the suing out of the commission or the adjudication of bankruptcy. The debt claimed was barred by the

statute of limitations, and such a debt is insufficient. According to *Swayne v Wallinger*, 2 Str. 748, and *Quantock v. England*, 5 Burr. 2628, a third person cannot raise such an objection where the bankrupt has submitted to the commission ; but here the bankrupt makes the objection, and where such a debt has been proved, the Lord Chancellor has ordered the proof to be expunged, *ex parte Dewdney*, 15 Ves. 479, *ex parte Roffey*, 2 Rose B. C. 245. But it will be said that this debt was within the exception as to merchants' accounts. That is not so ; it was a mere debt. There were no mutual dealings, and the exception in the statute applies only where there are dealings on each side, *Barbor v. Barbor*, 18 Ves. 286, *Foster v. Hodgson*, 19 Ves. 179, *Catling v. Skoulding*, 6 T. R. 189. Then, was the plaintiff abroad until within six years of the commencement of the suit against him in 1821 ? The statute of 21 Jac. 1, c. 16, applies only to the absence of the creditor, the saving on account of the absence of the debtor depends upon the 4 Anne, c. 16, s. 19., which makes the same exception in favor of plaintiffs when the defendant is abroad, as the 21 Jac. 1, had done in case of the plaintiff's absence. But *Gregory*, returned to *England*, and was at *Deal*, for several days in 1814. It makes no difference that *Walsh*'s assignees did not know of his return, for the statute does not require such knowledge in the creditor in order to make the time begin to run. *If *Gregory* had remained in *England*, the six years would have been computed from the first day of his return. It is clear, therefore, that the time then began to run, and would continue to do so although he again went abroad, *Smith v. Hill*, 1 Wils. 134, *Doe v. Jones*, 4 T. R. 300. The exception in the 4 Anne, c. 16, will not, therefore, aid the present defendant, and his case must rest upon the effect of the writs which were sued out in 1812—13, and then indorsed by the sheriff *non est inventus*, but which were not returned and filed until after the commission issued. The roll was not carried in and continuances entered until two days before the trial in the Court of C. P. In the first place it may be doubted whether a commission of bankrupt can be considered as a continuance of a capias, *Smith v. Bower*, 3 T. R. 662. But, waiving that objection, if a writ is sued out and returned, that indeed will avoid the statute ; but if the writ be not returned, it has no such effect, *Brown v. Babington*, 2 Ld. Raym. 880. The court is not in possession of the suit until the writ is returned, *Harris q. t. v. Woolford*, 6 T. R. 617. Now the return of the writ is the return to the treasury of the court, not the mere indorsement by the sheriff, as appears by the rule of court, T. 30, G. 3, which requires the *custos brevium* to indorse upon every writ on what day and at what hour the same was filed. And in *Bates v. Jenkinson*,^t *Buller*, J., says, " If the first writ had been sued out, and kept in the plaintiff's pocket, there would have been great objection, (i. e. to treating it as the commencement of a suit so as to avoid the statute of limitations,) but "not any when returned of record, and not merely indorsed by the sheriff." *Stanway v. Perry*, 2 B. & P. 157, and *Weston v. Fournier*, 14 East, 491, are to the same effect, and in *Beardmore v. Rattenbury*, 5 B. & A. 452, the fact of the first writ having been returned, was relied upon to show that it was a good commencement of the action. At all events the adjudication of bankruptcy in this case was wrong, for at the time when the docket was struck, and the commission issued, the writs had not been filed, nor the continuances entered. The petitioning creditor, therefore, had not at that time perfected his title at law, and was not in a condition to show that *Gregory*, was indebted to him. Suppose the bankrupt in such a case were not to surrender within the time limited, if he were originally improperly adjudged to be a bankrupt, that would be an answer to an indictment under the 5 G. 2, c. 30, *Rex v. Bullock*, 1 Taunt. 71 : but if the subsequent return of the writs and entry of continuances could revive the debt and make the commission good, he might by mat-

* Cited by Lord Kenyon, in *Harris v. Woolford*.

ter *ex post facto* be made guilty of a capital offence. Besides this, to make him so or not would be in the option of the sheriff, who cannot be compelled to return a writ unless he is called upon to do so within six months after he quits his office. Suppose a prosecution to have been commenced before the entry of the continuances, in that state of things it must fail; could it then be made available or not by the subsequent entry of them? Lastly, to allow the continuances in this case, entered after the issuing of the commission, to suffice for the support of the commission, would be to allow the fiction of law to prevail against *the truth of the fact, in a case where that is material, which would be contrary to the decisions in *Johnson v. Smith*, 2 Burr. 950, [*352] and *Lyttleton v. Cross*, 3 B. & C. 317.

Denman, contra. This commission was good for all purposes; and even if that were not so it might be good for the purpose of distributing the bankrupt's estate. In the first place, the debt to *Walsh's* assignees arose out of merchants' accounts. *Walsh* was clearly the factor of *Gregory* and *Hipkins*. Now, whatever *dicta* may have been thrown out, the statute itself says nothing about mutual accounts; and the language of Lord *Kenyon*, in *Catling v. Skouling* shows that, in order to take a case out of the operation of the statute, it is not necessary that any item of the account should have arisen within six years. [*Bayley*, J. In that case there were mutual items, and that is noticed by Lord *Kenyon*.] Secondly, the debtor was beyond seas. It is not stated as a fact that he returned in 1814, but conflicting evidence as to that fact is set out; the court therefore are, as to that, placed in the situation of a jury, and must determine whether *Gregory* did return at that time. But supposing him to have come to *Deal* at the time and in the manner described, still it was not such a return as is contemplated by the 4 Anne, c. 16. It does not appear that there was any *animus revertendi*; but, coming into the *Dowms* by accident, he went on shore for the purpose of leaving a letter with the *Swedish* consul. Suppose a person, upon whom a right of entry descends during his absence from *England*, to be stranded on the coast, he knows nothing of this *right, and afterwards continues his voyage, and remains abroad more than twenty [*353] years, it would be very hard to say that his right was barred by the statute of limitations; yet that consequence must follow if *Walsh's* assignees are barred in this case. Thirdly, the writs issued in 1812, and 1813, were duly returned: it is so stated upon the face of this case, and the only question is, whether the continuances afterwards entered could set up the writs so as to take the claim out of the statute. It cannot be said that the action was not commenced and sued, when writs were actually issued and delivered to the sheriff, and returns indorsed by him, for although they might be inchoate returns only at the time when made, yet when delivered out of his office, they became perfect, and were returns from the time when the writs were returnable. This case has in effect received three determinations already; first, in this court in *Taylor v. Hipkins*, 5 B. & A. 489, where the court held that the writ had been duly returned and filed so as to save the statute of limitations, and that the continuances were properly entered; again by the whole of the Court of C. P. in *Gregory v. Hurrill*, 3 B. & B. 212, which was an action brought to try the validity of this commission, and in which *Richardson*, J. gives an answer to the objection that a commission cannot be valid as a continuance of the former suit. He says, "As long as a remedy was open to the party, by which the debt might have been recovered any where, it was not barred by the statute." The point was again decided by three of the Judges of that Court in a case between the same parties, sent by the Lord Chancellor for the opinion of that Court, when they *held that the petitioning creditor had a good debt at [*354] the time of suing out the commission now disputed, 1 Bing. 324. If then the writs were duly returned and filed, and the continuances properly entered, the demand was not barred by the statute; it was, consequently, a good petitioning creditor's debt, and the commission is valid for all purposes.

But if that were otherwise, still there are cases which show that proceedings may be good for civil purposes, although not for criminal, *Bones v. Booth*, 2 W. Bl. 1226, *Rex v. Punshon*, 3 Camp. 96, and therefore a commission of bankrupt may be good for the purpose of distributing the estate of the bankrupt, although not for rendering him liable to criminal proceedings.

Cur. adv. vult.

The following certificate was afterwards sent to the Lord Chancellor:

"This case has been argued before us by counsel, and we are of opinion, that, under the circumstances stated, the said *J. T. Taylor* and *J. Parker*, as assignees of the estate and effects of the said *Benjamin Walsh*, who are the petitioning creditors under the said commission of bankrupt awarded and issued against the said *G. B. Gregory*, had not at the time of suing out the said commission of bankrupt, viz., on the 22d of *March*, 1821, or on the 9th of *April*, 1821, when the said *G. B. Gregory* was declared a bankrupt, a valid debt as petitioning creditors to support the said commission."

C ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

J. LITTLEDALE.

*BERKELEY v. HARDY.

Where an indenture was made between "A. for and on behalf of B. on the one part, and C. on the other part," A. being thereto authorized by writing, under B.'s hand, but not under seal, and A. executed the deed in his own name: Held, that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B.

Covenant upon an indenture of lease. Plea, *non est jactum*. . The cause, and all matters in difference between the parties, were referred to a barrister, who, by his award as to the action, found that it was brought upon certain indentures which were, on the 24th of *July*, 1822, signed, sealed, and delivered by one *J. S.* for and on the behalf of the plaintiff, and by the said defendant respectively, the said *J. S.* having been theretofore authorized by the plaintiff, by writing under his hand, but not under seal, to execute the same for him, and on his behalf, the beginning of which said indentures was as follows: "Agreed the 24th of *July*, 1822, between *James Simmonds*, for and on behalf of *W. F. Berkeley* (the plaintiff), on the one part, and *J. Hardy*, of the other part, as follows: the said *W. F. Berkeley* agrees to let, and the said *J. Hardy* agrees to take, all those messuages, tenements, farms, and lands," &c. The *reddendum* was to the plaintiff, and the covenants were expressed to be made by *Hardy* to *Berkeley*, and by *Berkeley* to *Hardy*, the name of *J. Simmonds* never occurring in the lease after the commencement above set out, until the conclusion, which was as follows: "In witness whereof we have hereunto set our hands and seals the day and year above written. *J. Simmonds* (l. s.) *J. Hardy* (l. s.)" The arbitrator then found that *J. Hardy* had committed certain breaches of covenant, and assessed the damages at 280*l.*, and then proceeded: "But it having been objected on the *part of the defendant, that the said *W. F. Berkeley* was not entitled in law to maintain any action of covenant in his own name upon the indentures; and it appearing to me that such objection to the form of the action is well founded, I do hereby order and adjudge that the said *W. F. Berkeley* is not entitled to recover his said damages in such action of covenant." The arbitrator then proceeded to dis-

pose of other matters not material to this question. In *Hilary* term a rule nisi was obtained for setting aside the award, in as far as it determined that the said action of covenant was not maintainable.

Tindal and *Coleridge* now showed cause. Upon the facts disclosed in the award, it is clear that the plaintiff could not maintain covenant on the deed in his own name. First, his agent *Simmonds* had not any sufficient authority to bind him by deed: the authority should have been under seal, not under hand only, *White v. Crayler*, 6 T. R. 176; *Horsley v. Rush*, cited in *Harrison v. Jackson*, 7 T. R. 209; *Williams v. Walsby*, 4 Esp. 290; *Steiglitz v. Eg-gington*, Holt, N. P. C. 141. Secondly, supposing the authority to have been sufficient, still the execution was improper: the attorney should have executed in the name of his principal, *Combe's* case, second resolution, 9 Co. 78; *Frontin v. Small*, 2 Ld. Raym. 1418; *Barford v. Stucky*, 2 B. & G. 233; [*Littledale*, J. The same appears from *Wilks v. Back*, 2 East, 142.] Thirdly, it is a general rule of law, that where a deed is made *inter partes*, no person can maintain an action upon the deed who is not a party to it. In *Scudamore v. Vandene stene*, 2 Inst. 673. 2 Roll. Abr. 22. Faits, (F) 1., it was held [*357] that one of two covenanteees who had sealed the indenture, but was no party to it, could not release the covenantor; *a fortiori* he could not sue him. And in *Storer v. Gordon*, 3 M. & S. 308, it was held that a deed *inter partes* could not operate as a release to strangers. This rule does not apply to deeds poll. Nor does it prevent a covenantor from being sued upon an indenture to which he is no party. But in a case where two joint covenanteees sued upon an indenture executed by one of them only, it was held, indeed, that the action was maintainable, but for this reason, that the plaintiff who did not execute was nevertheless a party to the deed, and the covenantor had executed to him as well as to the co-plaintiff, *Clement v. Henley*, 2 Roll. Abr. 22. Faits, (F) 2. This case is very different: the plaintiff is a stranger to the deed, and therefore cannot sue upon it. *Salter v. Kidgyl*, Carth. 76, may be cited on the other side; but that case was the converse of the present, being an action by a party to the indenture against one who was no party, but had executed the deed; and that distinction was particularly pointed out by *Holt*, C. J. *Gilby v. Copley*, 3 Lev. 138, was never decided at all; but the argument used in support of the action was, that the deed then in question was in the nature of a deed poll.

Taunton and *Campbell*, contra. It may be admitted, that where an attorney executes a deed for another, he must execute in the name of the principal. It may be admitted also, that there is the distinction between deeds poll and *inter partes*, which has been pointed out. Still the plaintiff [*358] may support this action. The arbitrator appears to have proceeded upon the ground, that *Simmonds* was not properly authorised to execute the deed. In most cases, it is true that an attorney, in order to bind by deed, must have an authority by deed; but there is a difference between the cases where the principal parts with an interest, and where he gives a mere authority. In Co. Litt. 52 b. it is said, that an attorney to deliver seisin must be by deed; but in *Moyle v. Ewer*, Noy, 49; Cro. Eliz. 905, where an indenture of bargain and sale between *J. S.* of the one part, and *J. D.* of the other part; and in the end thereof, a letter of attorney to *J. N.* to make livery was produced in court, and it was urged that it should be void because the attorney was no party to the deed, the court held it well enough. [*Abbott*, C. J. Livery of seisin is a matter in *pais*.] So is the execution of a deed. It is clear, that, in order to bind by deed, a party need not in all cases be authorised by deed, for he may derive such an authority from a will. Then as to the third point, there is a material distinction between this case and those which have been cited. All the covenants are in words between the plaintiff and defendant. The name of *Simmonds* is merely introduced at the beginning and the end, and as he is no party to any of the covenants, the execution by him is a mere nullity, and the deed

may be considered as a deed poll executed by *Hardy* alone. [*Holroyd*, J. Then there is no demise to lay the foundation of the defendant's covenant.] *359] [*Abbott*, C. J. Treat the first clause of this indenture as an "agreement between the plaintiff and defendant, can it be valid if the plaintiff did not execute it? The execution of a counterpart by a lessee may, as against him, be evidence of the execution of the original, but it is only evidence.] The court may presume the deed before them to be in the nature of a counterpart, and that the original was properly executed by or for the plaintiff, and then all difficulty is avoided.

ABBOTT, C. J. I am not aware of any instance in which the court, upon the production of an instrument insufficient to support an action founded upon it, has presumed the existence of another deed which would be sufficient. We are left, then, to decide upon those strict technical rules of law applicable to deeds under seal, which, I believe, are peculiar to the law of *England*. Those rules have been laid down and recognised in so many cases, that I think we are bound to say no action can be maintained by *W. F. Berkeley* upon the deed in question. The rule for setting aside the award must therefore be discharged.

HOLROYD,† and **LITTLELDLE**, Js., concurred.

Rule discharged.

† *Bayley*, J., was in the Bail Court.



*CLAYTON v. GOSLING.

Where a promissory note, payable with interest twelve months after notice, was expressed to be "for value received," and the maker became bankrupt before any notice was given: Held, that the payee might prove it under the commission.

ASSUMPTI on a promissory note, in the following form: "December 30, 1820. On having twelve months' notice we jointly and separately promise to pay Mr. John Clayton, or order, 200*l.* for value received, with lawful interest. *G. Gosling, J. D. Bower.*" Pleas, the general issue and bankruptcy of defendant. At the trial before *Hullock*, B., at the *Derby Lent* assizes, 1825, a verdict was found for the plaintiff for the amount of the note, subject to the opinion of this court upon the following case. The name of *G. Gosling* was proved to be the hand-writing of the defendant. In 1821 the defendant became bankrupt, and a commission was issued against him, bearing date the 25th of October in that year, and on the following day a notice was given to him by the plaintiff, to pay in twelve months the 200*l.* and interest secured by the note; and a similar notice had been given to *Joshua Dale Bower*, of *Chesterfield*, (the place where the plaintiff and defendant resided.) No evidence was given as to whose hand-writing the name, *J. D. Bower*, signed to the note, was; but it was proved that there was no person, either in *Chesterfield* or in the neighborhood, answering the description of *J. D. Bower*, except the *Joshua Dale Bower* to whom notice was given. The defendant's certificate was dated the 29th of April, 1824. The case was now argued by

N. R. Clarke, for the plaintiff. The debt now sought to be recovered was *361] not provable under the commission issued against the defendant, and, consequently, is not barred by his certificate. The plea is, that the cause of action arose before the bankruptcy, *Charlton v. King*, 4 T. R. 156; but no action could at that time have been maintained upon the note. The

defendant had been guilty of no default; the debt was not payable, at all events, for it depended upon the contingency of notice being given by the plaintiff: that such debts cannot be proved, has been long decided; *Hancock v. Entrisale*, 3 T. R. 435; *Utterson v. Vernon*, 4 T. R. 570. Nor is the note to be considered as conclusive evidence of *debitum in presenti*. Neither is the case within the principle of the 7 G. 1, c. 31; that was intended to apply to cases relating to trade, and to allow the proof of bills payable at some specified day. The provision as to the rebate of interest makes that quite apparent.

S. M. Phillips, contra. The question in this case turns upon the 7 G. 1, c. 31, and that statute made the debt provable. It was *debitum in presenti*. The note is expressed to be "for value received." It was not a debt upon contingency, within the meaning of the cases cited. In them, either the amount of the debt was not ascertained, or the time of payment was uncertain, and did not depend upon the will of the creditor. Here the amount to be paid was ascertained, and the creditor, by giving notice, might at any time fix the day of payment.

Abbott, C. J. We have decided, on more than one occasion, that the expression "value received," in a note, imports, "received from the payee." The note in question may, therefore, be read thus: "We acknowledge [362 to owe the payee 200*l.*, and promise to pay him that sum, with interest, twelve months after notice." If so, there is not any contingency as to the debt, for that is admitted to be due. Nor is the time of payment contingent, in the strict sense of the expression; for that means a time which may or may not arrive: this note was made payable at a time which we must suppose would arrive. But no notice was given, and therefore no action could be maintainable at law at the time of the bankruptcy. The statute 7 G. 1, c. 31, was made to remedy such evils, and provides for the proof of debts payable in *futuro*, and provides also for a rebate of interest. Can, then, such rebate be made here? I think it may. The interest will cease, and then the effect will be the same as if the note had been payable at a certain period after date. The case, then, being free from the difficulties which might have occurred as to the rebate, had the note been payable without interest, I think it was provable, and, consequently, that the plaintiff's demand was barred by the certificate.

Bayley, J. Where it is matter of contingency whether the debt will ever be payable, or where the amount of it is uncertain, it cannot be proved. But here the note is expressed to be for value received, which, according to *Hightmore v. Primrose*, 5 M. & S. 65; (See also *Priddey v. Henbrey*, 1 B. & C. 874,) is an acknowledgment of a debt due. The twelve months after notice merely applies to the time of payment, and the 7 G. 1, c. 31, is founded upon the distinction between debts not due and not payable. If interest had not been payable from the date but from the notice, then, as notice had not been given at the time of the bankruptcy, the amount of the sum to be paid [363 might have been doubtful; but as interest is payable from the date of the note, no such difficulty arises. For these reasons, it appears to me that the case falls within the words and the spirit of the 7 G. 1, c. 31, and that the debt was provable.

Holroyd, and *Littledale*, Js., concurred.

Postea to the defendant.

PRINCE, et al., v. LEWIS.

The king granted to A., that he, his heirs and assigns, should have and hold a market in a place therein described, and within certain specified limits there, for the buying and selling of all kinds of vegetables, fruits, flowers, roots, and herbs. The grantees of the market had for his own profit permitted part of the space, within the limits described, to be used for other purposes than those specified in the grant. The remaining part of the space, within which the market was to be held by the terms of the grant, became insufficient for the public accommodation, and there was not, on ordinary occasions, space within the market for carts and wagons resorting thither with vegetables, &c.: Held, that the lord of the market could not maintain an action against an individual for selling vegetables in the neighborhood of his market, and thereby depriving him of toll, even at a time when there was room in the market, without showing that on the day when the sale took place, he gave notice to the seller that there was room within the market.

DECLARATION stated, that the plaintiffs, before and at the time of the committing of the grievances thereafter mentioned, were and still are lawfully possessed of a certain close called *Covent Garden Market*, situate, &c., and of a market holden there for buying and selling of all and all manner of fruits, flowers, vegetables, roots, and herbs whatsoever, together with toll, stallage, and other commodities to such market belonging, whereby divers great gains during all the time aforesaid, until the committing of the said grievances, accrued to and were received by, and still of right ought to accrue and be received by the

*364] plaintiffs, to wit, at, *&c., yet the defendant, well knowing the premises, but contriving and wrongfully and *fraudulently* intending to injure the plaintiffs, and to deprive them of the profits which they might and ought to have had and enjoyed from and by their said market, &c., erected a new market for the sale of fruits, flowers, &c., near that of the plaintiffs. The second count charged, that the defendant, intending, &c., in a certain public street and highway there near to the market of the plaintiffs, that is to say, in a part of the said public street and highway, there within seventy-two yards of the plaintiffs' market, wrongfully and unlawfully and without any lawful warrant or authority, and without the license or consent, and against the will of the plaintiffs, exposed to public sale, and sold to divers persons, divers large quantities of vegetables, roots, and herbs; and the said persons who so bought the said vegetables, roots, and herbs, and who otherwise would have resorted to the plaintiffs' market, and there have bought the same, were induced to resort to the said last-mentioned street and highway, and there buy the vegetables, roots, and herbs so exposed for sale in the said street and public highway, which they otherwise would not have done, to the great damage of the plaintiffs, and the detriment of their market, by means of which said premises the plaintiffs were annoyed and disturbed in their market, and lost divers large sums of money. The third count stated, that the defendant, in a part of a public street within seventy-two yards of the market, exposed to public sale, and sold divers large quantities of vegetables, roots, and herbs which otherwise would have been brought into and sold at the plaintiffs' market, and divers persons were induced to buy the said vegetables, roots, and herbs so exposed to

*365] sale in the *said public street and highway, who otherwise would have resorted to the market of the plaintiffs and there have bought vegetables, roots, and herbs, and not in the said street or public highway, to the great damage of the plaintiffs and the detriment of their market. Plea, not guilty.

At the trial before Abbott, C. J., at the *Middlesex* sittings, after *Trinity* term, 1825, the following appeared to be the facts of the case. King *Charles* the Second, by letters patent, granted to *William, Earl of Bedford*, that he, his heirs and assigns, should from thenceforth forever have, hold, and keep a market within the parish of *Saint Paul, Covent Garden*, in a certain place there called the *Piazza*, near the church of *Saint Paul, Covent Garden*, extending from the said church towards the east four hundred and twenty feet of

assize, little more or less, and from the garden wall of the said Earl, there towards the north, three hundred and sixteen feet of assize, little more or less, as well within the rails as without on every day in every week (except *Sunday*, and the feast of the Nativity) for the buying and selling of all kinds of fruits, flowers, roots, and herbs whatsoever, together with all liberties, free customs, tolls, stallage, and picage, and all other profits to the like market belonging, to hold unto the use of *William, Earl of Bedford*, his heirs and assigns forever. By act of Parliament passed in 53 G. 3, c. lxxi, reciting these letters patent, and that the market had been held, that the Duke of *Bedford*, was seised in fee of the market, and the ground and soil whereon it was then holden, the owners of the market were authorised to take from the *seller* the tolls then usually taken or collected within the market. The plaintiffs were the lessees of the market under the Duke of *Bedford*. The defendant resided in **James Street*, about seventy or eighty yards without the limits of the market, and between the hours of six and eight o'clock of the morning [366] of the 4th of *January*, 1825, a wagon loaded with greens was drawn up before his door, and the same were there exposed to sale and sold by him. There was evidence to show, that during some part of the time while he was selling the greens there was room for his cart in the market. The agent of the plaintiffs demanded from the defendant a toll, but did not apprise him that there was room for his cart in the market. The defendant refused to pay the toll, upon the ground that he was not bound to pay toll for goods which he sold in *James Street*. The northern part of the market, which was next to *James Street*, was that part usually appropriated to carts and wagons with vegetables. On the north, the west, and east sides of the market, the plaintiffs let out to different individuals, part of the space in the market-place between the denter stone and the railing, (that being the space allotted for carts and wagons with vegetables, &c., for sale,) standing-room for their carts, for which these persons paid yearly or weekly rents, and the space so let to them was always kept for them, and each of the tenants had a particular place for the purpose of placing his cart. This standing-room was occupied in the early part of the morning by the growers who come from the country, and afterwards by the higgliers, and rent was paid by both. Part of the space in the centre of the market was let out to yearly tenants for sale of different articles, not being fruits, flowers, or vegetables; and there were china shops, old iron shops, and some public houses. About one-third of the space allotted for the market was occupied with covered buildings. It appeared that toll had been *frequently collected in *James Street*. In consequence of so much of the market- [367] place being appropriated to other purposes, the remaining space was on ordinary occasions fully occupied. The Lord Chief Justice (without adverting to the fact, that during part of the time while the defendant was selling his vegetables, there was room for his cart in the market,) was of opinion that the lessees of the market were not entitled to maintain this action, unless they gave up the whole space for the use of those who attend it from day, to day for the purpose of selling those commodities, to the sale of which the market was devoted, and the plaintiffs were nonsuited, but liberty was reserved to them to move to enter a verdict. A rule *nisi* having been obtained for that purpose in last *Michaelmas* term,

Scarlett and *Marryat*, now showed cause. This action is founded upon a supposition that the defendant has fraudulently evaded the payment of toll, and that the profits of the market of the plaintiffs have been thereby abridged. Now the plaintiffs cannot be damnfified by any sale out of their market, made at a time when their market was already fully occupied by other goods there exposed to sale, because they thereby derived from the tolls payable on those goods the full benefit contemplated by the grant of the franchise. It is therefore no injury to them if during such time a person sell near to their market. So if the lord appropriate the whole of the space intended for the market to

other purposes, he cannot bring any action against a person for selling out of his market. Or if he appropriate part of the space intended for the market to other purposes, and the residue of the space is fully occupied by goods exposed to sale *there, he cannot maintain an action against other persons for selling near to his market. The market ought to be open to every person who chooses to resort there; but here particular individuals had the privilege of placing their carts in particular places, and the space allotted for the purposes of the market was generally full. If it was so at the time when the defendant was selling his goods in *James Street*, then the plaintiffs have sustained no damage whatever by the same. But assuming that during some part of the time he was so selling his goods in *James Street*, there was room in the market, still, in order to charge him with fraudulently evading the payment of toll, it ought at least to be shown that he knew that there was space for him within the market at that time. He might reasonably presume that, as there was not room for his cart on ordinary occasions, there was not on that particular occasion; and if so, he cannot be said to have fraudulently intended to deprive the plaintiff of his toll.

Gurney, Denman, Brougham, and Hutchinson, contra. The plaintiffs by having proved the grant of a market, and a sale of goods near to their market by the defendant, were entitled to recover in this action. It lay upon the defendant to show, that at the time of such sale there was not room for him within the market. There was evidence to show that there was room for his cart in the market. Secondly, it is no answer to this action, to show that the lord or lessee of the market has appropriated to other purposes part of the space intended for the market. If there was room for the defendant's cart, he has no right to resist the payment of toll. As between the lord of the market and the seller ^{*369]} of goods the former claims his toll, on the ground that the seller has the benefit of having his goods exposed for sale to the persons resorting to it, and he is defrauded of his toll by the act of the seller in not coming into the market but selling near to it. The defendant in this case does not deny that he had all this advantage, but refuses to pay, because part of the market is appropriated to other purposes than the sale of fruits, flowers, and vegetables. The defendant has not been damaged by part of the market having been so occupied, and he has derived a benefit from the market by selling his goods. *Rex v. Burdett*, 1 Ld. Raym. 148, is an authority to show, that it is not unlawful for the lord of a market to erect and let out stalls in a market, if sufficient room be left for the market people.

ABBOTT, C. J. I thought at the trial, that before the lord of this market or his lessee could complain in a court of law of a person who sells without the limits of the market, as doing him damage, it was incumbent upon him to show, (or at least that the contrary should not have appeared in evidence against him,) that no part of the market which ought to be open and free of access for the public accommodation, is with his assent devoted to other purposes. I still continue of the same opinion. It may be true, perhaps, upon a critical examination of the evidence, that during some part of the time when the defendant's cart was standing in *James' Street*, there may have been room for it within the limits of the market. But assuming that to be the fact, it would not alter my opinion as to the right of the plaintiff to ^{*}maintain this action, because ^{*370]} if, according to the general and ordinary use which is made of this market, the public are deprived of the accommodation which they ought to have, and if it generally happens that the space allotted to them is wholly filled up, then, inasmuch as the lord of the market or the lessee cannot complain of a person selling near the market at a time when it is full, it is incumbent upon the lord or the lessee, when on a particular occasion it is not wholly occupied, to give notice to any person whom he seeks to charge with a toll, that there is room. Not having done so in this case, I think he had no right to claim of a

person selling out of the market the same toll as if he had sold in the market. It has been said that many of these erections in the market have existed from very ancient times, and that may be so. Probably when the market was first erected, the space allotted for it was more than the public accommodation required, but by the great increase of population, and the consequent increase of the consumption of vegetables, that space has now become insufficient. Those erections and those appropriations of the space allotted for the market, which in former times might be legitimate and reasonable, have now become illegitimate and unreasonable. Before the lord of this market can maintain an action against any person for defrauding him of his toll by selling near to it, he must remove all the obstructions and devote the whole of the space to the object for the furtherance of which the grant of a market upon that space was intended, viz. the accommodation of persons who come there to sell commodities of a particular description. It appeared in evidence that there were china shops and public houses upon this space. Now, although public houses [371] may be convenient to persons resorting to the market, yet they may well be placed without the limits of the market. If they are inconsistent with that appropriation of the space which the law contemplated for the benefit of the public, the lord must remove them; if the lord wishes to bring an action against any person for not selling in the market, he must first show that there has not been such an appropriation of the space allotted to the market as excludes that person from the market.

BAYLEY, J. I am of the same opinion. Wherever there is the franchise of a market, the lord has certain rights, but he has also certain duties to perform towards the public in respect of those rights. One of those duties towards the public is, that the lord shall, as far as the limits of the market will allow of, take care that there is sufficient room for all the purposes of the market. Now this is a market created by charter for a specific purpose, and having specific limits. Generally speaking, if the space allotted for the market is more than is necessary for the purposes of the market in ordinary times, the lord may lawfully appropriate a part of that space to other purposes; but whenever the convenience of the public frequenting the market requires that the whole of the space shall be dedicated to the use of the market, then, as it seems to me, there is an obligation on the part of the proprietor so to dedicate it. And if at ordinary times there is not sufficient space for the purposes of the market, I think that he cannot bring any action against a person who sells out of the limits of the market, unless he shows that he first apprized that person that there was, at the time of the sale, room in the market to which he might resort. *If [372] the lord does communicate that to the party, then there may be an obligation on him to go into the market, but he is not bound to attend *de die in diem* for the purpose of seeing whether there be or be not room. Now, in this case, the plaintiffs did not apprise the defendant that there was room for him in the market, but they merely demanded the toll. In my opinion there was a fraud, but it was a fraud practised by the lessees of the market, and not by the defendant. One of the objects which ought to be attended to by the owner of a market is, that the nuisance, which is the necessary consequence of it, shall be confined to the limits of the market. Now in this case it appears, that on market days *James Street*, which is out of the market, was treated by the lessees as a part of the market. It was encumbered with carts. The lord of the market claimed a toll of the persons selling in that street, he therefore permitted them to sell there, provided they paid him the toll, but if they did not, then he considered them as wrong-doers. In my opinion this nonsuit was right, because it was clearly proved that there was not sufficient room for the purposes of the market within the specified limits on ordinary occasions, and there was no specific communication to the defendant at the time he was selling in *James Street*, that there was room for him to place his cart within the limits of the market.

LITTLEDALE, J.† I am of opinion that this nonsuit was right. The *Duke of Bedford* is the owner of the soil, and has a grant from the crown to hold a market, *which grant is confirmed by act of parliament. Such a grantee [373] is not bound to extend the market over the whole of the soil; he may appropriate so much only of the soil as is sufficient for the purposes of the market, and he may shift and change the market to different parts of the space specified in the grant. That was expressly decided in *Curwen v. Salkeld*, 3 East, 538. The *Duke of Bedford*, as the owner of this franchise, therefore, was not bound to appropriate the whole of the space mentioned in the grant to the purposes of the market, unless it was actually necessary; but before he or his lessee can bring an action for the disturbance of the franchise, I think he is bound to show that he has left sufficient room for the purposes for which the franchise was granted to him. Now here it appears, that there is not room at all times of the year for the persons resorting to this market. In consequence of this, many persons, and among them the defendant, sell out of the market. I concur in the argument urged on the part of the plaintiffs; that, generally speaking, in such an action as this, it lies upon the defendant to show that there is not room for him within the market; for when the plaintiffs have once established their right, and it appears that the defendant has sold things, which are the subject of sale in the market, so near that it would *prima facie* be a fraud upon the owner of the market, it lies upon the defendant to rebut the case so-established. But here it was shown, that a part of the space allotted for the market was appropriated to other purposes. There were china shops, an old iron shop, and some public houses. The *plaintiffs had no right to put [374] them into that space which was distinctly appropriated by the grant for the sale of fruit, flowers, and vegetables. The lord of the market has the direction of the market; he may direct the vegetables to be sold in one place, the fruit in another, the flowers in another. So he may direct that carts should come to one place and baskets to another, by virtue of the general power which he has as lord of the market, but he is bound to appropriate the whole space to the purposes of the market, if the public convenience require it. Many actions similar to this have been brought against individuals selling their goods, so as to defraud the lord of a market; but in all those cases it appeared in proof, that there was sufficient room for those persons to come there if they thought fit; and I infer from thence, that it is necessary for the lord of the market always to set out sufficient space for the purposes of the market. If the right claimed by the plaintiffs were established, the *Duke of Bedford* or his lessees would gain more by this market than they have a right to do. They have now the full profit of the market, for they have the benefit of toll upon all the goods sold there; but by this action his lessees seek to establish a right to toll upon goods sold in *Russell Street* and *James Street*, which are without the limits of the market; by that means they would gain a much larger profit than they have a right to do. It is said, that upon the morning in question there was sufficient space for the defendant to place his wagon within the market; but it appeared in evidence, that for a considerable part of the year the market was so occupied that it was impossible for the defendant to get into it. I think he [375] is *not bound to be upon the watch day by day, and hour by hour, to get a spot where his cart can stand. As it was proved that the market was generally occupied, it lay upon the plaintiffs to show that the defendant knew, that on the morning in question there was space for his cart in the market. The rule for a new trial must be discharged.

Rule discharged.‡

† Holroyd, J., not having been present during the argument, gave no opinion.

‡ In order to maintain an action of this nature, it seems to be incumbent on the plaintiff to establish that the defendant *fraudulently* sold goods near to the market, but out of its limits, in order to avoid the toll. See *Blakey v. Dinsdale*, Cowp. 661.

KEEGAN v. SMITH.

A husband is liable for necessaries provided for his wife pending a suit in the ecclesiastical court, and before alimony decreed, although a decree afterwards made direct the alimony to be paid from a date before the time when the necessaries were provided for the wife.

Assumpsit for meat, drink, washing, lodging, and other necessaries, found and provided for *Eliza Ann*, the wife of the defendant. At the trial before *Abbott*, C. J., at the *Middlesex* sittings after *Trinity* term, 1826, it appeared, that the action was brought by the plaintiff to recover the sum of 31*l.* 6*s.* 2*d.*, for board and lodging, furnished to the defendant's wife, from the 19th of *July* to the 8th of *November*, 1824. The plaintiff's case was admitted. On the part of the defendant it was proved, that his wife, in *February*, 1824, had instituted a suit in the consistory court for a restitution of conjugal rights, and in about a month after, another suit for cruelty and adultery. In the latter suit the court, on the 3d of *December*, 1824, decreed, that the defendant should pay to his wife, *pendente lite*, 30*l.* *per annum, in quarterly payments, to commence from the 8th of *March* preceding. There was no distinct [*376] evidence that that sum had been paid, but the registrar of the court proved, that, in default of payment, a monition might have issued within fifteen days after the decree, and that no such monition had ever issued. The Lord Chief Justice was of opinion, that, even assuming that there was evidence sufficient to show that the alimony had been paid from the 8th of *March*, 1824, still, as the decree for alimony was made subsequently to the time when the plaintiff's demand accrued, it was no defence to the present action; and he directed a verdict to be entered for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* for that purpose having been obtained in last *Michaelmas* term.

Denman and **Maule** now showed cause. The debt was contracted by the defendant's wife between the commencement of the suit in the ecclesiastical court and the decree for alimony. During that period it was uncertain whether any or what alimony would be allowed. A perfect right of action had once accrued to the plaintiff; that cannot be barred by matter arising *ex post facto*. It is true, that the decree directs the alimony to be paid in respect of the period which the plaintiff's demand accrued; but the circumstance of a husband having become bound by agreement, or by a judgment of a court of competent jurisdiction, to pay alimony from an antecedent period, cannot bar a right acquired before he became so bound.

***Tindal**, contra. It is laid down by Lord **Mansfield**, in *Ozard v. Darnford*, Selw. N. P. 279, that where the husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony; and if upon separation the husband agrees to make her a separate allowance and pays it, he is not liable, because she has no further demands upon him. Now in this case the wife had obtained a decree in the ecclesiastical court for alimony, payable in respect of the period during which the plaintiff's claim accrued, and it must be taken upon the evidence that that alimony was paid. She therefore had no further claim upon her husband; the plaintiff, her creditor, stands in her situation, and therefore can have no claim against him.

ABBOTT, C. J. At the time when this credit was given it was uncertain whether any or what alimony would be allowed. The decree of the ecclesiastical court by which it was allowed, took place after the whole debt claimed by the plaintiff was incurred. I am of opinion, that the plaintiff's right of action cannot be taken away by an event which has happened subsequent to the time

when that right of action accrued. The rule, therefore, for entering a nonsuit must be discharged.

BAYLEY, J. Although the creditor may be considered as claiming through ^{*378]} the wife, yet if the husband does *not supply the wife with the means of procuring necessaries, he gives her a credit; and upon that ground the law implies an authority from the husband to her, that she may contract for what is absolutely necessary for her sustenance. In this case there is no proof that the husband supplied her with necessities from the 19th of *July* to the 8th of *November*, 1824, during which period the plaintiff's demand accrued. The wife, therefore, had an authority from the husband to contract the debt in question.

HOLROYD and LITTLEDALE, Js., concurred.

Rule discharged.



SHIPTON et al. v. B. CASSON.

A. being indebted to *B.* the latter agreed to accept the amount by instalments, *C.* undertaking to guarantee the payment of them. On the day after the first instalment became due, *C.* remitted to *B.* the amount, partly in bills not then due, and partly in bank notes. *B.* wrote, acknowledging the receipt of the bills and notes, and said they should be placed to *A.*'s account: Held, that although he was not bound to accept the remittance so made, yet having done so, he had thereby waived all objection to the time when it was sent, or the manner in which it was made up, and that he could not afterwards maintain an action against *A.* upon the ground of his having failed to pay the first instalment.

At the time of making the said agreement, *A.* contracted to sell and deliver to *B.* a large quantity of bark. He delivered a small part only, and failed to complete his contract. *B.* never returned the part delivered: Held, that *A.* was entitled to set off the value of that part against *B.*'s demand.

ASSUMPSIT. The declaration, which was of *Easter* term, 5 *G.* 4, contained the common counts for work and labor, and the money counts. Pleas, the general issue and set off for goods sold and delivered, money lent, paid, &c. At the trial before *Abbott, C. J.*, at the *London* sittings after *Hilary* term, 1825, a verdict was found for the plaintiffs for 466*l.* 19*s.* 3*d.*, subject to the opinion of this court upon the following case. On the 26th of *November*, 1823, the defendant was indebted to the plaintiffs in the sum of 707*l.* 13*s.* 3*d.* On that ^{*379]} day the plaintiffs, and *Henry Casson*, the defendant's father, *and the several other persons whose names appear to be subscribed, signed the following memorandum of agreement. "Whereas *B. Casson*, of *Sculcoates*, stands indebted to us, whose names are hereunto subscribed, in the several sums wrote opposite our respective names, which he being unable at present to satisfy, hath requested us to grant him time for payment, in manner herein written, to which, in consideration and on condition of his father, *H. Casson*, agreeing to guarantee the full payment thereof, we respectively consent, and hereby do, and each of us doth, grant and allow unto the said *B. Casson* time for payment thereof in manner following: and hereby promise and agree that we will not sue, implead, prosecute, or otherwise molest or harm the said *B. Casson* for or on account of our respective debts owing to us, unless or until some default be made by him or them, of or in the payment of the said respective sums at the times hereby agreed to, that is to say, at four months from the date hereof, payment at the rate of 7*s.* in the pound, at eight months from the date hereof, other 7*s.* in the pound, and at twelve months from the date hereof, the remaining 6*s.* in the pound." On the 27th of *March*, 1824, *H. Casson* sent to the plaintiffs a letter as follows: "Inclosed are three bills, 1 bank post

bill and bank note; value together 242*l.* 10*s.* 6*d.* Please credit my son's account for the amount, and acknowledge the receipt in course of post." The plaintiffs received the said letter and remittances, and on the 29th of March wrote the following letter in answer: "Yours of the 27th instant is received this day, inclosing bills and note, value 242*l.* 10*s.* 6*d.*, which will pass to your son's account when paid." The defendant proved by way of set off, the delivery of bark to the plaintiff to "the amount of 23*l.* 4*s.* on the morning [380 of the 26th of November, 1823. In answer to which the plaintiffs proved, that such bark was part of a quantity bargained by the defendant to be delivered to the plaintiffs by the following contract: "Sold T. Shipton and Son the whole of the bark laid in B. Boyes' warehouse for 5*s.* per ton on the invoice price, to be transferred to his account, and after this, the 26th of November, at their risk and expense, the quantity about 57 tons, 17 cwt. B. Casson paying all expenses of delivery." The invoice price was 10*l.* per ton. Barges were hired by the plaintiffs to take away the bark, and one laid for some days waiting for the bark, and then went away, the defendant having failed to deliver the residue of the quantity stipulated according to his contract, within a reasonable time after the contract. It appeared that Mr. Boyes, in whose possession the said bark was, stopped the delivery of the residue to the plaintiffs, and they only obtained bark to the value of 23*l.* 4*s.* in part of the said entire quantity. The first instalment of 7*s.* in the pound on the said debt of 70*l.* 18*s.* 3*d.*, due from the defendant to the plaintiffs, amounted to 24*l.* 13*s.* 7*d.*, being 5*l.* 8*s.* 1*d.* more than the sum remitted. If the 23*l.* 4*s.* for the bark delivered to the plaintiffs was to be deducted and allowed to the defendant from the sum of 70*l.* 13*s.* 3*d.*, then 7*s.* in the pound on the residue left the remittance made by H. Casson 2*l.* 19*s.* 3*d.* more than the first instalment would amount to. The action was commenced before the second instalment became due. The case was now argued by

Chitty, for the plaintiffs. First, the remittance made by the father was too late. Where an agreement is "entered into for the discharge of a debt [381 by instalments, the money must be paid on the very day appointed, *Leigh v. Barry*, 3 Atk. 583; 1 Vern. 210. The case of *Cranley v. Hillary*, 2 M. & S. 120, shows how strictly the debtor is held to the performance of the bargain. There a composition was to be paid in bills, and it was held that the debtor ought to have tendered the bills on the right day, and that it was not sufficient that he had them ready to be delivered to the creditor on request. Secondly, the remittance sent was insufficient in two respects; first, it should have been in cash, and not partly in bills; secondly, the amount was insufficient, for the defendant had no right to set off against the demand of the plaintiffs the value of the bark delivered. The agreement bound the debtor to pay a certain sum of money on a certain day; he could not therefore claim a right to reduce that sum by setting off a counter demand. Again, the contract for the whole of the bark was entire, and had not been completed by the defendant; he could not therefore claim to set off the price of the small quantity delivered, *Waddington v. Oliver*, 2 N. R. 61; *Walker v. Dixon*, 2 Stark. 281.

Parke, contra, was stopped by the court.

ABBOTT, C. J. The first question is, whether the sum sent as payment of the first instalment was sufficient; that depends upon the question, whether the plaintiffs were bound to pay for the bark, which they received and kept, according to its just value, or whether they were entitled to keep it without making any such payment. I agree, that if a contract is made for the purchase [382 of a large quantity of any article, and a part only is delivered, the vendee is not bound to pay for that part before the expiration of the time fixed for the delivery of the whole. For if the seller fails to complete his contract, the purchaser may return the part delivered. But the case is very different if he elects to keep that part; he must then pay the value of it; and in contracts for the sale of goods the value of a part may always be ascertained. It is said,

that the value not being ascertained cannot be set off; but the common form of set-off is, that the plaintiff is indebted for goods sold and delivered, which, at the time of the sale and delivery, were worth such a certain sum. In the case of a contract which cannot be well severed, difficulties as to such a set-off may arise, *ex gr.*, if a contract is made for building a house, and that is only performed in part, it may be difficult to sever the value of the part finished from the value of that which remains to be done; but no such difficulty occurs in the present case. The second question is, whether the remittance came in time, and was of a proper nature. I agree that the plaintiffs were not bound to accept it; they might have returned it, and insisted upon their right of action. But instead of that they made the amount available to their own purposes, and undertook to place it to the credit of the defendant's account. Having done so, as against the plaintiffs, it must be taken that there was no objection either to the nature of the remittance, or the time when it was made.

BAYLEY, J. I am of opinion that the remittance was sufficient, and that the objection to the time when it was sent and the manner in which it was made up, was waived by the plaintiffs. Where an entire contract for goods is performed in part, and the whole may be completed, no action will lie in respect of that which has been done until after the expiration of the time fixed for the completion of the whole. But where some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the value (not the stipulated price) of those goods, although he is liable to a cross action for the breach of his contract. I therefore think, that the sum of 23*l.* 4*s.*, the value of the bark delivered, may properly be considered as constituting an item of set-off at the time when the instalment became due, although it might not be so immediately on the delivery of the bark. Secondly, it seems clear that the plaintiffs waived all objection to the payment made by *H. Casson*. After receiving the bills they wrote and informed him, that the amount should be placed to his son's account; but the father sent them in discharge of the instalment then due, and the plaintiffs had no right to place them to any other account. Having kept the bills and applied them to that account, they cannot now say that the remittance was too late, or that they were not bound to take the bills in payment.

HOLROYD, and **LITTENDALE, Jr.**, concurred.

Postea to the defendant.

*384] *DOE, on the several Démises of TURNBULL, et al., v. BROWN.

Where an award is void, and nothing can be done upon it without suit, the court will not interfere to set it aside, because such suit must fail. But where a cause is referred by order of N. P., and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered; although such award be void, the court will set it aside, for otherwise the party in whose favor the award is made will have judgment upon the verdict without any new proceeding to enforce the award.

EJECTMENT. At the *Carlisle* Summer assizes, 1824, when this cause came on for trial it was referred, by order of *nisi prius*, to a barrister, who had power to direct in whose power the verdict should be entered. In April, 1825, no award having been made, the lessors of the plaintiff by notice in writing revoked the submission. In August, 1825, the arbitrator made an award, di-

recting a verdict to be entered for the defendant. In *Michaelmas* term, 1825, *Alderson*, obtained a rule *nisi* to set aside the award; against which

Patteson, now showed cause. This rule was obtained on the ground, that the award was made after the submission had been revoked. But the order of *nisi prius* is an instrument of a higher nature than a mere writing not under seal, and cannot be revoked by such a writing. The authority of the arbitrator was not therefore affected by the mere notice in writing given in this case. If, however, his authority was gone, the award is a nullity, and there is nothing for the court to set aside, *King v. Joseph*, 5 *Taunt.* 452. In *Clapham v. Higham*, 1 *Bing.* 87, the court certainly did set aside an award made after the revocation of the arbitrator's authority, but in the judgment it is never noticed that the award was void in itself.

**Alderson*, contra, was stopped by the court.

ABBOTT, C. J. This is clear, where an award may be considered as a nullity, and nothing can be done upon it but by suit, the court will not interfere to set aside the award; because any suit brought to enforce it must fail. But the award before us orders a verdict to be entered for the defendant, who will be entitled to judgment thereon unless we interfere. The rule must, therefore, be made absolute.

Rule absolute.

BLACKETT v. WEIR.

Where in *assumpsit* for goods sold and delivered, to which the general issue was pleaded, a witness called by the plaintiff to prove the defendant's liability, admitted on the *voir dire* that he (witness) was jointly liable: Held, that this did not render him incompetent.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial before *Bayley*, J., at the *Northumberland* Summer assizes, 1825, it appeared that the action was commenced to recover the price of a cargo of coals sold and delivered to a steam yacht company. In order to prove that the defendant had a share in the concern, one *Gilson* was called, who admitted on the *voir dire* that he also was a partner, and it was thereupon objected for the defendant that the witness was incompetent. The learned Judge overruled the objection, and the plaintiff obtained a verdict, the defendant having leave to move to enter a nonsuit. In *Michaelmas* term, a rule *nisi* for that purpose was obtained by *F. Pollock*, who cited *Bland v. Ansley*, 2 N. R. 331, *Brown v. Brown*, 4 *Taunt.* 752, *Mant v. Mainwaring*, 3 *Taunt.* 139.

**Scarlett*, (with whom was *J. Parke*), showed cause. The witness *Gilson*, was clearly competent for the plaintiff in this case. He came to speak against his own interest; for the admission that he was a partner made him liable to contribution, of which there was no other evidence. He could not then be interested in obtaining a verdict for the plaintiff by whom he was called. *Bauerman v. Radenius*, 7 T. R. 663, shows, that a party to the record cannot be a witness; but *Gilson*, was not either actually or virtually a party to this record. It will be argued that he had an interest in making as many persons as possible appear to be partners, in order to reduce the amount of his own contribution. But there was nothing except his admission to show that he was liable to contribute. [*Littledale, J., Cosham v. Goldney, and Another*, 2 *Stark.* 414, appears to be in point.]

F. Pollock. That is an authority in favor of the defendant, for it shows that a person alleged to be a partner may prove the sole liability of the defendant; he cannot, therefore, prove the converse, viz., that he is a partner, and that the

defendant is jointly liable with him. The admission of *Gilson*, that he was a partner in the steam yacht company rendered him *prima facie* liable to the whole demand, and therefore it was his interest to fix the defendant as a joint contractor. *Lockhart v. Graham*, 1 Str. 35, and *York v. Blott*, 5 M. & S. 71, appear to be in favor of the plaintiff, but they are distinguishable on this ground. Where it is admitted that there is a joint contractor, one of them [387] may be called to prove the identity of the parties; but here the witness was called to prove the existence of the joint contractor.

ABBOTT, C. J. I am of opinion that the evidence of *Gilson*, was properly received. On the motion for this rule cases were cited which show that one joint contractor, having suffered judgment by default, cannot be called as a witness. To that position I accede; it is founded upon the rule that a party to the record cannot in general be examined. It is said that the witness had an interest: he had so; but it was his interest to defeat the plaintiff, for in the event of his recovery, the defendant would be entitled to contribution from the witness. In actions of trespass, witnesses apparently open to a much stronger objection are constantly admitted. In that action a recovery against one of several co-trespassers is a bar to an action against the others; and yet scarcely a circuit passes without an instance of a person who has committed a trespass being called to prove that he did it by the command of the defendant. In that case a verdict for the plaintiff would operate as a discharge to the witness, there being no contribution in actions of tort. Here, on the contrary, it brought a liability upon him.

BAYLEY, J. I think that *Gilson*, was a competent witness. To a certain extent he had an interest in obtaining a verdict for the defendant; for, having admitted his own liability, he made himself liable to pay a proportion of the costs, as well as the debt, if the plaintiff recovered. The only difficulty arises from his proving a partnership with the defendant; but his testimony would [388] not prove that in any other action; "and if the defendant can hereafter make out that he was not a partner, I think that he may perhaps at law, and certainly in equity, recover from the witness all that he is compelled to pay in this action.

HOLROYD, J. I also think that the witness was competent. The consequence of his evidence would be to render himself liable in another suit. It has been argued, that unless the defendant were fixed with a part, the witness might be made liable to pay the whole debt. But it appears to me that the defendant would have a right to recover from the witness, in an action at law for money paid to his use, the whole sum recovered in this action, if he could show that the witness was originally liable to pay it. That is the ground upon which all actions for contribution proceed.

LITTLEDALE, J. If the plaintiff recovers, the defendant will have contribution. If he fails, he may sue the witness for the whole, and the latter may then claim contribution from the defendant. To this it is answered, that in such an action he might not be able to establish that the defendant was a partner. But it must be remembered that the admission of the witness was the only proof of his own liability; it is, therefore, only reasonable to take the whole of his evidence together; and that showed the defendant to be jointly liable. For these reasons it appears to me that the rule must be discharged.

Rule discharged.†

† See *Young v. Bairner*, 1 Esp. 103. *Hudson v. Robinson*, 4 M. & S. 475. *Geedacre v. Breame*, Peake's N. P. C. 174. *Birt v. Hood*, 1 Esp. 20.

*The KING v. The Sheriff of MIDDLESEX.

On moving to set aside an attachment against the sheriff, it is sufficient to entitle the affidavit *Rex v. Sheriff of _____*, without naming the cause, although it is convenient to do so.

An exception to bail must be entered in the bail book, and ~~enable~~ that written notice of it must be given to the defendant's attorney.

BAIL above having been put in, the plaintiff's attorney gave to the defendant's attorney a parol notice of exception, but the exception was not entered in the bail book. The bail not having justified, an attachment issued against the sheriff; and a rule *nisi* having been obtained to set it aside,

Abraham, showed cause, and first objected that the affidavit upon which the rule had been obtained was not properly entitled; the title being "*Rex v. Sheriff of Middlesex*," without naming the cause in which the attachment issued.

Abbott, C. J. It may be very convenient that the affidavit made on moving to set aside an attachment should contain in its title the name of the cause; but I have great difficulty in saying that is necessary, inasmuch as an indictment for perjury would lie upon it in the present form.

Abraham, then contended that the notice of exception given to the defendant's attorney was sufficient.

F. Kelly, contra, relied upon *Cohn v. Davis*, 1 H. Bl. 80, where it was held that a written notice of exception must be given to the defendant's attorney in order to bring the sheriff into contempt, even where the exception was [*390] duly entered in the filazer's book.

Per Curiam. The sheriff had nothing to look to but the bail book, and that gave him no information of the exception. The rule for setting aside the attachment must, therefore, be absolute.

Rule absolute.

HALDEN v. GLASSCOCK.

Where a cause is referred by a judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a judge's order, on moving for an attachment for not performing the award, it must be shown that the order enlarging the time was made by consent.

THIS cause was referred to an arbitrator, by an order of *Abbott*, C. J., made upon hearing the attorneys of both sides, and by their consent, so as the arbitrator should make his award before the first day of last Trinity term, or such other time as the arbitrator by indorsement upon that order should appoint. Another order was afterwards made by the Lord Chief Justice in the following form: "I do order that the time for the arbitrator to make his award in this matter be enlarged until the 21st of June;" and a third order, in similar terms, enlarged the time until the first of July, before which day an award was made, ordering a sum of money to be paid to the plaintiff. A rule *nisi* for an attachment against the defendant for not performing the award was afterwards obtained upon affidavits that the award was duly executed, and that a copy of the award and of three several rules of court, whereby the orders above mentioned were made rules of court, had been served upon the defendant, and the money awarded "duly demanded." The defendant, in answer, made affidavit that the orders enlarging the time for making the award were not made by the consent of himself or his attorney; that the orders were not served upon him at the time when they were made; and that when the rule

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making the original order of submission a rule of court was served upon him, there was not any indorsement upon it enlarging the time for making the award.

Marryat, showed cause, and contended, that the award did not appear to have been made in time, for that none of the documents before the court showed that the time originally fixed for making the award had been duly enlarged, *Wohlenberg v. Lageman*.†

Chitty, contra, contended, that although the second and third orders of the Lord Chief Justice were not expressed to be made by the consent of the parties, yet that it must be presumed they would not be made without proper authority.

HOLROYD, J. To bring the party into contempt, at least it must be shown that the enlargement of the time was by consent. The original order enabled the arbitrator to enlarge the time by indorsement; but there is no affidavit that he did so enlarge it. Suppose a rule of court were drawn up, simply ordering a party to abide by the award of *A. B.*, you could never bring that party into contempt for not performing the award, unless you showed how the rule was obtained. Neither can you have an attachment in this case, without showing that the second and third orders were duly made.

LITTLEDALE, J., concurred.

Rule discharged.

† 6 *Taunt.* 251.; and see *Davis v. Vass*, 15 *East*, 97.

TAYLOR v. TAYLOR.

The court will not set aside an execution issued upon a judgment obtained by default, confession, or *nil dicit*, and served, and levied by seizure upon the property of a bankrupt before his bankruptcy, the statute 6 *G. 4*, c. 16, s. 108, not rendering the execution in such case void, but merely enacting that the plaintiff in such execution shall share rateably with the other creditors.

THE defendant, by warrant of attorney of the 4th of November, 1825, authorized certain attorneys therein named to appear for him and suffer judgment by *nil dicit* as of last *Trinity* term, or *Michaelmas* term, then next for 4000*l.*, with a *defeasance* to be void on the payment of 2000*l.* on demand. Judgment for 4000*l.* by *nil dicit* was signed by the plaintiff on the 22d of *March*, 1826, and a writ of *fieri facias* thereon issued, directed to the sheriffs of *London*, returnable on *Wednesday* next, after fifteen days of *Easter*, commanding him to levy 2041*l.*; and under that writ the sheriff seized the goods of the defendant, and was in possession on and before the 7th of *April*. On that day an act of bankruptcy was committed by, and a docket was struck against the defendant, and on the 10th a commission issued, and on the 11th he was duly declared a bankrupt, and a provisional assignment executed. On the 10th of *April*, notice of the docket and commission was served on the sheriff. A rule *nisi* had been obtained for setting aside the execution in this case, and for a stay of proceedings in the mean time, on the ground that by the statute 6 *G. 4*, c. 16, s. 108, under the circumstances of this case the execution creditor was *393] "not entitled to avail himself of the execution. That section enacts, "that no creditor having security for his debt, or having made any attachment in *London*, or any other place by virtue of any custom there used, of the goods and chattles of the bankrupt, shall receive upon such security or attachment more than a rateable part or such debt, except in respect of any execution or

extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy. Provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors ;" and now

The Attorney General and Stork were heard against the rule, and Scarlett and F. Pollock in support of it. The principal question discussed was, whether an act of bankruptcy having been committed, and a commission having issued after seizure, under an execution on a judgment by *nil dicit*, but before the return of the *fi. fa.* would defeat the execution under the 108th section of the Bankrupt Act 6 G. 4, c. 16. It was contended against the rule, that this was a case within the exception of the enacting part of the 108th section, because the execution was levied by seizure before the bankruptcy ; and although the terms of the proviso were very large, they must receive a reasonable construction ; for it never could have been intended to apply to a judgment obtained any length of time before the bankruptcy. It was probably meant to apply to those cases only where, pending an action, such a judgment by *nil dicit* *was given. Secondly, it was contended that the execution [394] was not void. On the other hand, it was argued, that the exception in the enacting part of the clause must have been intended to apply to judgments not comprehended in the proviso, otherwise it meant nothing. Those would be judgments obtained on verdicts which would be by a public not a secret act. It evidently appeared from the words used in the proviso, that the object of the legislature was to discountenance secret securities.

HOLROYD, J. The act does not say that the execution shall be void, or that the creditor shall not avail himself of it, but merely that he shall not avail himself of it to the prejudice of other fair creditors, but shall be paid rateably with them. If the true construction of the act be that contended for on the part of the assignee of the bankrupt, he is not without a remedy ; he may bring an action of trover against the sheriff if the goods be removed, or he may petition the Lord Chancellor. The question upon the act of parliament is of very general importance. It is therefore fit that the parties should have an opportunity of raising the question upon record, if indeed it be a question to be determined in a court of law ; of which, however, I entertain considerable doubt.

LITTLEDALE, J., concurred.

Rule discharged.

*The KING v. ELLIS.

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The statute 3 G. 4, c. 38, s. 2, enacts, "that if any servant shall steal any money from his master, and shall be convicted thereof, and be entitled to the benefit of clergy, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to benefit of clergy, shall be transported for fourteen years." Held, that a servant convicted of petty larceny was not within the meaning of this statute, and that he was subject to be transported for seven years only.

THE defendant was indicted at a court of quarter sessions held before the justices of the city and county of Exeter, and the indictment charged, that he, one piece of the current coin of this realm called a shilling, of the value of one shilling, of the money, goods, and chattels of Susan Newman, feloniously did steal, take, and carry away. Another count charged, that the defendant was a servant to S. Newman, and being such servant, one other piece of the cur-

rent coin of this realm called a shilling, of the value of one shilling, of the money, goods, and chattels of the said *S. Newman*, feloniously did steal, take, and carry away, against the form of the statute, &c. The jury having found the prisoner guilty upon the indictment generally, the court adjudged that he be transported to parts beyond the seas for the term of fourteen years. A writ of error having been brought upon this judgment, the error assigned was, that by the law of the land the defendant could not for the offence charged in the indictment be legally transported beyond the seas for the term of fourteen years, or for any longer term than seven years. This case was argued on a former day in this term, by

Chitty, for the prisoner. The judgment cannot be supported. The defendant, having been convicted of petty larceny, was liable to transportation for seven years only. This is not a case within the statute 3 G. 4, c. 38, s. 2, which enacts, "that if any servant, &c. shall feloniously steal any money, &c. thereof, and be entitled to the benefit of clergy, then every such offender, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to the benefit of clergy, may be transported for fourteen years." The statute contemplated cases where the party convicted was compelled to claim the benefit of clergy to exempt himself from the punishment of death. But petty larceny was at no period so punishable, 4 Blac. Com. 238; 3 Inst. 218. Clergy was not allowable at common law in petty larceny or mere misdemeanors, 4 Blac. Com. 374. The statute 4 G. 1, c. 11, which first gave the court a discretionary power of ordering transportation in certain cases, mentions petty larceny by name, and it limits the period to seven years. (He was then stopped by the court.)

Parke, contra. The judgment of transportation for fourteen years is warranted by law. Secondly, at all events, it is good as a judgment of transportation for seven years. Thirdly, if the judgment cannot be supported, the prisoner may be remanded to the court below, in order that he may receive such judgment as the law will warrant. The judgment pronounced is warranted by the statute 3 G. 4, c. 38, s. 2. Before that statute all persons guilty of petty larceny, including servants robbing their masters, as well as others, might receive judgment of transportation for seven years. The object of that statute was to increase the punishment in the case of servants robbing their masters or employers. It must, therefore, have been the intention *of the legislature to subject such offenders to fourteen years transportation. There could be no doubt if the words "and shall be entitled to benefit of clergy" were omitted. In order to give effect to the manifest intention of the legislature, those words must be read, "shall not be excluded from the benefit of clergy." They have that meaning in the statute 4 G. 1, c. 11, from which they have been adopted into the statute 3 G. 4, c. 38, s. 2. The judgment, therefore, is a valid judgment. Secondly, it is a good judgment of transportation for seven years. In *Rex v. Collyer and another*, 1 Wils. 332, the defendants were convicted upon an indictment for insulting a justice of the peace in the execution of his office, and adjudged to be imprisoned for a month, and ask pardon, and to advertise it. The two latter parts of the judgment were held to be void, but the former part good. It is true a defective judgment, omitting an essential part of the punishment required by law, is bad, *Rex v. Walcott*, 4 Mod. 395; *Rex v. Read*, 16 East, 404. But here the judgment is excessive. It is good for that part which is warranted by law, and bad for the residue. At all events, the prisoner ought to be remanded to the court below, in order that the proper judgment may be given, *Rex v. Kenworthy*, 1 B. & C. 711.

Cur. adv. cult.

Attorn, C. J., now delivered the judgment of the court. This was a writ of error brought to reverse a judgment, by which the prisoner, who was con-

victed of petty larceny, was sentenced to fourteen years' transportation. [398] The objection was, that the offence charged being only petty larceny, the prisoner could not by law receive judgment for fourteen years' transportation, but for seven only. To sustain the judgment, the statute 3 G. 4, c. 38, s. 2, was relied upon. That section recites, that frequent depredations had been committed by servants, to the serious detriment and loss of their masters, and that it was expedient that such offenders, *when entitled to benefit of clergy*, should be made liable to a more severe punishment. It then enacts, "that if any servant shall feloniously steal any goods, chattels, money, &c. from or belonging to his master, and shall be lawfully convicted thereof, and be entitled to the benefit of clergy, then and in every such case such offender, instead of being subject to such punishment as may now by law be inflicted upon persons so convicted, and entitled to the benefit of clergy, may, at the discretion of the court by or before which they shall be convicted, be adjudged to be transported beyond the seas for any term not exceeding fourteen years." It has been contended, that the expression "entitled to the benefit of clergy" limits the operation of the section to those offences for which a party convicted was compelled to pray benefit of clergy in order to save himself from death; and as petty larceny was an offence never so punishable, and for which therefore it never could have been necessary to pray the benefit of clergy, it followed that a party guilty of such an offence could not be considered as a person entitled to benefit of clergy. Before the passing of this act the statute 4 G. 1, c. 11, enacted, "that where any persons had been convicted of any offence within the benefit of clergy, and were liable to be whipt or burnt in the hand, as also where any persons should be thereafter convicted of grand or petit larceny, or any felonious stealing or taking of money, &c. either from the person or the house of any other, or in any other manner, and who by law should be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, it should be lawful for the court, instead of ordering any such offender to be burnt in the hand or whipped, to order and direct that he should be sent to some of his majesty's colonies and plantations in America for seven years." Now it is to be observed, that in this statute, which is the first which authorizes courts of law to transport offenders to parts beyond the seas, petit larceny is mentioned by name. In the statute 3 G. 4, c. 38, it is not. The object of the last statute being to increase punishment, we are of opinion that it should be construed strictly, and it being doubtful whether the legislature had in view petit larceny or grand larceny only; and the latter being the only description of larceny in respect of which the party convicted must have the benefit of clergy in order to exempt himself from a more severe punishment, we think it the safer course to confine the construction of the statute to those instances. The consequence is, that the judgment of the court below is more severe than that which is authorized by law. But it is said, that the judgment is good as a judgment for seven years' transportation; but I cannot assent to that proposition. If the prisoner is sent out of the country for fourteen years, who is to say that he is to be discharged at the end of seven? It has been further urged, that the prisoner may be remanded to the court below, and there receive the proper sentence, that having been done in *Rex v. Kenworthy*, 1 B. & C. 711, *but there is this material distinction [400] between the two cases; there no judgment whatever had been passed in the court below; and this court therefore ordered the prisoner to be remanded to the inferior court, in order to receive judgment. But here the court below has passed a judgment, and that judgment being erroneous, we think there is no ground to send it back to be amended. The consequence is, that the judgment pronounced by the court below must be reversed.

Judgment reversed.

FREE, D. D. v. BURGOYNE.

The stat. 27 G. 3, c. 44, does not limit the time for proceeding in the ecclesiastical court against clerks upon a charge of fornication, if deprivation be the object of the suit; and therefore, where a suit was instituted in that court against a clerk, charging (amongst other things) fornication committed more than eight months before the commencement of the suit: Held, that a prohibition should go as to proceeding upon that charge for reformation of manners, but that a consultation should be awarded as to proceeding for deprivation.

PROHIBITION. The declaration alleged, that by a statute of the 27 G. 3, c. 44, s. 2, it was (amongst other things) enacted, that no suit should be commenced in any ecclesiastical court for fornication or incontinence, after the expiration of eight calendar months from the time when such offence should have been committed; yet the defendant, contriving, &c., had lately, to wit, in October, 1824, against the form of the statute, drawn the plaintiff into a plea in the spiritual court, touching and concerning the crime of fornication and incontinence alleged to have been committed by him, the plaintiff, with divers females in the several and respective years, 1810, 12, 13, 14, 15, 17, and 22, by wick-
edly and subtilly, in and by a certain libel or articles, objecting *articles
clinging and libelling against the plaintiff in the said spiritual court in manner following. (The libel was then set out, by which it appeared that the present plaintiff was charged with various offences.) The first article alleged, that by the ecclesiastical laws, canons and constitutions of the church of England, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment, and to abstain from fornication or incontinence, profaneness, &c., under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures, as the exigency of the case and the law thereupon may require and authorise. The second article alleged that Dr. Free, was a clerk in holy orders. The libel then proceeded to state the various acts of fornication and incontinence alluded to in the plaintiff's declaration, and many other instances of misconduct. The declaration concluded in the usual form, that the defendant continued to prosecute the plea in the ecclesiastical court, notwithstanding the king's writ of prohibition. The defendant, after denying the contempt, demurred generally to the declaration. Joinder in demurrer.

Campbell, in support of the demurrer. The statute 1 H. 7, c. 4, enables persons having episcopal jurisdiction to punish clerks for incontinence, and it does not limit the time within which suits for that purpose are to be commenced. This statute is not recited, or in any way alluded to in the 27 G. 3, c. 44, which no doubt would have been the case had it been intended to limit the time for commencing the proceedings under it. It may be *collected from the title of the modern statute. "An act to prevent frivolous and vexatious suits in ecclesiastical courts;" that it was not intended to interfere with cases under the former act, for it can hardly be supposed that the legislature would treat a suit against a clergyman for gross profligacy as a frivolous and vexatious suit. It is not within the mischief intended to be remedied, and is therefore, to be construed to be out of the provision of the statute, although within the words of it, *Com. Dig. Parliament* (R. 16.) Again, the provision that no suit for fornication shall be commenced against parties after they have lawfully intermarried, can hardly apply to a priest; for his conduct before such marriage may have been so bad as to render him wholly unfit to remain in his office. Sir J. Nicoll, has already given an opinion upon the case against the present plaintiff, by admitting those articles in the libel which charged the then defendant with incontinence, 2 Addams, 414.

Denman, contra. There is no doubt that the 27 G. 3, c. 44, s. 2, must be

construed in favor of the plaintiff in prohibition. It was not intended to repeal the former act, but merely to limit the time within which suits should be commenced. The title is general and the recital is, "whereas it is expedient to limit the time for the commencement of *certain suits* in the ecclesiastical courts;" not "suits against certain persons." Why, then, should priests be excepted out of the operation of the statute? If such an exception had been intended it would have been very easy to express it. [Holroyd, J. Against a clergyman there may be an object beyond the mere punishment *pro salute animæ*.] The case of *Galizard v. Rigault*, Salk. 552, shows that [*403] these offences cannot be taken in two different aspects.

Campbell, in reply. The foundation of the proceeding in the ecclesiastical court is, that the present plaintiff is a priest unfit for his office. The question resolves itself into this, whether this is a suit for fornication, within the meaning of the 27 G. 3, c. 44, s. 2. Suspension or deprivation is the object of the suit; if the prayer of the libel does not specify it, still if the ecclesiastical court may punish in that way, this court will not grant a prohibition.

Cur. adv. vult.

The judgment of the court was now delivered by

Abbott, C. J. This was a proceeding in prohibition, founded upon the stat. 27 G. 3, c. 44, s. 2, which limits the time for commencing certain suits in the ecclesiastical court. The declaration states, that the defendant, in October, 1824, against the form of the said statute, drew the plaintiff into a plea in the spiritual court, concerning the crime of fornication and incontinence, alleged to have been committed by him in the years 1810, 12, 13, 14, 15, 17, and 22. Looking at the title of the libel, it is clear that it was not exhibited against him for that offence only, but for neglect of divine service on divers Sundays; for using the porch of the parish church as a stable; for converting to his own use and profit the lead on the roof of the chancel of the church; for refusing and neglecting and delaying to baptize or christen divers children of his parishioners; for refusing and neglecting *to bury divers corpses, and for requiring illegal fees to be paid to him for baptisms and burials. As to [*404] those parts it is clear there must be a consultation. Then we come to the construction of the stat. 27 G. 3, c. 44, s. 2, by which it was enacted, "that no suit shall be commenced in any ecclesiastical court, for fornication or incontinence, or for striking or brawling in any church or churchyard, after the expiration of eight calendar months from the time when such offence shall have been committed, nor shall any prosecution be commenced or carried on for fornication, at any time after the parties offending shall have lawfully intermarried." It has been contended before us, that this statute extends to the clergy as well as the laity; and we think it does, as far as they and laymen are on the same footing; that is, where the object of the suit is reformation of manners or the soul's health: but that it was not intended to limit the time for proceeding against a clerk, *as such*, for deprivation. Such a suit is not frivolous or vexatious; it is not within the mischief or object of the statute. Reformation of manners is not the object, or at all events not the only object of this suit. The first article of the libel sets forth, that by the ecclesiastical laws and canons of the church of *England*, all clerks and ministers in holy orders, are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment, and to abstain from fornication or incontinence, profaneness, &c., "under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures as the exigency of the case and the law thereupon may require and authorize." The second article states that the present plaintiff is a priest or minister in holy orders of the Church of *England*. [*405] These articles show that one at least of the objects of the suit was to procure the deprivation or suspension of the plaintiff, a species of jurisdiction which

the ecclesiastical court has no opportunity of exercising over laymen. Now in other temporal matters, such as forgery of orders, there cannot be any proceeding against a layman as such ; but if he has obtained a benefice, he may be sued in the ecclesiastical court in order to his deprivation, according to *Slader v. Smallbrooke*, 1 Lev. 138. 1 Sid. 217. We think, therefore, that as to the charge of incontinence, the ecclesiastical may proceed for the purpose of deprivation, and our judgment will be, that the prohibition stand as to proceeding upon the charge of fornication, with a view to reformation or the soul's health, but that there must be a consultation as to proceeding upon that charge for deprivation or any other punishment. This course was adopted in the case of *Townsend v. Thorpe*, 2 Ld. Raym. 1507, which was a proceeding against a parish clerk, who was charged with several offences punishable in the temporal and not the spiritual courts, yet it was held, that there might be proceedings against him in the spiritual court in order to deprive him of his office, and as to that a consultation was granted. Objection has since been made to that case, on the ground that the ecclesiastical court had no authority to suspend or deprive a parish clerk. Perhaps that objection is well founded, but the rest of the case has never been questioned, and is an authority for our present decision.

Consultation awarded as to all but proceeding for incontinence with a view to reformation.

A horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a *Sunday*.

This cause was tried before *Park*, J., at the Summer assizes, for the county of *Warwick*, 1825, and a verdict was found for the plaintiff. A rule *nisi* was obtained for entering a nonsuit, and cause was shown against the rule on a former day in this term. *Clarke* was heard against the rule, and *Adams*, Serjt., and *Balguy*, contra. The material facts of the case, the arguments urged by the respective counsel, and the authorities cited, are so fully commented upon in the judgment of the court, that it is unnecessary to state them here.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the court.

This case came before the court upon a motion for a new trial. It was an action upon the warranty of a horse. The plaintiffs were *horse-dealers*, and the horse was bought and the warranty given on a *Sunday*, and the only question was, whether, under the 29 Car. 1, c. 7, the purchase was illegal, and the plaintiffs precluded from maintaining the action. That is an act for the better observation of *Sunday*, and after directing that every person shall on every Lord's day apply himself to the observation of the same by exercising himself in the duties of piety and true religion, publicly and privately, one of its provisions is, that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or *exercise any worldly labor, business, or work of their ordinary callings* upon the Lord's day, or any part *thereof, works of necessity and charity only excepted. That the purchase of a horse, by a horse-dealer, is an exercise of the business of his ordinary calling no one can doubt. And is there any thing in the spirit or frame of this act which will take such a purchase out of its operation ? The spirit of the act is to advance the

interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit unless it is so construed as to check the career of worldly traffic. And is there any thing in the frame of it to prevent its applying to the case in question? It does not indeed apply to *all persons*, but to such only as have some *ordinary calling*; and the interposition of the word "business" between the words "labor and work" might justify a question, whether it included every description of the business of a man's ordinary calling, or whether it was not confined to such as was manual and calculated to meet the public eye. There is nothing, however, in the act to show that it was passed exclusively for promoting public decency, and not for regulating private conduct; and though I expressed a doubt upon this point in *Bloxsome v. Williams*, 3 Barn. & Cres. 232, I am satisfied upon further consideration that it would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction. Labor may be private and not meet the public eye, and so not offend against public decency, but it is equally labor, and equally interferes with a man's religious duties. The same may be said of business or of work. Each may be public and meet the public eye; *each may be private and concealed. There is nothing, therefore, in the position of the word "business" between those of "labor and work," which in our judgment can justify us in giving to it any thing but its ordinary meaning; and it seems to us that every species of labor, business, or work, whether public or private, in the ordinary calling of a tradesman, artificer, workman, laborer, or other person, is within the prohibition of this statute. The statute, in direct terms, provides that every person shall apply himself to the observation of the Lord's day, publicly and *privately*; so that private as well as public conduct was expressly within its contemplation. In *Drury v. De la Fontaine*, 1 Taunt. 135, Lord C. J. *Mansfield*, (after the court had taken time to consider,) lays it down, that if any man in the exercise of his ordinary calling, make a contract on a *Sunday*, that contract would be void (and the case before him was a private contract for the purchase of a horse,) but he showed that that case was not within the statute, because no one of the parties was in the exercise of the business of his ordinary calling. His expression that the contract would be *void*, probably meant only that it would be void so as to prevent a party who was privy to what made it illegal from suing upon it in a court of law, but not so as to defeat a claim upon it by an innocent party; and so it was considered by this court in *Bloxsome v. Williams*, 3 B. & C. 232. That was also the case of a *private* sale of a horse, and an action brought upon a warranty, and to recover back the price. The objection was made that the purchase was on a *Sunday*. Though I expressed the doubt I have mentioned, whether the statute *applied to *private* sales, such as were not open breaches of the *Sunday*, that was not the ground of the [*409 decision, but very distinct grounds were stated to show that the statute did not apply, for the sale was substantially not on the *Sunday* but on a *Tuesday*. The defendant was the only person who was in the exercise of his ordinary calling, and the plaintiff did not know what his calling was, so that the defendant was the only person who had violated that statute, and it would have been against justice to have allowed him to take advantage of his own wrong to defeat the rights of the plaintiff, who was innocent. These cases, therefore, tend to support the present objection. And upon the principle that this statute is entitled to such a construction as will promote the ends for which it was passed, that it applies to private as well as public conduct, and that the purchase by the plaintiff was within the mischief intended to be suppressed, and within the words made use of to suppress it, we are of opinion, that the plaintiffs cannot maintain the present action, and that the rule for a new trial must be made absolute.

*The KING v. HAYTHORNE.

By an ancient parliament roll, it appeared that the commons, by their petition exhibited in parliament, prayed King *Edward* the Third, that the charter made to his liege subjects, burgesses of the town of *Bristol*, and the franchises by him granted to his said burgesses should be ratified and confirmed in that parliament. The answer to the petition was, that it was assented and agreed in parliament that the franchises whereof the petition made mention should be ratified and confirmed under the king's great seal. The charter was ratified by King *Edward* the Third accordingly: Held, that the crown was not prevented by this proceeding in parliament from granting a new charter to the burgesses of *Bristol*, varying the mode of electing a mayor from that provided for in the charter, recited in the petition to the king in parliament.

Queen *Anne*, by charter granted to the burgesses of *Bristol*, that they should be a body corporate, &c. &c., and released to the corporation that power of removing its members which had been reserved by a former charter of King *Charles* the Second, and released any just cause of complaint which might be against the corporation for having acted in opposition to it: Held, that it did not thereby appear that the queen granted this charter in consideration of the former charter granted by King *Charles* the Second, and that the Queen's charter was not therefore void, although the supposed charter of *Charles* the Second did not exist.

A RULE nisi had been obtained for an information in the nature of a *quo warranto* against the defendant, calling upon him to show by what authority he claimed to be mayor of the city of *Bristol*, and county of the same city. The affidavits in support of the rule stated, that *Bristol* was an ancient city, having divers liberties and privileges, but that it was not a corporation by prescription. That King *Edward* the First, by charter bearing date at *Westminster* the 28th of *March*, in the twenty-eighth year of his reign, confirmed former charters granted by King *Henry* the Third, and further granted to the burgesses of *Bristol*, that they and their successors, *burgesses of the same town*, as often as, and whensoever they should choose their mayor, (the time of war alone excepted,) should present him to the constable of the castle of the town to be admitted, and not at the Exchequer. The charter was accepted by the burgesses, and was confirmed by King *Edward* the Second, in the fifteenth year of his reign, and again by King *Edward* the Third in the fifth year of his reign. By another charter bearing date at *Woodstock* the 8th of **August*, *411] in the forty-seventh year of the reign of King *Edward* the Third, reciting that by the charters as well of his progenitors, formerly kings of *England*, which his said majesty had confirmed, as by his own, divers liberties and acquittances had been for ever granted to the *burgesses* of the town of *Bristol*, and their heirs and successors; and that at the petition of the mayor and commonalty, which was also recited, his majesty did grant, and by his said charter did confirm, for himself and his heirs, to the burgesses, and their heirs and successors for ever, that the town of *Bristol*, with its suburbs and precincts of the same, according to its metes and bounds, as they were limited, should be for ever in future alike separated, and in all respects exempted from the counties of *Gloucester* and *Somerset*, both by land and by water, that it should be a county by itself, and called the county of *Bristol*; and that the burgesses, their heirs and successors for ever, might have, within the town and the suburbs, and their precincts, by metes and bounds as they were limited, the liberties and acquittances thereunder written, and might fully enjoy and use them, that is to say, amongst other things, that every mayor of the town of *Bristol*, as soon as he should be elected into the same place, should be the escheator of his majesty, &c. The charter then contained a grant of several other privileges; and also, that the said burgesses, and their heirs and successors for ever, should have all other liberties and acquittances then before granted them, as well by his said majesty's progenitors as by himself, and also all other their customs and their profits thence arising: but it contained no provision as to the election of mayor. *412] By letters patent, bearing date at *Westminster* the 1st of *September*, in the *forty-seventh year of his reign, reciting the last-mentioned char-

ter, the same king appointed and commanded a perambulation between the county of *Bristol*, and the precincts of the same, as well by land as by water, and the said counties of *Gloucester* and *Somerset*. That a perambulation of the said county of *Bristol*, and the metes and boundaries thereof was had, and a return thereof was made into the Chancery, and the perambulation was exemplified. That by an act of parliament in the forty-seventh *Edward* the Third, the said charter, and all and singular the grants and liberties and acquittances, and all things contained and specified therein, and the perambulation exemplified by the letters patent, were ratified and confirmed to the burgesses of *Bristol* and their successors; that that act was never repealed, but still continued in force. It was then stated that, according to the belief of the party who made the affidavit, at the time of the granting the charter and the passing of the act of parliament, one of the liberties, privileges, and customs of the town of *Bristol* was, that the burgesses should choose from among themselves, each and every year, a burgess to be mayor, and that at or before the granting of the charter, and confirmation thereof, there was no common council distinct from the burgesses; that by charter of King *Henry* the Eighth, on the 5th of July, in the thirty-fourth year of his reign, *Bristol* was made a city; that in the fourth year of *Henry* the Sixth the charter and former act of parliament were recognized by parliament; that in the twenty-fifth year of the reign of *Charles* the Second, a certain number of the members of the corporation of *Bristol* attempted to surrender the rights and privileges of *Bristol* to his majesty, but that such surrender was never enrolled of record; that King *Charles* the Second, by letters patent bearing date the 2d of June, [413] in the thirty-sixth year of his reign, granted that the citizens and inhabitants of *Bristol* should be a body politic and corporate, by the name of the mayor, burgesses, and commonalty of the city of *Bristol*. By that charter the right of electing a mayor and sheriffs was to be in the common council; and there was also reserved to the king a power of removing the mayor, recorder, or any of the aldermen, or the sheriffs, or any one or more of the common council, or the common clerk steward, or coroners of the city. The affidavit then set forth a proclamation issued in the fourth year of King *James* the Second, which proclamation, after reciting that his majesty was resolved to restore all his cities to the same state as they were in before any surrender of their charters, deeds, and franchises, declared that corporations whose deeds of surrender were not enrolled, or judgment entered against them, (of which the corporation of *Bristol* was one,) and the mayor, bailiffs, &c., and the members respectively, upon the publication of that proclamation, should take upon themselves to act and proceed as a body politic; that that proclamation was accepted and acted upon by the mayor, burgesses, and commonalty of *Bristol*; and that the surrender was cancelled by the king. That the common council of the city of *Bristol* acted upon the said charter of the 36 Car. 2, or upon some subsequent charter, which, (if there were any such,) the deponent, one of the burgesses, believed to be void in this respect; and that he received no notice, at any time previous to or on the 29th of September, 1825, to attend on that or any other previous day, for the election of a mayor of the said city for the year then ensuing; and deponent believed that no such notice was given to any [414] of the burgesses for such purpose, unless to certain select bodies of the corporation, consisting of the mayor, aldermen, and common councilmen, amounting together to about forty-three persons. That at a meeting of these said select bodies *Haythorne* was elected to be mayor, and that all burgesses except the said bodies and their officers were excluded from being present, or voting at the meeting. Many other burgesses made affidavits that they had not any notice of the meeting. Upon these affidavits two objections to the election of *Haythorne* were raised; first, that it appeared, by the charter of the 28 Edw. 1, that the mayor was at that time elected by the burgesses, (not by a select body of them,) and that the charter 47 Edw. 3, did not alter the mode

of election, but confirmed all former customs. That the latter charter having been ratified by act of parliament, had the authority of such an act, and could not be altered by any subsequent charter from the crown, and that, consequently, the mayor ought still to be elected by the burgesses at large, and not by the select body. Secondly, that if the charter of the 47 *Edw. 3.*, might be altered by subsequent charters, that had not been done; for that the surrender to *Charles II.*, was void, and, consequently, the charter founded upon that surrender was also void, and the old customs and privileges of the corporation of *Bristol* remained unaltered.

The affidavits against the rule were made by the chamberlain of the city and county of *Bristol*, who had the custody of the charters and other documents belonging to the corporation, and by the deputy keeper of his majesty's records in the *Tower*, to whom the charters and documents had been delivered for the purpose of examination. Those affidavits first set out a charter *granted by queen *Anne*, in the ninth year of her reign, by which she granted to the mayor, burgesses and commonalty of the city of *Bristol*, (amongst other things,) that there should be out of the better and more discreet citizens forty persons besides the mayor, who should be the common council, and that as often as it should happen that any mayor, recorder, sheriffs, common councilmen, common clerk, steward of the court of the sheriffs of the county of *Bristol*, or coroners of the said city, should die or be removed, or go out of his or their office or offices, or that any election of the aforesaid officers or of any one or more of the same should thereafter be vacated or rendered ineffectual by incapacity or refusal, or by any other means, that then and in every such case another fit person or other fit persons should be duly elected from time to time by the common council of the said city of *Bristol*, or by the greater part of the same into those offices respectively, and should be sworn by the mayor of the said city, or by such other person, at such times and in such place and manner as had been used and accustomed in the said city in that respect for the space of forty years then last past. By another clause in that charter, her majesty released to the mayor, burgesses, and commonalty of the city of *Bristol*, and to their successors, all power and authority reserved to King *Charles the Second*, by his letters patent, bearing date the 2d of *June*, in the thirty-sixth year of his reign, concerning the signifying the royal approbation of the mayor, &c., and all power reserved of removing the mayor and other officers, or any of the common council. The affidavit then stated, that this charter of queen *Anne*, was accepted by the mayor, burgesses, and commonalty of the city of *Bristol*, and had *ever since been acted upon, and that the uniform and constant practice and usage had been that on, &c., in every year the mayor, aldermen, sheriffs, and common council met in the *Guildhall*, to elect the mayor and sheriffs for the ensuing year, when the mayor for the time being proposed one of the common council to be the new mayor, the aldermen and sheriffs another of the common council, and the residue of the common council a third, and that one of the three proposed who had the greatest number of voices of the whole of the common council in his favor, was declared elected. It was further stated, that from the year 1598, the books of the corporation contained a regular series of entries of the elections of the mayor for each year, and during the whole of that period, it appeared from those entries, that the elections were made by the common council in the manner above stated; that before the commencement in 1598, of this regular series of entries, there were some entries of elections of mayors in the reigns of *Henry VI.* and *Henry VII.*, and that it appeared from them that all the elections of mayors were by the common council exclusively; that there was no entry in any of the books, papers, or documents of the corporation, of any elections of the mayors by any other persons than the common council, and that the burgesses and commonalty never exercised, or claimed to exercise, any right or interference in the election of mayors. The affidavit of the deputy

keeper of the records in the *Tower* stated, that from examining the books, documents, and papers delivered to him by the chamberlain of the city of *Bristol*, it appeared to him, and he believed, that the corporation of *Bristol*, was a corporation by prescription, and that before the charter granted to the *corporation in the forty-seventh year of King *Edward* the Third, there was a mayor and common council in the corporation. That the earliest [417] entry of an election of mayor in the books of the corporation was in the reign of *Henry* the Sixth. That there were entries of such elections in the reigns of *Henry* the Sixth and *Henry* the Seventh, and that such elections were by the common council exclusively. That no entry of such election by any other persons could be found.

A copy of one of the entries of the election of mayor in the time of *Henry* the Sixth, was then set out, by which it appeared, that "Robert Sturmy that time mayor, J. B., J. S., &c., with all the notable persons of the whole common council of the town of *Bristol*, assembled in their council house, and by their right, discreet, and sad advisements chosen R. H. to be mayor during the year next coming, &c. Which mayor, and all the notable persons aforesaid, after the said election done, enacted and established the ordinances that follow," &c.

The proceedings in Parliament in the 47th *Ed.* 3, were then set out from the rolls of Parliament, by which it appeared, that the commons by their petition exhibited in the Parliament, prayed the king as follows: "Please our lord the king of his good and especial grace, to grant that your gracious charter made to your lieges, burgesses of your town of *Bristol*, containing that the said town with the suburbs and precincts thereof shall be a county by itself, and the franchises by you granted to your said burgesses by the same, shall be by you ratified and confirmed in this present Parliament, together with the perambulation thereof made by your commission, and returned into your chancery of the *said precincts, and of the bounds thereof, and the commons pray that [418] this bill be confirmed in this present Parliament." The answer to this petition was as follows: "It is assented and agreed in Parliament, that the charter, franchises, and perambulation whereof this bill makes mention, be ratified, approved, and confirmed to the burgesses of the town of *Bristol*, and to their heirs and successors, under the king's great seal." The affidavit then stated, that after the said petition and answer, King *Edward* the Third, by an *insipicimus* charter, reciting the former charter, separating the town of *Bristol*, with the suburbs and precincts from the counties of *Gloucester* and *Somerset*, and also reciting the letters patent exemplifying the perambulation of the metes and bounds of the said county of *Bristol*, returned into chancery, did by the assent and agreement of the prelates, nobles, great men, and commonalty in Parliament, ratify, approve, and confirm forever to the burgesses of *Bristol*, their heirs and successors, as well the said recited charters, and all and singular the grants, liberties, and acquittances, and all other things contained therein, as the said perambulation exemplified aforesaid, the granting part of which said charter was as follows: "We by the assent and agreement of the prelates, nobles, great men, and commonalty being in our Parliament, called together at *Westminster*, on the morrow of *Saint Edmund* last past, do for us and our heirs, by virtue of these presents, ratify, approve, and confirm forever to the said burgesses of *Bristol*, and to their heirs and successors, as well our said charter and all and singular the grants, liberties, and acquittances, and all other things contained and specified in the same charter, as the said *perambulation exemplified by our letters patent aforesaid concerning the [419] metes and divisions so made between the aforesaid counties of *Gloucester* and *Somerset*, and the said county of *Bristol*, or the borders and bounds, and those letters and all and singular the things contained in those letters, as our charter and letters aforesaid more fully testify. In witness whereof we have caused

these our letters to be made patent. Witness ourselves at *Westminster*, on the 20th of *December*, in the forty-seventh year of our reign."

The Attorney-General, Scarlett, Taunton, Ludlow, and G. R. Cross showed cause. If the charter granted to this corporation by Queen *Anne* be a valid charter, it furnishes a complete answer to this application; for the affidavits show the election of Mr. *Haythorne* to have been according to that charter. The first objection made on moving for the rule was, that before the charter of the 47th *Edw. 3*, no common council existed in *Bristol*, that none was constituted by that charter, and that the charter having been confirmed by act of parliament, could not be altered by any subsequent charter from the crown. That objection is founded upon a mistaken supposition that the charter of the 47th *Edw. 3*, was confirmed by act of parliament. The document extracted from the rolls of parliament cannot be considered as an act of the legislature confirming the charter; it is a mere petition from the commons to the king, that he would confirm; and accordingly his answer was, that he would confirm the charter under his great seal; and it appears that he did so. Admitting, then, that no common council existed at that time, there is nothing *420] to show that such a body might not afterwards be lawfully constituted by the authority of the crown; and the entries in the corporation books plainly show that such a body did afterwards exist in the reign of *Hen. 6*, and did then elect the mayor. It is unnecessary to notice the charter granted by *Car. 2*, because that being founded upon a void surrender, was itself void. But no valid objection can be made to the charter of Queen *Anne*. The only one that can be suggested is, that it releases the power of a motion reserved to the crown by the charter of *Car. 2*, and, consequently, treats that as an existing charter, and that the Queen being deceived as to that fact her charter is void. But the existence of the former charter is nowhere treated as the consideration for the new grant; and, therefore, supposing the mistake suggested to have existed, it will not vitiate that grant. If so, the mayor was duly elected, and the rule must be discharged.

Wilde, Serjt., Merewether, Tindal, and Bompas, contra. The charter of the 28th *Edw. 1*, which directs the burgesses of *Bristol*, as often as they should choose their mayor, to present him to the constable of the castle, shows that at that time the election was by the burgesses at large, and not by a select body. No alteration is suggested to have been made before the 47th *Edw. 3*; when *Bristol* was made a county of itself, and that grant and all former privileges were confirmed by that which those who applied for the information call an act of parliament, but which the other side contend is improperly so called. Now the petition is, that the king would confirm the grant "in that present parliament." The king, by his answer, agreed that it should be so, and afterwards he did confirm it, "by the consent and agreement of the *prelates, nobles, great men, and commonalty being in our parliament called together." The confirmation was, therefore, clearly an act of the king in parliament. The forms of statutes were not the same then as now; but, taking the whole proceeding together, the confirmation was clearly an act of the whole legislature, and consequently the constitution of the corporation of *Bristol* could not afterwards be altered by the royal authority alone, *Rex v. Miller*, 6 T. R. 268. But supposing the court to be of opinion that those proceedings have not the force of an act of parliament, the next question is, whether the mode of electing a mayor now adopted has been ordained by any valid charter. The charter of the 36th *Car. 2*, was founded upon a void surrender, and was therefore also void, and could have no effect upon the rights and customs of the corporation. The charter of Queen *Anne* was evidently granted upon the supposition that the charter of *Car. 2*, was binding; its principal object appears to have been to release certain rights reserved to the crown by that charter, for, with the exception of the releasing part, it is almost wholly a charter of confirmation. The charter of *Car. 2*, being void, it appears that Queen *Anne* was

deceived as to the main reason for making a new grant; that grant was therefore void. Assuming, however, the opinion of the court to be in favor of this latter charter, still it does not warrant the mode of proceeding adopted at the election of *Haythorne*. It requires the election to be "at such times, and in such place and manner as had been used and accustomed in the said city in that respect for the space of forty years then last past." The charter of 36th *Car.* 2, *appointed the election of mayor to be by the common council; but even supposing the corporation to have acted under that void provision until the charter of the 9 *Ann.*, still the words of the latter charter would not be satisfied by acting according to the mode pointed out by the charter of *Car.* 2, for the election is to be as had been used for forty years, which period extends beyond the 36th *Car.* 2. In order to obviate that difficulty, reliance is placed upon the entries in the time of *H. 6*, which state that the mayor was elected by the notable men of the common council assembled in the council house. But there is nothing to show that up to that period the common council was known as a select body apart from the commonalty. There is not a single entry of the election or appointment of any person to be a common councilman, nor to show of what number the body consisted, nor what qualification was required of its members. It is, therefore, but reasonable to suppose, that where the common council assembled in the council house is spoken of in the old entries, such of the commonalty as thought fit to attend at the council house were designated. At all events, these questions are very important, and present much difficulty; and where that is the case, according to the usual practice of the court, such rules as the present are made absolute, in order that the matter may receive a more mature consideration than can be given to it on motion.[†]

***ABBOTT, C. J.** I think that this rule ought to be discharged. It is a fact not now controverted, that as far at least as living memory can go, the election of mayor of the city of *Bristol* has been conformable to that mode in which the officer against whom this application was made, was elected. It is not distinctly controverted that the same mode of election has prevailed ever since the granting of the charter of Queen *Anne*; and no instance has been shown of an election in a different mode since that time. But it is said, that an election under the charter of Queen *Anne* cannot be good, for two reasons: first, because that charter must be taken to be different from the charter of the 47th *Edw.* 3, and that a proceeding took place in that reign which had the effect of preventing the crown from granting any new charter to the city of *Bristol*, varying in its provisions from those contained in that charter or the liberties that had been previously enjoyed by the citizens. Another ground of objection made to the charter of Queen *Anne* is this: that the charter is in itself void, on the supposition that the Queen was deceived when she made that grant, inasmuch as it was founded upon the supposed existence of a charter of the 36th of *Charles* the Second, which charter was in truth void, being founded upon a surrender invalid for want of enrolment.

I will consider each of those grounds separately. First as to the proceedings which took place in the 47th year of *Edward* the Third. It appears that on the 8th of *August*, in the 47th year of his reign, King *Edward* the Third by his charter confirmed for himself and his heirs to the burgesses of *Bristol* all former liberties, and granted that *Bristol* should thenceforth be a county of itself to be comprised within certain metes and bounds; *that in the following month the king issued a commission for a perambulation, in

[†] A similar rule had been obtained against the sheriffs of *Bristol*; the facts stated in the affidavits were the same, except that an entry of the election of a sheriff in the reign of *H. 5*, which was alleged to be by the mayor and common council, was followed by a return to the crown by the whole corporation, which stated, "We, the mayor and commonalty, &c." This, it was said, proved that, by "common counsel," the whole commonalty were designated.

order to ascertain the metes and bounds of the county of the city of *Bristol*. After that commission had been issued, and the return made to it, a proceeding took place in parliament which, it is insisted, is an act of parliament in itself, and confirms all that had been done in *August* and *September* preceding by the king, and that the effect of it was to prevent the king from varying without an act of parliament, the customs, liberties, and privileges confirmed by the charter. Now, one question is, whether that effect can properly be given to this proceeding in parliament? It begins, (as many ancient statutes do,) in the form of a petition or application by the commons to the king, and this is followed by an answer from the crown. The commons address themselves to the king and say, "May it please our Lord the King, of his good and especial grace, to grant that your gracious charter made to your lieges, burgesses of the town of *Bristol*, containing, &c. shall be by you ratified and confirmed in this present parliament, together with the perambulation, &c." And the commons pray that this bill be confirmed in this present parliament." That being the prayer of the commons, let us now see what was the king's answer. "It is assented and agreed in parliament, that the charter franchises and perambulation, whereof this bill makes mention, be ratified, approved, and confirmed to the burgesses of the town of *Bristol*, and their heirs and successors." If it had stopped there, it might with great reason have been contended, that this confirmation, at the prayer of the commons, of that which had previously been done by the crown in the month of *August*, was in itself an act of parliament.

*425] But it does not stop there; "for the answer goes on to say, that this shall be done *under the king's great seal*, clearly referring to a confirmation that was to take place by some act that was to be afterwards done by the king himself. Then there is a charter dated in *December* in the same year of King *Edward* the Third, shordy reciting this proceeding, and then going on to say, that "by the assent of the prelates and nobles, &c., we do ratify and confirm the previous charter which has been granted by us." This, therefore, is a proceeding entirely different from that which was the subject of consideration and decision in the case of *Rex v. Miller*, 6 T. R. 268. There the constitution of the corporation was settled by act of parliament, and it was held that it could not be varied by the acceptance of any charter inconsistent with that act of parliament. I find no fault with any *dictum* of any learned Judge in that case, that that which had been settled by the joint act of the legislature could not be altered by the crown; but this case is quite different. Here the king specially reserved to himself, in his answer to the commons, that any ratification whatever which should be made in conformity to the prayer and desire of the commons, should be his own act under his great seal. It seems to me, then, that the proceeding in the 47th year of the reign of *Edward* the Third had not the effect of preventing the crown from granting in future any valid charter, varying in its provisions from those in the charter of the 47th of *Edward* the Third, and varying, amongst other things, the mode of electing corporate officers.

I come now to consider the next ground of objection, and that applies to the *426] charter of Queen *Anne*. "That charter is said to be void, because the queen was deceived when she made the grant, for that she manifestly granted this charter in consideration of the supposed validity of the charter granted by King *Charles* the Second; that charter being really invalid inasmuch as it was founded upon a surrender, which was void for want of enrolment. The question then is, whether the charter of Queen *Anne*, was founded on that of *Charles* the Second. It appears to me that it was not. It does not begin by reciting it, it does not confirm it. The only reference made to it is, that the queen releases to the corporation that power of removing its members which had been reserved by the charter of *Charles* the Second, and releases any just cause of complaint which might be against the corporation for not having acted in all respects in conformity to it, or even in opposition to it.

Now, does that import that the queen was then acting in conformity to the charter of *Charles* the Second? Might it not happen that, at that time, the queen, for the sake of ease and quiet to the corporation of the city of *Bristol*, and for the avoiding of all doubts and questions that might be made during her own reign or in after times, should declare: "I release you from all those odious powers of amotion which were reserved by the charter of King *Charles* the Second, and if any of you have offended against the terms of that charter, I release you from the consequences of that also." It seems to me, that that is by far the most reasonable construction to be put upon that charter; and then the very ground of the argument fails altogether.

The points which I have already mentioned are questions of law. I come now to consider that which is rather a matter of fact than of law. By the charter of Queen *Anne*, "the mayor and the sheriffs are to be elected by the common council in such manner as they have been elected for the space of forty years prior to the granting of that charter. That space of forty years will go back beyond the date of the charter of *Charles* the Second. The affidavits in answer to the rule, show that the present election has been made conformably to the usage that has prevailed from the time of the charter of Queen *Anne*, and if they had stopped there, that of itself would be evidence that it had been the usage for forty years before; for we must suppose that the usage which is found to have prevailed immediately after the acceptance of that charter, was conformable to the terms thereby imposed. But those who have made the affidavits have not stopped there; for they have shown, that ever since the reign of Queen *Elizabeth*, this has been the uniform course. It has been said, that all that has been done since the time of Queen *Anne*, and for above forty years before that charter, is entitled to no weight; because it appears from the affidavits that the same practice prevailed in the reign of Queen *Elizabeth*, when, in fact, there was no select body; no common council. It has been contended that the first institution of a common council, as a select body, was by the charter of King *Charles* the second. But it by no means appears that the documents which have been referred to in the arguments or affidavits prove any such thing. There is, indeed, in the reign of *Henry* the Fifth, an entry, that (in consequence of the death of an individual during the year he was serving the office of sheriff,) at a meeting of the good men of the common council assembled together in the council house, they elected out of themselves three persons, in order that out of those three persons one might be chosen by the king and his council as sheriff of *Bristol*. And then a return was made to the crown of that election by the corporation containing these words: "We, the mayor and commonalty of our common assent have chosen three persons out of ourselves, in order that out of the three persons one may be chosen by our lord the king and his council as sheriff of *Bristol*." And it is insisted, that this is a return made by the body corporate at large, and that it is wholly inconsistent with the fact of the election having been made by a select body. It does not appear to me that there is any inconsistency in that respect. The corporation at large would be to make a return of the persons elected, out of whom the Crown was to choose one. They might very well say, "we have elected according to ancient usage," the fact being that the election was not at an assembly of the body at large, but at an assembly of a select body, supposing such a select body to have existed and to have exercised that privilege for a long period of years. It appears to me, therefore, that those documents by no means establish that there did not exist a body called a common council as far back as the time of Queen *Elizabeth* and much further, but on the contrary, that the entry of the election by the common council serves to show that there was. But then it is said, there is no entry in any of the corporation books of the election of common councilmen antecedent to that time, to show how they were elected. That may be very true. I have no doubt in my own mind that the common councilmen

before the reign of *Charles the Second*, had been very irregularly selected and chosen, and not perhaps according to any definite or precise rule.

*429] Assuming that to be so, "if they had existed as a body known, although irregularly chosen, yet when the charter of Queen *Anne* comes to make good that which has been so done, it is immaterial to inquire whether the body by which it had been done were duly and regularly constituted.

For these reasons I think we ought to discharge these rules. I have given my opinion somewhat at length, but I confess I do not, for one, entertain any doubt upon the law or the facts of the case ; and not entertaining any reasonable doubt, I think I am called upon to discharge this rule, for what otherwise should we be doing ? If we granted a rule on any trivial grounds, we should be calling into doubt the rule and government of one of the most important corporations of this kingdom. We ought to be very careful before we set on foot a proceeding that may have the effect of disturbing such a corporation. I do not mean to say that the law is to differ in the case of a great corporation, from that which it would in a small corporation. But what I mean is this : that in proportion to the importance of any subject which is presented to our consideration, the human mind is so constituted, or my mind at least is so constituted, as to require somewhat more of conviction, or rather of proof, before I consent to interfere with long established usages and customs.

BAYLEY, and HOLROYD, Js., concurred.

Rule discharged.†

† *Littledale*, J., had gone to chambers.

On moving for the rule against the sheriffs, *Wilde*, Serjt., made another objection to the election, viz., that they had been in office within three years next before, which, he contended, was contrary to the 1 R. 2, c. 11. "It is ordained that none that hath been sheriff of any county by a whole year shall be within three years next ensuing chosen again."

Per Curiam. We think that does not apply to the case of a town corporate, although it may be a county of itself.

Rule refused on that point.

Where a coroner holds two or more inquisitions at the same place on the same day, he is only entitled to one sum of 9d. a mile for travelling expenses, from the place of his abode to the place where the inquisitions are holden.

A RULE had been obtained for a *mandamus* to the justices for the county of *Warwick*, commanding them to allow certain fees to one of the coroners for that county. It appeared that the applicant had, on some occasions, held several inquests on the same day at the same place, and for each he demanded the fee of 1*l.*, and the sum of 9d. a mile for the distance from his usual place of abode to the place where the inquests were held. On another occasion, the coroner had gone from his own house to *A.* to hold an inquisition there, and from *A.* proceeded to *B.* for the like purpose, and he demanded for travelling expenses 9d. a mile from his residence to *A.*, and also from his residence to *B.* The justices, at the last *Epiphany* sessions, allowed 1*l.* for each inquisition, and in the cases first mentioned one sum of 9d. a mile from the residence of the coroner to the place where the inquisitions were holden ; and in the last instance 9d. a mile from the coroner's house to *A.*, and from *A.* to *B.*

The Attorney-General, and Holbech, showed cause, and contended, that the justices had put the right construction upon the statute 25 G. 2, c. 29, s. 1, which provided, that for every inquisition which shall be duly taken in *England*, by any coroner, the sum of 20*s.*; and for every mile which he shall be

compelled to travel from the usual place of his abode to take such inquisition, the further sum of 9d., over and above the said sum of 20s., shall be paid out of the county rates.

**Scarlett*, contra, contended, that the coroner was in every case entitled to the fee of 20s.; and 9d. a mile from the place of his abode to the place of holding the inquest. [431

ABBOTT, C. J. Where a coroner holds two or more inquisitions at the same place on the same day, it cannot be said that he is compelled to travel thither in order to take the second and subsequent inquisitions. His journey has been accomplished in order to hold the first. In like manner, when he had gone to A. for the purpose of holding one inquisition, and proceeded thence to B. to hold another, it cannot be said that he travelled further than from A. to B., in order to discharge his duty in this second instance.

Rule discharged.



The KING v. The Justices of ESSEX.†

In a notice of appeal against an order of two justices for stopping or diverting a public footway, it is necessary to state that the party intending to appeal is injured or aggrieved by the order.

AT the Epiphany sessions for the county of Essex, 1826, *George Frost*, appealed against an order made by two justices, for diverting and turning a certain part of a public footway in the parish of Mountnessey, in the said county. It was stated in the notice of appeal, that *George Frost*, of the parish of Mountnessey, a rated inhabitant of the said parish, intended to appeal against the order, &c., but it was not stated that he was injured or aggrieved by the order, and it was objected, that the "55 G. 3, c. 68, s. 3, gave [432 the right of appeal only to the person or persons injured or aggrieved by the order or proceeding; and that it was therefore necessary for the party intending to appeal, to show by his notice that he was a person injured or aggrieved; for otherwise he did not come within the description of persons entitled to appeal. The court of quarter sessions were of opinion that the notice was insufficient in this respect, and they refused to hear the appeal. A rule nisi had been obtained by *Jessopp*, for a mandamus commanding the justices to cause continuances to be entered, and to hear and determine the merits of the appeal at the next quarter sessions.

Knox, and *Brodrick*, showed cause, and contended, as before, that the party could not show himself to be entitled to appeal unless he described himself as a party grieved.

Jessopp, and *Dowling*, contra. The statute in question does not require that the grounds of the appeal should be stated; the party was not, therefore, bound to show how he was aggrieved by the order. That was to be made out by evidence at the hearing of the appeal; and if he could not show himself aggrieved, it would be a sufficient reason for dismissing the appeal. *Prima facie* every person is aggrieved by the stopping up or diverting of a public footway, and as the appellant is not compelled to state how he is aggrieved, it would be useless to describe himself as the party aggrieved. That would not give the respondents any information as to the nature of the case which they had to meet at the sessions.

***ABBOTT, C. J.** The matter in question, viz., the stopping up or diverting of a public highway, affects in a certain degree all his majesty's subjects, and therefore, as the statute has not given a right of appeal to

† This case was decided in Hilary term, but was accidentally omitted in the part containing the cases decided in that term.

all persons, but merely to the *party aggrieved*, we must suppose that the legislature intended to confer that privilege upon those persons alone who have sustained some special and peculiar injury, and not to extend the power of appealing to any captious person whomsoever. Upon the whole, then, I am of opinion that, in order to satisfy this statute (without giving any rule for the construction of others,) it should have been stated in the notice that the appellant was aggrieved. This rule must, therefore, be discharged.

Rule discharged.

PHILLIPS v. PEARCE.

Land belonging to a parish was occupied by A., and he paid rent to the churchwardens. They executed a lease of the same land for a term of years to B., and gave A. notice of the lease. In an action for use and occupation by B. against A.: Held, that A., was not estopped by having paid rent to the churchwardens from disputing B.'s title, and that the latter could not derive a valid title from the churchwardens.

ASSUMPTION for use and occupation. Plea, general issue. At the trial before Alexander, C. B., at the last Spring assizes, for the county of *Surrey*, the following appeared to be the facts of the case : The parishioners of *Wandsworth*, were in possession of land in the parish upon which houses were built, the rent of which was applied in aid of the church rates. There were no documents to show how they became possessed. Six years ago the old houses were pulled down, and new ones built out of the church rate. Mrs. *Sadler*, occupied one of them, and paid twenty-five guineas a year rent to "the churchwardens, and in 1824, she married the defendant. These premises were leased by the churchwardens to the plaintiff on the 27th of December, 1824, for twenty-one years from *Michaelmas* preceding, in consequence of a resolution of the vestry. From *Michaelmas*, 1823, up to the time when this lease was executed, no rent had been paid. One year's rent was due to the churchwardens, and a quarter's rent to the plaintiff. The rent due to the churchwardens was paid in *February*. On the 19th of *January*, 1825, the churchwardens gave notice to the defendant that the plaintiff was the landlord of the house. The plaintiff, on, &c., demanded a quarter's rent. The only objection the defendant made was to paying it quarterly. A distress was then put in. The defendant called upon the broker and said he would pay £l. 11s. 3d. if he would allow him a week or two. At the expiration of that time he refused to pay. Upon these facts it was objected by the defendant, that as the churchwardens were not a corporation so as to purchase lands or take by grant, they could not make a lease of land belonging to the parish ; and if the lease made to the plaintiff were void, he had no title to the rent. On the other hand it was contended on the part of the plaintiff, that the defendant by having paid rent to the churchwardens had admitted their title, and that he could not therefore dispute that of the plaintiff which was derived from the churchwardens. The Lord Chief Baron, was of opinion that the lease granted by the churchwardens was void, and he directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a verdict for two quarters' rent.

**Thesiger*, moved accordingly, and relied upon *Rennie v. Robinson*, 1 Bing. 147, as an authority to show that the defendant could not call in question the title of the plaintiff. There the premises had been devised to a Mrs. *Williams*, before her marriage. Her husband demised to *Robinson* as a yearly tenant, and afterwards made a lease to *Rennie*, to which Mrs. *Williams* refused to assent. The husband gave notice to *Robinson* of the transfer,

and *Rennie* demanded the rent, but *Robinson*, paid it to Mrs. *Williams*, and never attorned to *Rennie*. It was held by the Court of Common Pleas, that as *Robinson*, had acknowledged the title of *Williams*, he could not impeach that of *Rennie*, which was derived from *Williams*.

ABBOTT, C. J. A man by paying rent to churchwardens, cannot make them a corporation when they are not so by law. Many inconveniences have been experienced in consequence of lands belonging to parishioners, who are not by law a corporation. The legislature has provided a remedy for these inconveniences in certain cases by the statute 59 G. 3, c. 12, s. 17, which enacts, that the churchwardens and *overseers* shall take and hold in the nature of a body corporate for and on behalf of the parish, all buildings, lands, and tenements belonging to the parish. That statute does not extend to this case. I think, therefore, that the churchwardens alone had no title to the land, or the rent which issues from it.

Rule refused.†

† See *deo dem.* *Grandy v. Clarke*, 14 East, 488.



*GRANT, et al., v. FLETCHER, et al.

[*436]

Where a broker, having made a contract, entered it in his book, but did not sign it, and afterwards signed and delivered bought and sold notes to the contracting parties materially differing from each other: Held, that there was no valid contract in writing to bind the parties.

ASSUMPSIT for not accepting four hundred bags of *Egyptian* cotton pursuant to contract. Plea, general issue. At the trial before *Hullock* Baron, at the last Spring assizes for the county of *Lancaster*, the following appeared to be the facts of the case. The plaintiffs having received advices, that six hundred bags of cotton were shipped for them at *Alexandria*, by the ship *Robert*, of which one *Wake*, was master, directed their broker, *Withington*, to sell four hundred bags at 17½d. per lb. *Withington*, accordingly entered into a verbal contract with the defendants, and made the following entry of it in his memorandum book: "Sold *Peter Fletcher & Son*, four hundred *Egyptians*, to arrive per *Robert, Wake*, at 17½d. per lb." And he delivered to the defendants the following note of the contract: "*Robert, Wake*, four hundred bags of *Egyptian* cotton at 17½d., shipped on the 22d of *February*, for *Wm. Grant*, and Brothers.—*Henry Withington*." On the same day he delivered to the plaintiffs the following note: "four hundred certain to *Messrs. Fletcher & Son*, at 17½d., ten days and three months from the delivery, you allowing me my commission, *H. W.*" It was objected, that as the notes delivered to the contracting parties were different, neither was bound, and *Cumming v. Roebeck*, Holt's N. P. C. 172, was cited. The learned Judge was of opinion, that there was no valid contract binding both parties, and the plaintiff was nonsuited.

**Cross*, Serjt., moved for a new trial. It may be conceded, that where a broker delivers to the contracting parties two instruments, [*437] each of which contains a distinct contract, neither party is bound. But here, neither of the notes delivered to the parties contained a complete contract. That delivered to the defendants did not import a contract of sale, nor were the names of the buyers mentioned. That delivered to the plaintiffs did not mention the commodity sold. The contract of sale was verbal, and the question is, whether there was any note in writing of that contract. Now, the entry by the broker in the memorandum book, together with the note delivered to the

defendant, did constitute a complete contract. For they contained the names of the buyers and of the sellers, the description of the commodity sold, and the price ; and that being so, there was a note in writing of the contract.

ABOTT, C. J. The broker is the agent of both parties, and, as such, may bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the *same* contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. The entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it. A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed : but if the notes are imperfect, as in the present case, an unsigned entry [438] in the book will not supply the defect. It is the duty of brokers to make the contract so as to be binding on both parties. They are employed to prepare contracts on which great sums of money depend, and I must say, that in many cases which have come before me they appear to conduct their business in a very slovenly, negligent manner.

Rule refused.

DOE, on the Demise of JOHN BIRTWHISTLE, v. VARDILL.

A child born in *Scotland*, of unmarried parents, domiciled in that country, and who afterwards intermarry there, is not by such marriage rendered capable of inheriting lands in *England*.

EJECTMENT for an undivided third part of lands in several parishes in *Yorkshire*. Plea, the general issue. At the trial before *Bayley*, J., at the *Yorkshire* Spring assizes, 1825, the jury found a special verdict in substance as follows : *William Birtwhistle* being seised in his lifetime in his demesne as of fee, of and in one undivided third part, (the whole into three equal parts to be divided,) of and in the premises mentioned in the declaration, on the 12th of *May*, 1819, died so seised without leaving any issue of his body. All the brothers of the said *William Birtwhistle* had died in his lifetime, and they all died unmarried and without issue, except *Alexander*, one of the brothers of the said *William*, who married and had issue in the manner and at the time hereinafter particularly mentioned. The said *Alexander Birtwhistle* went from *England* into *Scotland* in the year 1790, and became and was domiciled there, and there remained and dwelt so domiciled until the time of his death as hereinafter mentioned. One *Mary Purdie* was also a person dwelling and remaining in *Scotland*, domiciled there during the whole of the period of time [439] in which *Alexander Birtwhistle* was so domiciled there as aforesaid. *Alexander Birtwhistle* and *Mary Purdie* being so domiciled in *Scotland*, the said *Alexander Birtwhistle* did cohabit with the said *Mary Purdie*, and did beget upon the said *Mary Purdie* the within named *John Birtwhistle*, which said *John Birtwhistle* was the only son of the said *Alexander Birtwhistle* and of the said *Mary Purdie*, and was born in *Scotland* on the 15th of *May*, 1799. After the birth of the said *John Birtwhistle*, that is to say, on the 6th of *May*, 1805, the said *Alexander Birtwhistle* and *Mary Purdie* were married in *Scotland* according to the laws of *Scotland*. On the 5th of *February*, 1810, *Alexander Birtwhistle*, the father of the said *John Birtwhistle*, died in *Scotland*, seized to him and his heirs of divers lands and tenements there situate,

leaving the said *John Birtwhistle* him surviving, who, after the death of his father, was, duly according to the law of *Scotland*, served heir to the said lands and tenements of the said *Alexander Birtwhistle*, and now holds and enjoys the same in his own right, he, the said *John Birtwhistle*, having from the time of his birth hitherto dwelt and remained in *Scotland*, and been domiciled there. If a marriage of the mother of a child with the father of such child takes place in *Scotland*, such child born in *Scotland* before the marriage is equally legitimate by the laws of *Scotland* with children born after the marriage, for the purpose of taking land and every other purpose.[†] The case was now argued by

"*Vindal*, for the lessor of the plaintiff. The lessor of the plaintiff being legitimate by the law of the country where he was born, is legitimate all over the world; for legitimacy is a personal *status*, which accompanies a man wherever he goes. The marriage of the parents is to be decided according to the law of *Scotland*, where they were domiciled; and a marriage valid there is valid every where. Why then should not the legitimacy of the offspring of such marriage be decided in the same mode? It is part of the *Scotch* law of marriage, that a marriage solemnized under the circumstances stated in this special verdict is presumed to have taken place before the birth of the child. That is *præsumptio juris et de jure*, against which no averment is allowed, and, consequently, the child is *legitimus*, not *legitimatus*. There is nothing contrary to this in the definition of an heir by the law of *England*. In Co. Litt. 7 b., it is said, " *Hæres*, in the legal understanding of the common law, implieth, that he is *ex justis nuptiis procreatus*; for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood do descend of some estate of inheritance." The lessor of the plaintiff contends that he was born *ex justis nuptiis*, according to the law of the country where he was born; and by that law the question ought to be determined. Neither is that which has been commonly called the statute of Merton, c. 9, applicable to this case. That was not, properly speaking, a statute, but a refusal by the parliament to make a statute, introducing the civil and canon law into this country, and leaves the present question untouched, which relates to a person not born here, but born in a country where that law does prevail, and according to which he is legitimate. In questions of dower, where parties have not been married in *England*, if there is an issue *ne unques accouple*, &c. that must be tried by a jury, upon evidence of the law prevailing in that country where the marriage took place, *Ilderton v. Ilderton*, 2 H. Bl. 145. So, also, the question of legitimacy must be decided by evidence of the law prevailing in the country where the child was born. The special verdict finds what is the law of *Scotland* upon this point, and that is founded upon the canon and civil law, both of which recognize the effect of a *subsequens matrimonium*, in rendering legitimate the issue born before. Balfour's Practice, p. 239, s. 9; Craig, b. 2, dieg. 13, s. 16; Bancton, b. 1, tit. 5, s. 54; Erskine, b. 1, tit. 6, s. 52; Nov. 19, 89; Pothier Traite du Contrat de Marriage, p. 5, c. 2, art. 2, ss. 1—5, *McAdam's* case, 1 Dow. 148. These authorities fully establish, that in countries where that law prevails the *subsequens matrimonium* is by a fiction of law referred back to the time of procreating the child. According to the law of *Scotland*, then, the lessor of the plaintiff was legitimate, and the question here being one which ought to be decided upon the principles of international law, let us see what law ought to govern the decision of this case. *Vinnius*, tit. 1. " *De jure personali*," says, " *Status est persona coadiutor aut qualiter quoque efficit ut hoc vel illio jure uiatur, ut esse liberum, esse servum, esse inge-*

[†] It was admitted on the argument, that this statement of the law is subject to qualification, viz. "if begotten and born whilst such father and mother were respectively unmarried, and if these respectively continued unmarried from the time when such child was begotten until the time of their intermarriage."

nuum, esse libertinum, esse alieni, esse sui juris." *Huber*, in his treatise, "De conflictu legum," b. 1, tit. 3, gives three rules, by which it is to be decided how far the law of one country shall be "received in another."

*442] He introduces the subject with this observation: "Sæpe fit ut negotia in uno loco contracta, usum effectumque in diversi locis imperii habeant aut alibi dijudicanda sint:"—and then follow his rules, 1st. Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant neque ultra." (The second is not material to this question.) 3d. Recatores imperiorum id comiter agunt ut jura cujusque populi, intra terminos ejus exercita, teneant ubique vim suam, quatenus nihil potestati aut juri alterius imperantis ejusque civium prejudicetur." In the same book, s. 8, it is said. "Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, prejudicii aliis non creandi." And in s. 9, "Porro non tantum ipsi contractus ipsæque nuptiæ, certis locis rite celebrate ubique pro justis et validis habentur, sed etiam jura et effecta contractum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt." In s. 12, "Ex regulis initio collocatis etiam hoc axioma colligitur. Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu ut ubivis locorum eo jure quo tales personæ alibi gaudent vel subjecti sunt, fruantur et subjiciantur." It must be conceded, that these rules can only apply where our laws admit the existence of a corresponding *status*, and where they are not at variance with any positive law, consequently they do not apply to the *status* of slavery, which is not recognized in this country. In many instances, the laws of foreign nations have been allowed to be imported here. In *Dalrymple v. Dalrymple*, 2 Hagg. 58, Lord *Stowell* says, that the cause "being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." In like manner, a marriage celebrated according to the law of the country where the parties are domiciled, cannot be dissolved by the law of divorce prevailing in another country, *Lolley*'s case, Russell & Ryan's C. C. 237, which is recognised by Lord Eldon in *Torey v. Lindsay*, 1 Dow. 117. In the case of other contracts, they are construed according to the laws of the place where they are made, *Faubert v. Turol*, Prec. in Cha. 207; *Freemoult v. Dedire*, 1 P. W. 429; *Alves v. Hodgson*, 7 T. R. 241; *Male v. Roberts*, 3 Esp. 163; *Inglis v. Usherwood*, 1 East, 515. There is also a large class of cases in which it has been held that the bankrupt laws of one country are to have effect in another, *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; and *Richards v. Hodson* there cited, *Poller v. Brown*, 5 East, 124; *Burrows v. Jemino*, 2 Str. 733. In like manner in cases of intestacy the foreign law prevailing at the place of the intestate's domicile has governed the distribution of property in this country, **Gordon v. Gordon*, 3 Swanst. 400; *Somerville v. Somerville*, 5 Ves. 750; *Brodie v. Barry*, 2 Ves. & B. 127; *Ryan v. Ryan*, 2 Phill. 832, *Balfour v. Scott*, 6 Bro. P. C. 550. Lastly, there are two cases which have been decided in the House of Lords bearing so strongly upon this, that although they are not precisely in point, yet they show very clearly that had the present case been then under consideration, the decision would have been in favor of the legitimacy of the lessor of the plaintiff. *Sheddon v. Patrick*, and the case of the *Strathmore* peerage. The former was originally decided in the court of session, and the judgment was affirmed in the House of Lords, 1808. *W. Sheddron*, of the city of *New York*, in *America*, entered into a regular marriage according to the law of *America*, with a woman

who had previously borne to him two children, *William* and *Jane*, and he died a few days afterwards, leaving an estate in *Ayrshire*, not disposed of by will or other settlement. Such marriage had not the effect of rendering the children legitimate in *America*. It was held that the son *William* could not inherit the *Ayrshire* estate, because his legitimacy or illegitimacy must be determined according to the laws of *America*, where his parents were domiciled and himself born, and by the laws of that country he was illegitimate.† This case proves two things; first, that the consequences of the marriage depend upon the law of the country where it is solemnized; second, that a man cannot be a bastard in one country and legitimate in another. The principle of this decision was recognized by Lord *Eldon* in *Gordon v. Gordon*, and in the [*445] case of the *Strathmore* peerage, where the son of the late lord, born in *England*, of parents domiciled in *England*, was held not to become entitled to the *Scotch* title and estates, by the subsequent marriage of his parents solemnized in *England*. Lord *Eldon* said he could discover no material difference between the case of the then claimant and that of *Sheddon*; and Lord *Redesdale* says, "The law that attached to him at his birth was the law of *England*;" and after referring to the case of *Sheddon v. Patrick*, he proceeds, "So I apprehend that this child was born illegitimate according to the law of the country in which he was born, according to the condition of his mother of whom he was born, and according to the state of his father, who was at the time a person unquestionably domiciled in *England*." The present lessor of the plaintiff, on the contrary, is legitimate by the law of the country where he was born, and by that law is not only considered legitimate now, but to have been so from his birth. His case is the exact converse of *Sheddon v. Patrick*, and the *Strathmore* peerage case; it follows, then, that had the claim in either of those cases been founded upon circumstances similar to those upon which the present case depends, that claim would have been established by the House of Lords.

Courtenay, contra. It appears from *Calvin's* case, 7 Co. 1, that the right of inheriting *English* lands, must be decided by *English* principles and *English* law. Foreign laws, and the decisions of foreign courts, cannot prevail. Innumerable inconveniences and difficulties would arise [*446] if the courts of this country were to allow the law of the place, where any party may happen to be born, to decide the right of inheritance. According to the canon law, if a man, during the life of his wife marries another, if the second wife is in *bona fide*, that is, if she knows not of the impediment to the marriage, although the second marriage be void, her issue is legitimate, *Pothier Contract de Marriage*, pt. 5, s. 4. Suppose, then, a man in this country to have several daughters, and to go abroad where the canon law prevails, and enter into such a second marriage and to have a son; although legitimate in the country where born, yet surely he could not inherit lands here to the exclusion of the daughters. Suppose a man to enter into several marriages in a country where polygamy is allowed, each would be a good marriage there, but would each wife be entitled to dower? Or suppose the Pope were by dispensation to allow an *incestuous* marriage, would the issue be considered legitimate in this country? Take the converse of this, and suppose the case of a marriage between first cousins, in a country where that is prohibited, and where the issue would be considered illegitimate, would that prevent them from inheriting lands in *England*? The law of *possessio fratris, &c.*, is peculiar to this country; but the son of a second marriage, born abroad, where no such rule prevails, would not, therefore, inherit lands in this country, to the exclusion of the sister of the whole blood. *John Voet*, b. 25, tit. 7, s. 4, mentions three modes of rendering legitimate those who were not so by birth. "Per obla-

† This account of *Sheddon v. Patrick* is taken from the printed case laid before the House of Lords in the *Strathmore* peerage case.

tionem curia, per subsequens matrimonium, et per rescriptum principis." Now if a child, rendered legitimate *per subsequens matrimonium*, is to inherit lands in "this country, why should not the same privilege be granted to those legitimate "per oblationem curia et per rescriptum principis?" Yet in the latter cases it would hardly be contended that the child can inherit. The whole argument on the other side rests upon the necessity of recognising in this country the personal *status* of any individual coming into it. But that cannot be done where it is contrary to the general spirit of our moral, religious, or political institutions. *Huber* and *Vinnius*, describe slavery as a personal *status*, that accompanies a man every where: *Somerset's* case, 20 St. Tr. 79, shows that such a *status* is not recognised here. The comity of nations, upon which reliance is now placed, could not obtain a recognition of the laws prevailing in one of our colonies, much less, then should it have the effect, where the conflict is between the laws of *England*, and those of an independent nation. The same reason exists for refusing to give effect to the law of, *Scotland* now, that prevented the Court of King's Bench, from recognising the laws of *Jamaica*. It is contrary to the spirit of our moral, religious, and political institutions. The statute of *Merton* is decisive. That was not only a refusal to make a new law, but a Parliamentary declaration of the then existing law upon the subject. Lord *Coke*, in 2 *Inst.* 97, cites the following passage from *Glanville*, b. 7, c. 15. "Orta est quæcunque si quis antequam pater matrem suam desponsaverat fuerit genitus vel natus, utrum talis filius sit legitimus hæres cum postea matrem suam desponsaverat. Et quidem licet secundum canones et leges Romanos, talis filius sit legitimus hæres, tamen secundum jus et consuetudinem regni, nullo modo tanquam hæres, in heræditate sustinetur, vel hereditatem de jure regni petere potest." He then adds

"And herewith do agree, not only other ancient authors, but the constant opinion of the judges in all succession of ages ever since, of the ancient law of *England*;" for which he cites *Bracton*, b. 5, 416, *Fleta*, b. 6, c. 38, *Fort*, c. 39, 11 *Ass.* p. 20. Lord *Coke*, afterwards mentions the case of *William* the Conqueror, in a manner which shows, that in his opinion it made no difference whether the party was born and his parents married in a foreign country or in *England*. "Some have written that *William* the Conqueror being born out of matrimony, *Robert*, his reputed father, did after marry *Arlot* his mother, and that thereby he had right by the civil and canon law, but that is *contra legem Anglie*, as here it appeareth." Page 98. He then says, that "Our common laws are aptly and properly called the laws of *England*, because they are appropriated to the kingdom of *England*, as most apt and fit for the government thereof, and have no dependency upon any foreign law whatsoever, no not upon the civil or canon law, other than in cases allowed by the law of *England*." *Selden*, in his "*Dissertatio ad Fletam*," c. 9, s. 2, gives two reasons which our ancestors had for not admitting the civil law into this country. "Altera est, juris Cæsarei apud majores tunc nostros (qua regimen publicum illud omnino spectaret) aperta et publica improbatio. Altera, juris Anglicani, quod commune vocitamus, ejusdemque principiorum, qua gentis hujus genio ab intima antiquitate adaptata sunt, singularia aestimatio, atque inde, nec immerito, in eodem adhesio constans et sane pertinax."

**449]* lished that legitimacy is a personal *status* which accompanies a man every where, it would by no means follow, that a capacity to inherit lands is a personal *status*. The right to inherit is personal *sub modo*, that is, subject to the conditions and restrictions of the feudal law. *J. Voet*, recognises several modes in which children illegitimate by birth may become legitimate; but in book 38. tit. "Digressio de feudis," s. 65, he says, "Jure tamen feudali nulli alii quam *legitime nati*, ad feudalem veniunt successionem, adeoque exclusi omnino naturales." Which shows that it is one thing to be legitimate, another to have a capacity to inherit. Inheritance in the feudal law is a new admission to the fee. All the incidents of that tenure, relief *primer seisin*, &c., show

that it is not a personal but a mixed right, and a variety of instances may be cited which show that the *lex loci rei sitae* must regulate that right. By the common law of the land, the husband is not tenant by the courtesy unless there has been issue of the marriage; in the case of gavelkind lands that is not necessary. By the general law, the eldest son inherits the whole of the land, but gavelkind and borough-english lands descend in a different mode. And in all cases where there is a conflict of laws, the *lex loci* prevails. The result appears to be this, that feudal inheritance is a matter of contract, and every contract must be construed according to the laws of the place where it is to have effect. In *Madox, Form. Ang.* it is said, that feuds are made hereditary by the words "*hæredibus suis*." Now, *hæres*, according to Lord *Coke's* definition, is "*ex justis nuptiis procreatus*." No person who does not answer that description can be within the meaning of the contract, which must be construed as between the king and the subject, and therefore, *in favor of the former, (all feudal grants having been originally made by him,) who has a direct interest by reason of his right in case of *escheats*. He was then stopped by the court, who called upon

Tindal, to reply. The difficulties suggested as likely to result from the recognition of a foreign law in this case are merely imaginary. The supposed claim of dower by several wives married where polygamy is allowed, the imagined descent to a brother of the half blood, or to the son of a second wife who marries in *bona fide* during the life of the first, can have no application. They are in direct opposition to the laws of this country. The argument for the plaintiff only extends to the recognition of the *status* of marriage and of legitimacy, which are known to the whole of *Europe*, where Christianity is professed. We do recognize the foreign marriage in this case, why not the consequences also? The case of legitimation by rescript has been put: the effect of that in the country where it takes place is merely to release to the bastard a part of the property which is forfeited to the prince. The passage from *J. Voet, Diggessio de feudis*, has no application; it would prove too much; for, no doubt, the feudal law was applicable to *Scotland*, and yet persons not *legitime nati* inherit there if legitimated *per subsequens matrimonium*: or if it does apply, it proves that persons in the situation of the lessor of the plaintiff are in *Scotland*, considered *legitime nati*. So also the passages cited by Lord *Coke*, from *Glanville, Fleta*, and *Bracton*, merely relate to the laws of this country, and only establish that persons born in *England*, before the marriage of their parents cannot be legitimated. The claimant's argument concedes that the eldest son *ex justis nuptiis procreatus* is to inherit; the "question is, which is that son?" and that question must be answered by the laws of the country where the parties were domiciled, where the child was born, and where the marriage took place. The instances of gavel-kind and borough-english, where the local law governs the course of descent, have nothing to do with the question. Here the course of descent is admitted, no attempt is made to apply the foreign law to that, but to ascertain who is the person answering the description of heir according to that course of descent. This is a question of fact to be decided by evidence of the foreign law in the same manner as in *Lollys's* case, *Dalrymple v. Dalrymple*, 2 Hagg. 106, and *Ruding v. Smith*, Ib. 385.

ABBOTT, C. J. The impression which I received upon the first reading of this case has not been altered by the argument. The simple question is, who is the heir to lands in *England*? The rule as to the law of the domicile has never been extended to real property, nor have I found in the decisions in *Westminster Hall*, any *dictum* giving countenance to the idea that it ought to be so extended. Two decisions in the House of Lords have, however, been referred to, whence it is said such an opinion may be inferred; it is therefore, satisfactory to me to know that this case may be carried before that tribunal. There being no authority for saying that the right of inheritance follows the law of

the domicile of the parties, I think it must follow that of the country where the land lies. Personal property has no locality, and even with respect to that it is not correct to say that the law of *England*, gives way to the law of a foreign country, but that it is part of the law of *England*, that "personal property should be distributed according to the *jus domicilii*. The question now to be decided is, whether a person having been born abroad can inherit land here, who would not have inherited had he been born in *England*. That the descent of land in *England*, follows the law of the place where it is situate, appears by the various customs prevailing in different manors. Is there then any authority that the law of *England*, as to any lands in *England*, is to adopt the law of a foreign country? We are not altogether without an authority upon the subject. It appears by the statute of *Merton*, that the bishops were desirous of having that very law, for which the lessor of the plaintiff now contends, introduced into this country; but it was refused in language which has always been remembered and often repeated. That language, it is said, must be confined in its application to persons born in *England*; but the Crown had foreign possessions at that time, and persons born there were not aliens; and I see no reason for restraining the meaning of the passage in question in the manner contended for. Having that authority before me, and finding nothing in our law books to support a contrary doctrine (indeed in *Brodie v Barry*, 2 Ves. & B. 127, there is a *dictum* in favor of it) I think we shall not be warranted in giving effect to the *Scotch* law of legitimacy. It is not against our law that a foreign marriage, however solemnised, should be held good; we adopt the laws of all Christian countries as to marriage, but it by no means follows that we are to adopt all the consequences of such marriages which are recognised in foreign countries; it is sufficient if we admit all such *consequences as follow from a lawful marriage solemnised in this country. For these reasons, I am of opinion that our judgment must be in favor of the defendant.

BAYLEY, J. I am entirely of the same opinion; I concede, that the *lex loci* governs the question of marriage; but whether all the consequences recognised in a foreign country, as following upon a marriage there, are also to be recognised in this country, is a very different question, and I think must be answered in the negative. In my judgment, the right to inherit land depends upon the quality of the land, and not upon any personal *status*. In this country there are many different tenures, and the question in each is, who is *hæres*, according to the law of *England*? If the land be of gavelkind tenure, it goes to all the sons alike; if borough-english, to the youngest son. What, then, is the descendible quality of lands held in *socage*; who is the *hæres*? We have no occasion to go beyond the statute of *Merton*, in order to answer that question. The title of it is, "He is a bastard that is born before the marriage of his parents;" not restricting it to those born in *England*. After that, various statutes were passed to give to persons born out of *England*, the same right of inheritance that they would have had if born within this country; such were the statute 25 *Edw.* 3, s. 2, and 7 *Anne*, c. 5, s. 3. The present ejectionment is founded upon a claim of right which the lessor of the plaintiff could not have had if born within *England*. In stating descents in real actions, it is not sufficient to say that the land descended to "A. *filio primo*," you must add "et *haeredi*." No person can so describe himself whom the law of this country does not recognise as *heir. In *Co. Litt.* 7 b. a definition of *hæres*, as recognised by our law, is given; it is he *ex justis nuptiis procreatus*; the lessor of the plaintiff does not answer that description, and, consequently, cannot recover in this action.

HOLROYD, J. It appears to me, that the question to be decided lies within a very narrow compass. The case must be determined entirely by the law of *England*. The case of *Dalrymple v. Dalrnyple*, certainly appears applicable to the present, but in my opinion it applies in favor of the defendant. **Lord**

Stowell says, that the case being entertained in an *English* court, must be adjudicated according to the principles of *English* law. Upon the question of marriage, it is part of the law of *England*, that the law of the country where the marriage is solemnised shall be adopted; and the same observation applies to the distribution of personal property, according to the law of the domicile. But no such principle applies to the inheritance of real property; to that the *lex loci* is alone applicable. And I take it, that legitimacy alone is not sufficient to make a person inherit *socage* lands, it must be legitimacy *sub modo*; the heir must be a child born after marriage. Foreign laws of descent are in no case adopted; the brother of the half-blood cannot inherit here, although he would in many foreign countries. Upon these grounds, I am of opinion, that the defendant is entitled to our judgment.

LITTLEDALE, J. The rule is perfectly clear as to personal property: the *lex domicilii* governs its distribution; but that is on account of the ambulatory nature of the property. The reason is inapplicable to land, *and no such rule as to the inheritance of land can be found in our law books; it must, therefore, depend upon the law of the place where it is situate. One general rule applicable to every course of descent is, that the heir must be born in lawful matrimony. That was settled by the statute of *Merton*, and we cannot allow the comity of nations to prevail against it. The very rule, that a personal *status* accompanies a man every where, is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that *status* are sought to be enforced. Here it would militate against our statute law to give effect to that *status* of legitimacy acquired by the lessor of the plaintiff in *Scotland*. He cannot, therefore, be received as legitimate heir to land in *England*.

Judgment for the defendant.



WILSON v. GEORGE.

A plaintiff cannot declare *de bene esse* upon a *latitat* returnable on the last general return of a term.

CRESSWELL had obtained a rule to set aside the judgment in this case upon the ground that the declaration was improperly filed *de bene esse*, the writ, (a non-bailable *latitat*,) being returnable on the 9th of *February*, the last general return day of *Hilary* term. On that day notice of declaration being filed *de bene esse*, was served, and the defendant was required to plead within eight days: and judgment was afterwards signed for want of a plea. The 12th of *February* falling on a *Sunday*, *Hilary* term ended on the 13th.

**Coltman* showed cause, and contended that the rule of court *Trin. term, 22 G. 3.* sanctioned the course adopted in this case. The rule [*456 is, "that upon all process returnable before the last return of any term, where no affidavit is made or filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead within eight days after the filing or delivery thereof, provided the declaration be filed or delivered, and notice thereof given four days exclusive before the end of the term, and a rule to plead be duly entered." Now the last day of the term is the last return of writs of *latitat*; the process in this case was, therefore, returnable before the last return, and the declaration was filed, and notice thereof given four days exclusive before the end of the term.

Per Curiam. The declaration was improperly filed *de bene esse*. That the "last return" in the rule referred to, means the last general return, is plain, when you consider that it was made to enlarge the privilege of declaring *de bene esse* upon writs returnable on the first or second returns, which had been given by a former rule, *Mich. term, 10 G. 2.*

Rule absolute.

*457]

*DOE on the Demise of GRUBB v. J. GRUBB.

Where, in ejectment, *A.* was admitted to defend alone, as landlord, and died before the termination of the action, having devised all his real estates to *B.*, and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless *B.* would appear and defend the action as landlord.

A RULE had been obtained calling upon *E. Grubb*, the devisee of *J. Grubb*, the defendant in this action, which was an ejectment for lands in the parish of *Horsender*, in the county of *Buckingham*, to show cause why the lessor of the plaintiff should not sign judgment against the casual ejector, and issue execution thereon, unless the said devisee or the tenant in possession would appear and defend the action. It appeared by the affidavits that the lands in question descended to the lessor of the plaintiff in 1812, from his father, who had not been in possession since 1805. In 1814, he brought ejectment to recover possession, when *E. Grubb* appeared and was admitted to defend as landlord. Before the suit was ended, viz. in 1817, *E. Grubb* died intestate, leaving *J. Grubb*, (then an infant,) his heir at law. Negotiations were then entered into, but ultimately failed; and in 1820, the lessor of the plaintiff brought another ejectment, when *J. Grubb* appeared, and was admitted to defend as landlord. The lessor of the plaintiff filed a bill in the Exchequer for a discovery, to which the defendant made an insufficient answer, and soon afterwards went to *India*, where he remained until he was killed in battle in *May*, 1825, when he left his brother, *E. Grubb*, devisee of all his real property, whereupon the lessor of the plaintiff, finding that the statute of limitations would be a bar to a new ejectment, made this application.

*The court after hearing *Parke* against the rule, and *Scarlett* and *458] *Patteson* in support of it, thought it was but reasonable to grant the leave desired, inasmuch as the lessor of the plaintiff had not been guilty of any wilful delay in the prosecution of his claim.

Rule absolute.

GRAY v. COX.

Where the court, after verdict for the plaintiff, granted a new trial without mentioning the costs, and the plaintiff discontinued: Held, that the defendant was not entitled to the costs of the trial.

The plaintiff in this case originally obtained a verdict in his favor, but a new trial was afterwards granted, and nothing said about costs; and the court having, in *Trinity* term, 6 G. 4, refused to allow the plaintiff to amend his decla-

ration unless upon the terms of paying the costs of the former trial, he discontinued. Whereupon the master in his taxation of costs allowed the defendant the costs of the former trial. A rule having been obtained for the master to review his taxation,

Campbell showed cause, and contended, that according to the case of *Jackson v. Hallam*, 2 B. & A. 317, the defendant was entitled to the costs of the former trial, inasmuch as the plaintiff had thought fit to abandon the suit; and that the present case was stronger in favor of the allowance than that which was cited, for costs upon discontinuance are allowed by statute 8 Eliz. c. 2.

J. L. Adolphus, contra, was stopped by the court.

Per Curiam. It has in many cases been considered as a settled rule that a party can never have the costs of *a trial in which he has been defeated, [^{*459} *Trelawney v. Thomas*, 1 H. Bl. 641; *Austen v. Gibbs*, 8 T. R. 619. Suppose then the cause had gone to a second trial, and the defendant had succeeded, he could not have obtained the costs of the former trial. That being the practice of the court, it is difficult to find a reason why the defendant should be in a better situation because the plaintiff does not choose to have the cause tried a second time, indeed, *Howarth v. Samuel*, 1 B. & A. 566, is an express authority against him. The decision in *Jackson v. Hallam*, 2 B. & A. 317, proceeded on the ground that the plaintiff, who gained the verdict on the first trial, was ultimately successful. It appears, therefore, that the master's taxation in this case is not correct, and ought to be reviewed.

Rule absolute.

The KING v. GUDRIDGE et al.

Upon an appeal against an order for the allowance of overseers' accounts, a magistrate, a rated inhabitant of the parish, cannot vote either on the determination of the appeal, or on a question as to granting a case for the opinion of this court.

A RULE had been obtained for quashing a writ of *certiorari quia improvide emansvit*. The writ issued under the following circumstances: An appeal against an order for the allowance of the accounts of the defendants as churchwardens and overseers of the poor of the parish of *Cosheston*, in the county of *Pembroke*, was entered and respited at the *Midsummer* quarter sessions, and came on to be heard at the *Michaelmas* sessions, when the order for the allowance was quashed. The attorney for the respondents requested to have a case for the opinion of this court, but a majority of the *justices present thought it ought not to be granted. After some of them had left [^{*460} the court, a case was again applied for, when three magistrates voted for a case, and two against it. One of the three was a rated inhabitant of the parish of *Cosheston*, and had on that account refused to vote on the decision of the appeal. A case was afterwards drawn up without the concurrence of the appellant or his attorney, and together with the order of sessions was removed into this court by *certiorari*.

Brodrick showed cause. The real question is, whether the case was properly granted at the sessions. If the magistrate, who was a rated inhabitant of *Cosheston*, had a right to vote, there can be no doubt that the case was properly granted, and if so the *certiorari* to remove the order into this court would issue as a matter of course. Now the vote of the justice objected to was against his own interest. The statute 16 G. 2, c. 18, s. 3, prevents justices from acting in the determination of any appeal to the quarter sessions from any

order relating to the parish where they are charged or chargeable. But here the appeal was determined before the case was applied for, the statute is therefore inapplicable.

Campbell and *E. V. Williams*, contra. Even if the act of parliament did not apply, it would by the common law be illegal for any person to act as judge in his own case, *Parish of Great Charte, v. Kensington*, 2 Str. 1173; *Rex v. Yarpole*, 4 T. R. 71. The 16 G. 2, c. 18, did not disable justices from acting where they might have done so before; on "the contrary, it gave [§ 461] them power to act in certain cases, but to prevent doubts as to the extent of the power so given, provided that they should not act in the determination of appeals against orders affecting parishes in which they were rateable. Besides, here the magistrate, whose vote is disputed, did act in the determination of the appeal; for the case granted by the court became a part of the order of sessions made on hearing the appeal.

Abbott, C. J. We think it the safer course to hold that magistrates should not intercede in cases where they are interested, and that the rule for quashing the writ of *certiorari* must be made absolute.

Rule absolute.

The KING v. The Inhabitants of LLANTILLO GROSSENNY, MONMOUTHSHIRE.†

A. made a parol agreement with B. for the purchase of a cottage and garden for 40*l.* A. took possession, and paid 30*l.* on account, and resided upon the premises. No conveyance was executed. After A. had been in possession twelve months, he sold the property for 40*l.* to C., to whom he gave up possession. A. afterwards paid the remainder of the purchase-money to B.: Held, that A. did not gain any settlement by the purchase of any estate or interest within the statute 9 G. 1, c. 7, s. 5.

UPON an appeal against an order of two justices, whereby *W. Edwards*, his wife, and children, were removed from the parish of *Saint Peter*, in the county of *Hereford*, to the parish of *Llantilio Grossenny*, in the county of *Monmouth*, the court of quarter sessions confirmed the order, subject to the opinion of this court on the following case:

**W. Edwards*, was born in the parish of *Llantilio Grossenny*, and [§ 462] he also gained a settlement in that parish by hiring and service. The parish of *Llantilio Grossenny*, relied on showing a subsequent settlement in a third parish, namely *Skenfreh*, in the county of *Monmouth*. In 1816, the pauper made a parol agreement with one *Ann Carter*, for the purchase of a cottage and garden in the parish of *Skenfreh*, for the sum of 40*l.* Under this contract he took possession and paid *Ann Carter*, 30*l.* on account; no conveyance was ever executed. After the pauper had been in possession twelve months, living and sleeping in it with his wife and children, he sold the property for 40*l.* to *S. Watkins*, to whom he gave up possession, and afterwards paid the remaining 10*l.* to *A. Carter*. The pauper was never in possession of the premises after he had paid the whole of the purchase-money. *S. Watkins*, is now in the possession of the cottage and garden. The question for the opinion of this court was, whether the pauper gained a settlement in *Skenfreh*.

† Three of the Judges of this court sat, as on former occasions, from Tuesday, the 9th to Saturday, the 13th of May, inclusive. During that period this and the following cases were argued and determined.

Nolan, in support of the order of sessions, relied upon *Rex v. Long Bennington*,^t and *Rex v. Geddington*, 2 B. & C. 129, as decisive authorities to show that the pauper did not gain any settlement by the purchase of any estate or interest within the statute 9 G. 1, c. 7. He was then stopped by the court.

Maule and *Watson*, contra. This case is distinguishable from the cases cited. In *Rex v. Geddington*, 2 B. & C. 129, by the terms of the contract, the purchase-money was to be paid, and the conveyance was to be executed on a particular day. In this case no time was fixed for payment of the purchase-money, or for making the conveyance. In *Rex v. Geddington*, the pauper could not call for any conveyance before the day appointed. Here the pauper was let into possession, and might immediately, on paying the 10*l.*, have demanded a conveyance. There the residue of the purchase-money was never paid, but the contract was rescinded. Here, the residue of the purchase-money was paid, and the contract was ultimately performed. During the whole time the pauper resided on the premises he had an equitable estate upon condition, the condition being the payment of the residue of the purchase-money. When that condition was performed, he acquired an equitable estate by relation, from the time when his occupation commenced.

BAYLEY, J. It is very desirable to adhere to the language of the act of Parliament, and to the construction put upon that language in decided cases. The statute 9 G. 1, c. 7. s. 5, enacts, "that no person shall be deemed to acquire or gain any settlement in any parish, for or by virtue of any purchase of any estate or interest in such parish, whereof the consideration for such purchase doth not amount to the sum of 30*l.* bona fide paid." There must, therefore, be a purchase of an estate or interest, and by the latter word must be understood some specific definite interest, and the party contracting must become the purchaser. *Rex v. Long Bennington*, 2 B. & C. 132, and *Rex v. Geddington*, 2 B. & C. 129, establish, that although an equitable estate is sufficient to give a settlement, still the purchase must be completed; and that if it be not an estate, but an equitable right only, no settlement is gained. The principle deducible from those cases is, that the relation of trustee and *cestui que* trust must be created, in order to give a settlement by the purchase. In *Rex v. Geddington*, the agreement was to purchase an estate for 310*l.*, of which 160*l.* was to be paid on the 30th of November, and 150*l.* on the 24th of June, then next. The latter sum was never paid; the pauper resided a year and a half, and afterwards the contract was rescinded. There, by paying 150*l.*, a perfect equitable estate would have been acquired, but it was never paid, and therefore the pauper was held never to have had a perfect equitable estate. Here the pauper had paid 30*l.*, and by paying 10*l.* more he would have performed all he was bound to do, and would have acquired a perfect equitable estate. During the whole time the pauper was in possession in this case he might have been removed. He never was the purchaser of an estate or definite interest. It has been ingeniously argued, that the payment of the 10*l.* would have given the purchaser a right to demand a conveyance; and that as it might have been made at any time, the payment, when made, related back to the time when the occupation began; and, therefore, that the estate by relation was the estate of the purchaser, from the time when his occupation commenced. I think, however, that for the purpose of gaining a settlement, such a payment did not give him the estate *ab initio*, but only from the time when the payment was actually made. The expression of my Brother *Holroyd*, in *Rex v. Geddington*, 2 B. & C. 129, as to the vendee having acquired a settlement by having paid or offered to pay the remainder of the purchase-money, must be understood in that sense.

HOLROYD, J. I think there is no distinction between the cases of *Rex v.*

^t Cited by *Bayley*, J., in *Rex v. Geddington*, 2 B. & C. 132.

Bennington, and Rex v. Geddington, 2 B. & C. 129, and the present case. The pauper in this case never was in possession of the estate after he had paid the 10*l.* He therefore, never came to settle upon his own estate. A tender of the purchase-money perhaps might have been equivalent to payment on the principle that an offer to perform is equivalent to actual performance; but then in that case, in order to give a settlement, the purchaser at the time of the tender must have had a right to continue to hold the premises. Here, at the time when the payment of the residue was made, the purchaser had no right to hold the possession of premises.

LITTLEDALE, J., concurred.

Order of sessions confirmed.

*466] *The KING v. The BRIGHTON Gas Light and Coke Company.

By an act of Parliament a company was established for lighting the town of *B.* with gas, and they were authorised, with the consent of certain commissioners (appointed under another act of Parliament passed for lighting and paving the town of *B.*) to break the ground, and lay their pipes in the streets of *B.* The company having so laid their pipes for the purpose of conveying the gas, were held to be rateable to the poor in respect of the land occupied by their pipes, and to the extent of the increased value of the land in consequence of its being used by them for the purpose of conveying the gas.

UPON appeal against a rate for the relief of the poor of the parish of *Brighton*, made upon the *Brighton Gas Light and Coke Company*, of the sum of 6*l.* for and in respect of the mains or pipes and other apparatus for the conveyance of gas belonging to the company, situate, being, and fixed in the ground in the parish of *Brightelmstone*, the court of quarter sessions confirmed the rate, subject to the opinion of this court on the following case:

The company was established by statute 58 G. 3, c. xxxvii. entitled "An act for lighting with gas the town of *Brightelmstone*, in the county of *Sussex*,[†] which is declared a public act. The buildings and manu-

*467] factory are in the parish of *Rottingdean*; the mains or pipes forming

[†] Section 42, recited, that for the purpose of using the gas for lighting the public streets, &c., it would be requisite that the gas should be conveyed by means of pipes or tubes to be properly laid for that purpose, and enacted, that if at any time the commissioners (under a former act for paving and lighting *Brighton*.) should think it fit to contract with the company to light the public streets, &c., in the town of *Brighton*, it should be lawful for the company and their successors under the direction and inspection of such commissioners, or of their surveyor, to break up the soil and pavements of any such streets, and to dig and sink trenches and lay pipes, and from time to time, under such direction and inspection, to alter the position of, and repair and relay such pipes, &c.

Sect. 43, enacted, that it should not be lawful for the company, or their servants, to break up the soil or pavement of any of the streets, &c., belonging to, or paved or repaired by or under the direction of the commissioners, without the consent in writing first had and obtained of the commissioners, to be signified under the hand of their clerk; nor to enter upon or break up any pavement or soil of any public or private street, &c., being the property of or belonging to any body corporate, or any other person, without the consent in writing first had and obtained of such body corporate, or the respective owners for the time being.

Sect. 46, enacted, that the company might, under the direction and inspection of the commissioners, or their surveyor, break up the soil or pavement of any of the streets, &c., and sink trenches, and lay any main or pipe, to communicate with the works of the company, under, across, and along any of the streets, &c., requisite for the supply of any dwelling-house, &c., or carrying into execution the powers thereby granted, and erect any machine or other apparatus requisite for securing to such dwelling-house, &c. a competent supply of gas, and also to alter the position of, repair, relay, or amend any pipes, although no contract might have been entered into with the commissioners for lighting any public street, &c. in the parish or place where such houses should lie or be situate.

the subject of appeal, are in the parish of *Brightelmstone*, placed in the ground, and covered over. The gas is sold in *Brightelmstone*. It is a manufactured article, and the profits of the manufactory arise from the sale of gas and coke, of which the gas is conveyed in mains or pipes, and the coke in carts. The mains and pipes within the parish of *Brighton*, produce no profit but by conveying gas. They are worth 360*l.* per annum, at the least, to any person who could use them for that purpose, and it was further proved by the testimony of a witness, that he would be willing to give 400*l.* per annum for them, taking all chances both at law and in fact as to the mode in which he might employ them, but that he formed his calculation upon a moral certainty of being able to employ them for conveying gas. The expense of putting them down amounted to 10,000*l.* or upwards, and the sum of 40*l.* per annum, at which the mains or pipes are assessed, *is a ninth part of the estimated value of 360*l.*, that being the proportion in which other rateable property at [*468] *Brightelmstone* is rated. Personal property is not rated in *Brightelmstone*.

Marryat and *Courthope* in support of the order of sessions. The question is, first, whether property of this description is liable to be rated to the relief of the poor. Secondly, whether it is liable to be rated to the extent to which it has been rated in this case. Where a party has the exclusive use of any part of the soil for the purpose of conveying water or any other subject matter, he is rateable to the relief of the poor in respect of the land so occupied. In *Rex v. The Birmingham Gas Light and Coke Company*, 1 B. & C. 506, the question was not as to the rateability of the company, but merely as to the quantum, but unless there be a distinction between pipes conveying gas and pipes conveying water, *Rex v. The Corporation of Bath*, 14 East, 609; and *Rex v. The Rochdale Water Works Company*, 1 M. & S. 634, are authorities expressly in point to show that this property was rateable. Here the company use the land for the purpose of conveying gas, and they have the exclusive enjoyment of that part of the land in which their pipes lie; they are, therefore, rateable. The next question is, whether they are liable to be rated to the extent of the increased value of the land so occupied. The rate here is upon the land, but the pipes are connected with the freehold, and form part of it. Now it has been decided, that a party is rateable in respect of the increased annual value, although that annual value be derived from the annexation of a personal chattel, as *a weighing machine, *Rex v. St. Nicholas, Gloucester*, [*469] Cald. 262; or from a machine not fixed to the freehold, as in the case of the carding machine, *Rex v. Hogg*, Cald. 266.

Adams, Serjt., *Long*, and *Doughty*, contra. The company are not rateable. First, they are not occupiers of land within the parish. Secondly, assuming that they are rateable, they are rateable only in respect of the land occupied by them, and not in respect of their pipes. The company are not occupiers of any land. They have not any control over the soil. The only land they occupy is in the parish of *Rottingdean*, where their manufactory is situated; there they ought to be and are rated. They cannot even break the ground to lay down their pipes, without the consent of the commissioners. They have only a special license, and cannot use the pipes for any purpose but the conveyance of gas. This case differs, therefore, from that of *Rex v. Corporation of Bath*, for there the water company were entitled to, and had the full control over the land itself. But, secondly, assuming that the company are rateable, they are rateable only in respect of the land occupied by them, and not in respect of their pipes; the pipes may be removed by the company at any time. They do not, therefore, constitute part of the freehold; they are merely a mode of conveyance for a manufactured article: and this is a mode of using the public way.

Berkeley, J. To make property rateable it must come within the words of the statute 43 Eliz. The only question in this case is, whether the company

*470] can be deemed occupiers of land, and to the extent to which they are *rated. The company are empowered, by an act of the 58 G. 3, with the consent of the commissioners for paving and lighting the town of *Brighton*, to break up the soil of the streets and roads, dig and sink trenches, and lay pipes, and to alter the position of, and to repair and relay such pipes. If it were doubtful in this case, whether the pipes constituted part of the freehold, the company would, at all events, be liable to be rated for an occupation way ; but I think that we may collect from the case, that the pipes are fixed in the soil ; and if so, then *Rex v. The Corporation of Bath*, 14 East, 609, establishes that they are to be deemed occupiers of that land in which the pipes are fixed. *Rex v. The Rochdale Water Works Company*, 1 M. & S. 634 ; and *Rex v. The Birmingham Gas Light and Coke Company*, 1 B. & C. 506, establish the same principle. In the latter case, part of the apparatus used for the manufacture of gas and coke was affixed to the freehold, and part was not, and it was held that the company were liable to be rated to the extent of their occupation of land, and that the branches and pipes were to be considered part and parcel of the land. In the case of a canal the proprietors are rateable, not only in the parish where the tolls are collected, but in each parish where they occupy land for the purposes of their canal. In many acts of parliament authorising the making of a canal, it is provided, that the company shall not be rated at a higher rate than the adjoining land ; but if there be no such provision, then they must be rated in respect of the value which the land has acquired, from its having been used for the purposes of the canal. There is no such provision in this case ; and as the pipes are laid down so as to *become part and

*471] parcel of the land for the time they remain, they thereby improve the value of the land in the same manner as buildings erected upon the land, and the whole must be rated accordingly. I entertained some doubt at one time whether the right of the company to remove the pipes might not prevent their being rateable in respect of the increased value of the land ; but upon reflection it appears to me, that that makes no difference, because they must be rateable upon the same principles as buildings are which may be removed at the end of the term. There are cases which, in principle, are similar to the present. Thus, a person who had the exclusive occupation of a wagon-way, and not a mere right of passage, has been held to be rateable. Upon these grounds I am of opinion, that this property is rateable. Secondly, that it is rateable to the extent of the value of that which for the time constitutes part of the freehold. Thirdly, I am of opinion, that the rate is properly made in *Brighton* and not in *Rottingdean*, because the rate must be upon the land occupied by the company, and here the land occupied is in the parish of *Brighton*.

HOLROYD, J. I am of opinion that the gas company are liable to be rated in respect of this property, and that they are liable to be rated in respect of the increased value of the land. The first point is decided by many cases which are similar in principle to the present. In one case it was held, that a weighing machine affixed to a building was liable to be rated, on the ground that the land and building constituted one entire thing, and that the house was much more valuable from the machine being appurtenant thereto, *Rex v. St. Nicolas*

*472] *Gloucester*, Cald. 262. In another case it was held, that where a carding machine was demised with a building, but not fixed to it, but forming one entire subject, the rate being on the building, that was properly rated for the entire profits, the house acquiring a greater value from the use to which it was put, *Rex v. Hogg*, Cald. 266 ; 1 T. R. 721. I think, therefore, that so long as the company used the land for the purpose of their pipes they are rateable, for they have the exclusive occupation of that part of the land in which their pipes lie ; and that they are rateable for the entire profits of that land, part of them arising from the gas pipes placed in the land.

LITTLEDALE, J. The rate must be upon the land. Here, the pipes being fixed to the land, the land and pipes are to be considered as one entire thing

The only difficulty in the case is, whether the company are to be considered as occupiers of land. They are authorised, with the consent of the commissioners mentioned in the act of parliament, to break the soil for the purpose of laying their pipes. Now, in *Dyson v. Collick*, 5 B. & A. 600, it was held, that the contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close across a stream there for the purpose of completing their work, had a possession sufficient to entitle them to maintain trespass against a wrong-doer. This is an authority to show that the company were virtually in the occupation of this land, and being in the exclusive occupation of that portion of land in which their pipes lay, they are rateable within the principle laid down in *Rex v. The Corporation of Bath*, Cald. 262; and *Rex v. The Rochdale Water Works Company*, 1 M. & S. 634. [473]

Order of sessions confirmed.

The KING v. The Inhabitants of ST. PETER THE GREAT in the County of WORCESTER.

By a certain act of the 31 G. 3, c. 31, s. 77, it was enacted, that the company should be rated to all parochial taxes in respect of their lands, &c., in the same proportion as other lands lying near the same should be rated, and as the same lands would be rateable in case the same were the property of individuals in their natural capacity. By a subsequent act of the 38 G. 3, c. 31, s. 20, it was enacted that the company should be rated to all parochial taxes in respect of the lands used by them for the purposes of the said navigation, in the same proportion as other lands and buildings adjoining or lying near the canal should be rated; but it was further enacted, that it should be lawful for the company to agree with any owner of lands adjoining their lands, taken for the purpose of the said navigation, for an exemption from all rates and taxes in respect of such lands, and for charging the same upon the adjoining lands of such persons, and in all such cases the parochial taxes, rates, &c. which might be thereafter charged upon or payable in respect of the lands so taken for the purposes of the said navigation, should be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof and the lands of the company should be exempted and discharged therefrom: Held, first, that by the 31 G. 3, c. 31, s. 77, the company were not liable to be rated for the land used for the purposes of the canal according to its improved value. Held, secondly, that the seventy-seventh section of the 31 G. 3, was not repealed by the twentieth section of the 38 G. 3, and that the company were not liable to be rated for the improved value of the land.

'ON the 4th of June, 1825, the churchwardens and overseers of the poor of the parish of *Saint Peter the Great*, in the county of *Worcester*, made a rate for the relief of the poor, in which the company of proprietors of the *Worcester and Birmingham Canal Company* were rated for land for wharfs, basin, warehouses, engine-house, lock-house, gardens, and premises, and for tolls and profits arising therefrom, 11*l.* 4*s.* 5*d.* Upon appeal, the court of quarter sessions amended the rate, by reducing the sum of 11*l.* 4*s.* 5*d.* to the sum of fourteen shillings and one halfpenny, and confirmed the rate so amended, [474] subject to the opinion of this court on the following case:†

By an act of the 31st G. 3, it is enacted, that the said company of proprietors shall from time to time be rated to all parliamentary and parochial taxes

† By another rate made for the relief of the poor of the same parish in the city of *Worcester*, the company were rated for five acres, three rods, and thirty-seven perches of land, being the canal and towing-path from *Diglis* to *Chapgate Bridge*, and the tolls and profits arising therefrom, 8*l.* 8*s.* 5*d.* Upon appeal against this rate, the sessions amended the same by reducing the sum of 8*l.* 8*s.* 5*d.* to 13*s.* 10*d.* subject to the opinion of this court on a case precisely similar to the first.

and assessments for and in respect of the lands and grounds to be purchased or taken, and all warehouses or other buildings to be erected by the said company of proprietors in pursuance of this act in the same proportion as other lands, grounds, and buildings lying near the same are or shall be rated, and as the same lands, grounds, and buildings so to be purchased or taken and erected would be rateable in case the same were the property of individuals in their natural capacity. And by an act of the 38th G. 3, for amending and enlarging the powers of the 31st G. 3, after reciting that the said last mentioned act had in some respects been found defective, and the exercise of some of the powers and provisions thereof, as therein directed, inconvenient, it is enacted, that the said company of proprietors shall from time to time be rated to all parliamentary and parochial taxes, rates, and assessments, for and in respect of the lands and hereditaments taken and used by the said company for the purposes of the said navigation; and all warehouses and other buildings erected or to be erected thereon by the said company of proprietors by virtue of the said act, and of *475] this present act, in the same proportions as other lands, grounds, and buildings adjoining or lying near the said canal are or shall be rated; but it shall be lawful for the said company to agree with any owner or owners of any lands or hereditaments of sufficient yearly value adjoining or lying near to the lands or hereditaments to be purchased or taken for the purpose of the said navigation, for an exemption from all rates and taxes in respect of such last mentioned lands and hereditaments, and for charging the same upon the adjoining lands and hereditaments of such person or persons; and in all such cases all the parochial and other taxes, rates, charges, and assessments which might be thereafter charged upon or payable in respect of the lands or hereditaments to be so purchased or taken for the purposes of the said navigation, shall be rated and charged upon such adjoining lands, and upon the owners and occupiers thereof; and the lands and hereditaments to be purchased for the purpose of the said navigation, shall be exempted and discharged therefrom. And it is in the same act further enacted, that all parochial rates and assessments which shall or may at any time be laid, assessed, or imposed upon the rates and personal estate of the said company of proprietors shall be laid, assessed, or imposed in each parish, township, hamlet, or place respectively, in proportion to the length of the said canal, in each respective parish, township, hamlet, or place, and not otherwise. And also in the same act it is enacted, that the said act of the 31 G. 3, and all and every the clauses, articles, provisions, matters, and things therein contained, (except such and so many of them or such parts thereof as are altered, varied, explained, or amended by this act,) *476] shall extend and be applicable to the present act, and the "powers, provisions, and directions hereof, in so far as the same are compatible herewith. The question for the opinion of the court was, whether the land used for the canal was to be assessed at the same rate as the adjacent lands, or whether the profits derived from the tolls were to be included in the rateable value. If the court should be of opinion, that the land so used is to be assessed at the same rate as the adjacent lands, then the rate was to stand as amended by the court of quarter sessions; but if the court were of opinion that the profits derived from the tolls were to be included in the rateable value, then the rate was to be amended by inserting the sum of 11*l.* 4*s.* 3*d.*, instead of 14*s.* and one halfpenny.

Russell, (and *Ryan* was with him,) in support of the order of sessions. *Rex v. The Grand Junction Canal Company*, 1 B. & A. 289, is a decisive authority to show that, under the statute 31 G. 3, the company were liable to be rated for their lands at the same value as other adjacent lands, and not according to the improved value derived from the land having been used for the purposes of the canal. (He was then stopped by the court.)

Campbell and *Godson*, contra. The 77th section of the 31 G. 3, which enacts, "that the company shall be rated for their land in the same proportion

as other lands, and as the same would be rateable if they were the property of individuals in their natural capacity," does not import that the tolls are not to be taken into consideration in fixing the rate. It is confirmatory [*477] of what the common law would have directed, viz. that the rate shall be equally laid upon all the property assessed. If the legislature had intended to exempt the tolls, the language of the act would have been similar to that of the acts for making the *Leeds* and *Liverpool* canal, 5 East, 325. There the tolls are expressly exempted from the payment of any rates other than such as the land which should be used for the navigation would have been subject to if those acts had not been made. But assuming that the 77th section of the 31 G. 3, did exempt the company from being rated in respect of the improved value of the land, that section is virtually repealed by the 20th section of the 38 G. 3, which enacts, "that the company shall be rated for their lands in the same proportion as other lands," omitting the other very material words in the 31 G. 3, viz. as the same would be rateable if they were the property of individuals in their natural capacity. The words thus omitted may be considered as struck out of the 31 G. 3, and then the fair construction of the clause is, that the land held by the canal company should be rated as other adjoining lands are, viz. in proportion to their value taken as land only.

BAYLEY, J. This case is perfectly clear. It is in effect decided by *The King v. The Grand Junction Canal Company*, 1 B. & A. 289; *Rex v. St. Mary's Leicester*, Trinity term, 57 G. 3. These cases establish this principle, that unless there is some clause of exemption in the act of parliament, land taken for the purpose of a canal will be *rateable not according to the [*478] value of the land when it was taken for the purposes of the canal, but according to that value which it has acquired from its having been used for the purposes of the canal. But canals are supposed to be of public benefit, and, therefore, some of the acts of parliament, under the authority of which canals have been made, have clauses of exemption, so as to leave land upon the same footing in this respect, as it was when first taken for the purposes of the canal. It is conceded that the language of the 31 G. 3, is not distinguishable from that of the 34 G. 3, in the case of the *King v. The Grand Junction Canal Company*, 1 B. & A. 289. It has been argued, that the true construction of this clause is, that the rates are to be equally laid upon all the property assessed, and that it is only confirmatory of the common law in that respect; but, in construing acts of parliament, we are bound to give statutable effect to the words used in them, and so construing them, I think the effect of that clause is to exempt the company from being rated in respect of the increased value of the land, derived from its having been used for the purposes of the canal. But it is said that the 77th section of the 31 G. 3, is virtually repealed by the 20th section of the 38 G. 3, and that the latter statute places the company in the same situation as if the former act had not passed, and makes land taken for the purposes of the canal liable to be rated according to its increased value. Now, if the legislature had intended to repeal that clause by the 38 G. 3, it would have been very easy to have done so by a clause stating specifically, that lands taken for the *purposes of the canal should be rated according to their improved value. It may fairly be concluded, that if the [*479] legislature had contemplated any change of purpose in this respect, they would have expressed that intention in clear and unambiguous language. It seems to me, that the latter part of the 20th section of the 38 G. 3, puts this beyond all doubt. It gives power to the canal company to make specific bargains for the purchase of lands exempt from rates, and to shift the rates from lands taken by the company, and to place them upon certain other lands in the hands of individual proprietors. In that case the value, at the time of the sale, must remain the rateable value, and there is no reason for supposing that a different rate would be payable if the company made no such bargain.

Order of sessions confirmed.

MERCERON v. DOWSON.

Where, in covenant against an assignee of a lease; the plaintiff declared that all the right, &c., of the lessee vested in the defendant by assignment, and that afterwards the premises were out of repair, and defendant pleaded in bar, that for one period he was possessed of one sixth of the premises, as tenant in common with A., B., and C., and for another period, of one third, as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment: Held, that the plea was bad in substance, as it could not be a bar to the whole action; that it was bad in form also, as it merely confessed that the defendant had possession of part of the premises, and not that he was assignee. *Sensible*, that the defendant should have pleaded in abatement, and should have shown how the other persons became tenants in common with him.

Covenant upon an indenture, whereby certain premises were demised to *J. N.* for ninety-nine years. The declaration averred, that all the interest of *J. N.* in the demised premises, came to and vested in the defendant by assignment; and that afterwards, and during the term, to wit, on the 1st of *January*, 1820, and thence hitherto, the premises were and have been out of repair *contrary to the covenant, &c. Pleas, First, *non est factum*. Secondly, that [480] all the interest of *J. N.* did not come to and vest in the defendant, as alleged. Issue thereon. Thirdly, *actio non*, because before the 30th of *December*, 1819, to wit, on the 5th of *August*, 1817, defendant became, and from thenceforth continually until the day and year hereinafter next mentioned, was possessed of and in one undivided sixth part only of and in the said demised premises, with the appurtenances, to wit, as tenant in common with one *J. D.* and *T. O.* and *W. D. D.*, and that he the said defendant afterwards, to wit, on the 23d of *February*, 1824, became, and from thenceforth until the day of commencing this suit was, possessed of and in one undivided third part only of and in the said demised premises, to wit, as tenant in common with one *W. D. D.* and *T. O.*; and that he the said defendant had not by assignment or otherwise, at the time of the commencement of this suit, or at any time theretofore, any greater estate, right, title, &c., share or shares of and in the said demised premises than as in this plea aforesaid. And this the defendant is ready to verify, wherefore he prays judgment, if the plaintiff ought to have or maintain his aforesaid action thereof against him. Demurrer and joinder.

Comyn, in support of the demurrer. This plea in its present form is bad, either as a plea in abatement or in bar. The facts alleged in the plea do not constitute a bar, and although they might be sufficient ground for a plea in abatement, yet the form is insufficient. First, the plea is pleaded in bar, and not in abatement; secondly, if pleaded in abatement, it should have shown how the defendant became tenant in common with the other person named, *Com. Dig. Abatement*, (F. 6.) pl. 4. It would be very hard upon the plaintiff to hold that such a plea is good in bar. He cannot be supposed to know the particulars of the defendant's title. *Congham v. King*, Cro. Car. 221, may be cited to show that the plaintiff might have declared against the defendant in respect of his share of the premises, but that related to a divided portion; here the defendant admits that his is an undivided share. Neither is *Stevenson v. Lambard*, 2 East, 575, any authority for the defendant. That proceeded entirely on the authority of *Congham v. King*; and, indeed, proves that to an action of debt for rent, eviction as to part cannot be pleaded in bar of the whole action.

J. L. Adolphus, contra. The plaintiff charges the defendant as privy in estate with the first lessee, and in order to do that, says, that all the estate, &c., vested in the defendant, who, by the plea in question, says in substance, that no more than one third ever came to him. In *Hare v. Cator*, Cowp. 766, it was held, that the assignee of a part must be charged according to the truth of the case, and the defendant having been charged as assignee of the

whole of the premises demised, when in truth he was assignee of part only, a nonsuit was entered. In *Gamon v. Vernon*, 2 Lev. 231, and *Congham v. King*, the party was charged according to the truth of the fact, being sole assignee of part. On covenants for rent, tenants in common may sue and be sued separately; but in *Kitchen and Another v. Buckley*, 1 Lev. 109, cited in *Bac. Abr.* **Joint Tenants*, (K.) it was held, that tenants in common might and ought to join in suing the assignee of a tenant for neglecting to repair, and that the covenant being indivisible, the wrong and damages could not be distributed, because uncertain. And since for this reason, one tenant in common cannot sue alone, so neither can he be sued alone for breach of a covenant to repair. Nor is he bound to plead in abatement, for he does not necessarily know who the other tenants in common are.

BAYLEY, J. I have no doubt that this plea is bad. The covenant to repair is a charge upon the estate. When an estate is divided, that is done, either so as to pass separate portions to separate owners, or to pass undivided interests. The division in this case was of the latter description. Then the question is, whether the defendant, under such circumstances, is liable to be charged in the manner now attempted. The declaration describes him as assignee of all the estate, right, title, &c., of the original lessee, *J. N.* This general form of pleading is allowed, because the plaintiff cannot be supposed to know the particulars of the defendant's title. It may be conceded to the defendant, that when the plaintiff is informed of the persons in whom the whole interest is vested, they must be sued jointly; but he insists that no one, even where the plaintiff is in ignorance of any other assignees, is liable to be sued singly. For this he relies upon *Hare v. Cator*. It there appeared, that Lord *B.*, tenant for life, with power to lease, demised certain premises in *Kent*, and others in *Surrey*, to the plaintiff at a pepper-corn rent, the plaintiff re-demised them to Lord *B.* at an annual rent of 500*l.* The defendant afterwards purchased the premises in *Kent*, but *not those in *Surrey*, and did not take an assignment of the lease from the plaintiff to Lord *B.* The plaintiff brought covenant for the rent. The defendant there never was assignee of the interest in respect of which the plaintiff claimed the rent, for it was claimed in respect of the term which never was assigned, and the rent was issuing out of two distinct estates, one of which never came to him. That case, therefore, is not applicable to the present. There are many cases showing that the assignee of a part is liable to be charged for that part. This case is somewhat different, for the defendant has no entire interest in any part, but a partial interest in the whole. The plea is not that defendant is liable to sustain a part only of a joint liability, but that he is not liable at all. That is a plea in bar, and I think clearly bad. It should have been that defendant was not liable to the whole burden in the manner charged. He should have pointed out the other persons liable, and then the plaintiff might have been compelled to include them in his declaration.

HOLROYD, J. I am of opinion that the plea in question cannot be supported. Supposing it could be good as a bar to any part of the action, it should have been confined in its application to those parts of the premises of which the defendant meant to insist that he was not assignee. If it had been pleaded to all, save for one period, one sixth, and for another period one third, it would have raised a very different question from that which is now presented to us. There is another objection to this plea in form: even as to the parts of which the defendant admits himself to be in possession, he neither admits or denies the assignment. It seems to me, indeed, that either the first lessee or any person *having part of his estate by assignment, if sued in such an action as this, may pray in aid other persons who are by assignment jointly possessed of other portions; but such a plea should be in abatement, and not in bar.

LITTLEDALE, J. I think that this plea is bad both in form and substance

It merely admits possession, and not an assignment. The latter part, in which it is alleged that the defendant had no greater part by assignment than as before mentioned, refers to the former part of the plea, and does not cure the informality. No issue could be taken upon it. It neither denies nor confesses and avoids. But it is bad in substance also. The ground of defence set forth in the plea is that the whole of the premises did not come to the defendant by assignment. If that were held good as a bar, the decision would amount to this, that if a lessee make assignments to various persons as tenants in common, the landlord can never sue until he discover them all. If the defendant meant to discharge himself of all liability beyond one sixth or one third, he should have confined his plea to so much of the action. There may be a difficulty in saying that the defendant should have pleaded in abatement, for he might not know the tenants in common with him. Either debt or covenant will lie for rent against the assignees of part of an estate according to *Gamow v. Vernon*, 2 Lev. 231, and if debt or covenant will lie against the assignee of a part for rent, I see no reason why covenant should not lie for a portion of the damages sustained by the want of repairs. But however that may be, this plea is clearly bad, and the plaintiff must have judgment on the demurrer.

Judgment for the plaintiff.



Trespass for breaking and entering the plaintiff's dwelling-house, and remaining there until the plaintiff paid him a large sum of money, to wit, &c. Justification under s. 6. to the sheriff of S. and a warrant thereupon to the defendant, as bailiff, directing him to levy —l. Replication, that before the said writ and warrant were fully executed, the defendant demanded and received 3l. 10s. more than he was authorised to levy. On demurral: Held, that the replication was bad, inasmuch as the facts alleged in it did not make out that the defendant was a trespasser *ab initio*.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and remaining there a long time, to wit, for six hours, and until the plaintiff, in order to obtain the quiet and peaceable possession of his house, paid to the defendant 119l. 10s. 9d. of lawful money. As to breaking and entering the house, and making a noise therein, and remaining there for the space of time in the declaration mentioned, pleas, first, not guilty; second, *actio non*, because before the said time, when, to wit, on, &c. Sir W. T., bart. sued out of the court of our lord the king, before the king himself at Westminster, a certain writ of *fit. fa.* directed to the sheriff of *Somersetshire*, commanding him to cause to be levied of the goods and chattels in his bailiwick of J. H., R. S., and the plaintiff, as well a certain debt of 200l. which the said Sir W. T. had then lately recovered against them in his said majesty's said court; as also 10l. which in the same court were awarded to the said Sir W. T. for his damages, &c., which said writ was delivered to the said sheriff, who made his warrant to R. S., and the defendant then and at the said time when, &c. being a bailiff of the said sheriff, and thereby by virtue of the said writ commanded them, &c. which said warrant afterwards and before the return of the said writ, and before the said time, when, &c. to wit, on, &c. was delivered to the defendant so being such bailiff, to be executed in due form of law, by virtue of which said writ and warrant the defendant afterwards, and before *the return of the writ, to wit, at *486] the said time when, &c. peaceably entered the said dwelling-house in order to levy the debt and damages aforesaid, according to the exigency of the writ, and on that occasion, and for that purpose staid and continued in the

said dwelling-house for the said space of time in the declaration mentioned, being a reasonable time in that behalf. And this, &c. Third plea to the trespasses in the introductory part of the second plea mentioned, stated the issuing of a *fi. fa.* indorsed to levy 110*l.* 15*s.* besides poundage, &c. and a warrant to defendant to levy; that defendant in obedience to the warrant, peaceably entered in order to levy, and did levy the said last mentioned sum, together with poundage, &c. Replication to the second plea, that the writ and warrant in that plea mentioned were respectively indorsed to levy a much less sum than the debt and damages in that plea mentioned, to wit, 110*l.* 15*s.*, besides poundage, &c. and that shortly after the defendant entered into the dwelling-house, in which, &c. and whilst he staid and continued therein as in the second plea mentioned, and before the said writ and warrant were fully executed, the defendant, under color and pretence of the said writ and warrant, extortunately and unlawfully demanded, exacted, and received of and from the plaintiff a much larger sum of money, to wit, 3*l.* 10*s.* more than he was entitled to levy upon the goods and chattels of the plaintiff, under and by virtue of the said writ and warrant, and according to the direction indorsed thereon as aforesaid; which said sum of 3*l.* 10*s.*, together with the further sum of 116*l.* 0*s.* 9*d.*, amounting in the whole to a large sum, to wit, 119*l.* 10*s.* 9*d.*, being the amount then and there claimed by the defendant by virtue of the said writ and warrant, *the said plaintiff was forced and obliged to pay for the purpose in the declaration mentioned. And this, &c. Similar replication to the third [487] declaration mentioned. And this, &c. Demurrer and joinder.

E. Laves, in support of the demurrer. The replication was no doubt drawn upon the supposition, that the facts alleged in it proved the defendant to be a trespasser *ab initio*. But the *Six Carpenters*' case, 8 Co. 145, is a direct authority the other way. It was there decided, that if the original entry be lawful, a subsequent nonfeazance will not suffice to make the party a trespasser *ab initio*. Such subsequent act must be itself a trespass. If, indeed, the plaintiff had tendered the money which the defendant was authorized to levy, and the latter had afterwards remained in the house, that might have made him a trespasser.

Manning, contra. The rule given in the *Six Carpenters*' case is, "when entry, authority, or license is given to any one by the law, and he abuse it, he shall be a trespasser *ab initio*." Now that is general, and applies to any abuse of the right given by the law, and does not make it essential that the abuse should amount to an act of trespass. The second resolution is, "that not doing cannot make the party a trespasser;" but if the argument on the other side be good, that resolution should have been, "that no act not amounting to a trespass should make him a trespasser." The real distinction is between misfeazance and nonfeazance, *Gates v. Bayley*, 2 Wils. 313. In *Winterbourne v. Morgan*, 11 East, 395, it was held, that a person who entered to distrain, and remained after the expiration of the five [488] days, became a trespasser; and the same was ruled in the case of *Griffin v. Scott*, 2 Ld. Raym. 1424. *Aitkenhead v. Blades*, 5 Taunt. 198, is a distinct authority, that an officer entering under an execution, and remaining longer than the law warrants, is a trespasser *ab initio*. Here the defendant should have left the premises when he got the sum directed to be levied; but, on the contrary, he did not go until he had extorted a larger sum. In 2 Roll. Abr. 562. tit. *Trespass ab initio*, many instances are put, where an officer, having the execution and return of process, is rendered a trespasser *ab initio*, either by neglecting to return a writ, or by making a false return; and the same was held in *Girling's* case, Cro. Car. 446.

BAYLEY, J. It seems to me that this replication is bad, and that the defendant cannot be deemed a trespasser *ab initio*. In the cases cited from Roll's Abr. and Cro. Car., where it is said that a sheriff is made a trespasser *ab initio*, by the neglect to return a writ, the expression is inaccurate. There,

for want of the return, no complete justification was ever shown. The distinction is this, where there are facts alleged on the record, making out a good defence, but something added in the replication destroys that defence, the party is made a trespasser *ab initio*. But if the sheriff seizes goods under a writ where it is his duty to make a return, he never has a justification unless he discharges that duty ; he must, therefore, allege that return in his plea. A bailiff not having the return of process is not bound to "make such allegation, as appears by *Girling's* case, which has been cited for the plaintiff." Here, then, the defendant had a good justification without showing a return. The answer given to it is, "that before the writ and warrant were fully executed, the defendant demanded, exacted, and received a larger sum than he was entitled to levy." Does that make him a trespasser with reference to the acts alleged in the count ? Where the subsequent act is a trespass, the law assumes that the party did not enter for the purpose alleged in the plea, but for the purpose of committing the trespass. But here the subsequent act was not a trespass, nor can it be reasonably supposed that the original entry was for the purpose of the extortion. For these reasons, I think that the defendant cannot, in this case, be considered as a trespasser *ab initio*, and that our judgment must be in his favor.

HOLROYD, J. If the allegations contained in this replication were sufficient to make the defendant a trespasser *ab initio*, the consequences to him would be very serious, for he would be liable to damages to the extent of the whole sum levied, and not merely the surplus exacted illegally. He is still liable for the extortion, although not for the sum which he was authorized to levy. The cases cited as to the necessity of a return by a sheriff are not applicable. In them, but for the return, the act would have been unlawful *ab initio*; instead of saying that the want of the return made the sheriff a trespasser *ab initio*, it would be more correct to say that the presence of the return was necessary in order to make his act lawful *ab initio*. The only question here is, whether *490] the first resolution in the *Six Carpenters'* case was correct, viz. that the parties were not trespassers *ab initio*, because the subsequent act was not a trespass. This replication does not show that the defendant held the goods longer than he was entitled so to do ; but that he took 3*l.* 10*s.* more than he was authorized to levy. The whole money was paid at once, and until a part was paid, the bailiff had a right to keep possession. It is not averred that the smaller sum was tendered and refused ; and perhaps even that, according to the doctrine in 8 Co. 146, might not have been sufficient.

LITTLEDALE, J. If the defendant were a trespasser *ab initio* there can be no doubt that the plaintiff would be entitled to recover the whole sum levied, just as if no justification at all had been pleaded. Considering the numerous instances of extortion that occur, there would unquestionably have been many actions of this nature had they been thought maintainable. It is contended, however, that such is the law according to the *Six Carpenters'* case. Whether there is much good sense in that case it is unnecessary to say ; for the decision of the present question it suffices to say, that in every instance put by Lord Coke there was a subsequent act of trespass, which made the party liable to be treated as a trespasser *ab initio*. Com. Dig. Trespass (C. 2,) *Dye v. Leatherdale*, 3 Wils. 20, and *Taylor v. Cole*, 3 T. R. 292, all confirm Lord Coke's view of the case. Here no act of trespass subsequent to the entry and levy is shown ; the replication alleges the extortion to have been before the writ was fully executed. There are many statutes against *extortion, but in none *491] of them is it said that the party guilty of it is a trespasser ; nor is he said to be so in any of the instances put in Com. Dig. tit. Extortion, or Trespass *ab initio*. I think, therefore, that this replication is bad.

Judgment for the defendant.

**ANNE STOKES, Administratrix of EDMUND STOKES,
deceased, v. BATE.**

In *assumpsit*, by an administratrix upon a promissory note, given to her intestate, it was averred in the declaration, that administration of all and singular the goods and chattels of the intestate was duly granted by the bishop of C. Plea, that the plaintiff never had been, nor was administratrix of all and singular the goods and chattels of the intestate in manner and form as she had alleged in her declaration; and issue being joined on this plea, the letters of administration granted by the bishop of C. were produced by the plaintiff; but it was also proved, that the intestate, at the time of his death, had *bona notabilia* in another diocese in a different province; and no evidence was given as to the residence of the defendant at the death of the intestate: Held, first, that the letters of administration were not void inasmuch as the other diocese in which the intestate had *bona notabilia* was in a different province.

Held, secondly, that the only question raised upon the issue was, whether the letters of administration were duly granted by the bishop of C., and that it was no part of the issue, whether the defendant, at the death of the intestate, resided within the diocese of C. The fact of his residence elsewhere, if relied upon, ought to have been specially pleaded.

THIS was an action on a promissory note given by the defendant to the intestate. The declaration contained one set of counts on promises to the intestate, and another upon promises to the plaintiff as administratrix. In the breach to the first set of counts it was alleged, that the defendant, intending to defraud the intestate in his lifetime, and the plaintiff as administratrix as aforesaid after the death of the intestate, (to which said plaintiff administration of all and singular the goods, chattels, and credits which were of the said *E. Stokes*, deceased at the time of his death intestate, by A. B., vicar-general and official principal of the Lord Bishop of Chester, in due form of law, was granted in that behalf,) had not paid the said several sums of money *to the intestate in his lifetime, or to the plaintiff administratrix as aforesaid since [492] the death of the intestate, although often requested so to do. The declaration concluded by a *profer* of the letters of administration. The defendant, after craving over of the letters of administration which were set out, pleaded, that the plaintiff was not, nor ever had been, administratrix of the goods and chattels, rights, or credits, which were of the said *E. Stokes*, deceased, in manner and form aforesaid, as the plaintiff had in her said declaration in that behalf alleged. Replication taking issue upon this plea. At the trial before Garrow, B., at the Summer assizes for the county of Salop, 1825, the letters of administration in the common form from the Bishop of Chester, were produced, but it was proved that the intestate at the time of his death had *bona notabilia* in the diocese of Litchfield and Coventry, (which is in the province of Canterbury,) as well as in that of Chester, (which is in the province of York; and it was objected that the letters of administration were, therefore, void in toto, and that the plaintiff was not administratrix of the estate of the intestate. Secondly, that at all events, she was not administratrix as to the debt which was the subject of this action, as the letters of administration only entitled her to sue for assets proved to have been in the diocese of Chester. The learned Judge reserved the points, and a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Campbell, in last Michaelmas term, moved accordingly. Where there are *bona notabilia* in two several dioceses, an administration granted by the bishop of either is *void, *Burston v. Ridley*, 1 Seld. 30. The administration granted to the plaintiff by the Bishop of Chester, was void, because there were [493] *bona notabilia* in the diocese of Litchfield and Coventry, and no administration was granted by the bishop of that diocese. The plaintiff, therefore, was not administratrix of any of the goods of the intestate. But supposing those letters were not void, at all events she was not administratrix as to the debt which was the subject of this action, there being no proof that the debtor re-

sided within the diocese of *Chester*, at the death of the intestate. And upon the issue joined, it was incumbent upon the plaintiff to prove that fact.

Per Curiam. Where an intestate has *bona notabilia* in two dioceses within the same province, neither diocesan has power to grant administration, but it must be done by the metropolitan of the province. But where there are *bona notabilia* within one diocese of one province, and another diocese in another province, the case is different. Now *Chester* and *Litchfield*, are not in the same province, and therefore, the administration granted by the Bishop of *Chester*, was not void. It will operate as to any debt where the debtor at the time of the intestate's death, lived in the diocese of *Chester*. The other question is, whether upon the issue it was incumbent upon the plaintiff to show that she was administratrix as to this debt, by proving that the debtor at the time of the intestate's death resided in the diocese of the bishop by whom the letters of administration were granted. It certainly would be more convenient [494] (if the defendant relies upon the debtor's having resided elsewhere) that such matter should be specially pleaded. But whether it must be so pleaded may admit of some doubt; and, therefore, on that point the defendant may take a rule.

W. E. Taunton and *Russell*, now showed cause. Although specialty debts are *bona notabilia* at the place where the securities are at the death of the intestate, yet simple contract debts follow the person of the debtor, and administration must be granted in that place where the debtor resided at the death of the intestate, *Yeomans v. Bradshaw*, Carth. 373. If, therefore, the debtor resided in the diocese of *Chester*, at the death of the intestate, the debt was *bonum notabile* in *Chester*; and, therefore, as to this debt, the plaintiff was duly appointed administratrix. The plaintiff having produced the letters of administration, it lay upon the defendant to show that this debt did not pass under them, by proving that the defendant did not reside in the diocese of *Chester*, at the death of the intestate. But, secondly, if the defendant meant to rely upon this fact, in order to show that the plaintiff was not entitled to sue in respect of this particular debt, he ought to have stated it in his plea. It being a general rule of pleading, that the plea must deny all or some essential part of the averments of fact in the declaration, or admitting them to be true, allege new facts which obviate or repel their legal effect. Here, the defendant in his [495] plea has introduced no new matter, but has merely denied the fact alleged in the declaration, that the plaintiff was administratrix. He has, therefore, only put in issue, whether the letters of administration were duly granted.

Campbell and *C. Phillips*, contra. There are two questions. First, what is the issue? Secondly, upon whom the *onus* of proving the issue lies? The issue involves two questions: first, did the bishop of *Chester*, grant the letters of administration; secondly, did this debt pass by them to the administratrix. She says, in substance, she is administratrix of the debt she seeks to recover, and that the defendant denies in his plea. If this be the issue, it was incumbent on the plaintiff to prove not only the granting of the letters of administration, but that the defendant resided in that diocese, for otherwise the debt in question did not pass to the plaintiff. In *Com. Dig. fit. Administrator*, B. 3, it is laid down, that nothing passes to the administrator out of the diocese in which the administration is granted. The plaintiff avers, that she is administratrix of all and singular the goods and chattels of the intestate. The defendant says she is not administratrix in manner and form as the plaintiff hath alleged. If the plaintiff was bound to prove the allegation to the full extent, it is clear she has failed. But, assuming that she was not bound to prove that to the full extent, still at all events it was necessary to prove that she was administratrix of the deceased as to the debt in question. Her allegation, therefore, may be taken to be that she was administratrix *quoad* this debt. Now

that allegation involves in it two facts: first, that the letters of administration were granted by *the Bishop of *Chester*; and, secondly, that the debtor at the time of the death of the intestate lived within that diocese. Then, [*496] if that be so, it is quite clear that the plaintiff must, in order to support the affirmative of the issue she has taken upon herself, prove not only that the letters of administration were granted, but that the defendant resided within the diocese of the Bishop of *Chester*, at the time of the death of the intestate. There is no authority to show that this is a matter which must be specially pleaded. *Hilliard v. Cox*, 1 Salk. 37, *Mellor v. Barber*, 3 T. R. 387, and *Yeomans v. Bradshaw*, Carth. 373, only show that in those cases it was thought prudent to plead the facts specially, but not that it was necessary so to do. In Mr. Serjt. *Williams's note to The King v. Sutton*, 1 Saund. 274, 275, it is laid down, that the defendant may give in evidence upon the plea of *ne unques executor*, that there were *bona notabilia*, for it confesses and avoids, and does not falsify the seal of the ordinary.

BAYLEY, J. It appears to me, that on these pleadings, the question whether the defendant at the time of the death of the intestate was resident in the diocese of *Chester*, was not parcel of the issue. The plaintiff alleges in the declaration, that administration of all and singular the goods and chattels belonging to the intestate at the time of his death was granted to her by the bishop of *Chester*. The defendant by his plea craves oyer of the letters of administration, and then says that the plaintiff has never been administratrix of all and singular the *goods and chattels of the intestate in manner and form as [*497] the plaintiff hath in her declaration in that behalf alleged, and upon that issue is joined. It is not stated in the plea that the plaintiff is not administratrix as to the particular subject matter of this action, but only that she is not administratrix as she has described herself to be. The plea, therefore, merely puts in issue whether she is such administratrix as she has described herself to be. Upon principle and authority, I am of opinion that if the defendant intended to insist that by reason of any matter *dehors* the letters of administration, the plaintiff was not administratrix as to the particular debt, which was the subject of this action, he should have stated that matter in his plea. The precedents show that this has been the usual practice. Thus, in *Yeomans v. Bradshaw*, Carth. 373, an action was brought against the drawer of a bill of exchange by an administratrix, under letters of administration granted by the bishop of *Durham*. The defendant pleaded that the city of *London*, was without the diocese of *Durham*, and within the diocese of *London*, and that he, defendant, before and at the time of the death of the intestate, was and is an inhabitant and commorant without the diocese of *Durham*, to wit, at *London*, within the diocese of *London*. The plaintiff demurred, and the court held this to be a simple contract debt, and the rule was that the bill should abate. In *Hilliard v. Cox*, 1 Salk. 37, the action was upon promises by an administrator claiming under letters of administration granted by the archdeacon of *Berks*; the defendant pleaded, that at the time of the *death of the [*498] intestate, and the committing of administration, he was inhabiting and resident at *Oxford*. In both these cases the place of residence of the debtor at the time of the death of the intestate was stated upon the face of the plea. In *Griffith v. Griffith*, Sayer, 83, debt was brought by an administratrix, and it appeared on the face of the declaration that letters of administration were granted by the bishop of *Bristol*; the defendant pleaded that the intestate died on the high seas, out of the jurisdiction of the bishop of *Bristol*, and that the letters of administration were therefore void, but on demurrer they were holden to be good, the right of granting them not being founded upon the dying of an intestate within a diocese, but upon his leaving goods therein; and there *Lee*, C. J., after noticing a mistake in the report of *Hilliard v. Cox*, 1 Salk. 37, says, "As there was a debt upon single contract due to the plaintiff's intestate

at the time of his death, from a person who at that time resided within the diocese of *Bristol*, this, agreeably to what is laid down in *Yeomans v. Bradshaw*, Carth. 374, gave a right *prima facie* to the bishop of *Bristol*, of granting letters of administration ; and we will not intend that the plaintiff's intestate left *bona notabilia* in any other diocese. We will, on the contrary, rather intend, for the sake of supporting the letters of administration, that the plaintiff's intestate did not leave *bona notabilia* in any other diocese." These authorities prove, that wherever it was intended to show that the letters administration were void, by some matters *dehors* them, or that they were not applicable to the particular subject matter in the suit, the uniform course of pleading has been for the defendant to state upon the face of his plea the specific circumstances which render them void, or which prevent the plaintiff from being entitled to sue. Upon these authorities, as well as upon the reason and principle of the thing, I am of opinion that upon this form of plea the only fact put in issue was, whether the letters of administration mentioned in the declaration were duly granted, and that the question whether the defendant resided in the diocese of *Chester*, at the time of the death of the intestate constituted no part of the issue. The rule for entering a nonsuit must therefore be discharged.

HOLROYD, J. I am of the same opinion. The plaintiff does not allege by her declaration that administration of the particular debt was granted to her, but that administration of all and singular the goods and chattels of the deceased was granted to her. That allegation must be construed to apply to all the goods and chattels intended to pass by the letters of administration. That being so, the issue was, whether she was administratrix of the goods and chattels which passed by letters granted by the Bishop of *Chester*. The declaration need not show that the archbishop or bishop had authority to grant the letters of administration. The law intends that he has such authority. It is true, indeed, that in *Denham v. Stephenson*, Salk. 40, Lord *Holt* says, that in former times it was thought not enough even to show an administration committed by a bishop, without averring *there were *nulla bona notabilia*. But in *Woodward v. Thompson*, Cro. Eliz. 907, and *Skidmore v. Winton*, Cro. Eliz. 879, it was held, that a declaration by an administrator need not allege that the archbishop or bishop by whom the administration was granted was *loci illius ordinarius*. If that be so, then the allegation in the plea that the letters were not granted in manner and form as the plaintiff has alleged, does not import that the bishop had not authority to grant the administration as to the debt which was the subject matter of the action. If the defendant intended to rely on any new matter as a defence, he should have stated it on the face of his plea. If this were not the case, this inconvenience would follow, that an administrator would upon this issue be called upon to prove the place of residence of his debtor, of which probably he might be wholly ignorant; whereas if the debtor, (who knows the truth of this fact,) must allege it, the administrator will have an opportunity of taking out new letters of administration.

LITTLEDALE, J. It seems to me that the question whether the debtor lived out of the jurisdiction of the Bishop of *Chester* is not parcel of this issue. The plaintiff, by making protest of the letters of administration, verifies the allegation in the breach to the first set out of counts, that administration was granted to her by the Bishop of *Chester*. The letters of administration are in the common form and purport to give administration of all and singular the goods and chattels of the intestate. But though that be the language, it can only apply to those goods and chattels over which *the grantor of the letters of administration had jurisdiction. The plaintiff, therefore, has in effect only alleged that administration has been granted to her of those goods and chattels of the deceased over which the Bishop of *Chester* had jurisdiction. The defendant by his plea denies that fact, and that only; and no more is put in

issue than that which is alleged. It is no part of the issue joined in this case whether the defendant at the death of the intestate resided out of the diocese of Chester.

Rule discharged.

J. HOLLIDAY, an Infant, by W. HOLLIDAY, his Father and next Friend,
v. ATKINSON et al., Executors of M'KNIGHT.[†]

Where a promissory note, expressed to be for value received, was made in favor of an infant aged nine years, and in an action upon the note by the payee against the executors of the maker, no evidence of consideration being given, the learned Judge told the jury, that the note being for value received, importeth that a good consideration existed, and that gratitude to the infant's father, or affection to the child, would suffice: Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient; and a new trial was granted. *Sensible*, That an intention to evade the legacy duty would not have been a good consideration.

Assumere on a promissory note given by the testator to the plaintiff for 100l., dated July 19, 1821, payable six months after date, and expressed to be for value received. At the trial before *Hullock*, B., at the *Cardale* Summer assizes, 1825, it appeared that the plaintiff at the time when the note was made was only nine years old. The testator was then in an imbecile state, and died a few months after. It appeared that the testator was intimate with *W. Holliday*, but no evidence of consideration was given. The learned Judge [502] told the jury, that the note being for value received, was *prima facie* evidence of some legal consideration. That it was not necessary to prove the consideration, but the defendant should have disproved it. That many good considerations might have existed, and that affection towards the plaintiff, or gratitude to his father, or an intention to avoid the legacy duty, would suffice. But that if they thought fraud had been practised, or the maker did not know what he was doing, they ought to find for the defendants. A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained in *Michaelmas* term, against which

Scarlett and *Patteson* showed cause. The only question made at the trial was respecting the competency of the testator to make the note. There was no evidence to impeach the consideration; it was therefore unnecessary for the plaintiff to prove it, particularly as the note was expressed to be for value received, which raises a presumption that a good consideration was given. Then with respect to the observations of the learned Judge, *Woodbridge v. Spooner*, 3 B. & A. 233, is a case where a note was given "for value received and his kindness to me," and the consideration must have been held sufficient, for the plaintiff recovered without proof of any actual consideration given. In *Lee v. Muggeridge*, 5 Taunt. 36, a moral consideration was held sufficient. In *Tate v. Hilbert*, 2 Ves. jun. 111; 4 Br. Ch. Ca. 286, Lord *Loughborough* would not decide that a note was invalid which was delivered as a gift. Here the motive might be to avoid the legacy duty.

**Brougham* and *Whitman*, contra. There is no doubt that a consideration might have been presumed in this case, and had the learned [503] Judge left it to the jury with that observation only, there would not have been any ground for this application. But he pointed out as good considerations, affection towards the child or gratitude to the father, and it is impossible to say that the verdict was not founded upon the supposition, that one or other of those considerations was the real one for giving the note.

† This case was argued and decided during the term.

ABBOTT, C. J I think that this case must be sent to a new trial. I agree that where a note is expressed to be for value received, that raises a presumption of a legal consideration sufficient to sustain the promise; but that is a presumption only, and may be rebutted. Now, we find that this note was given to a boy only nine years old, whose father was living, and that the donor was in a state of imbecility, and not far from his death. It then became a question for the jury, whether the note was given upon any legal consideration, and I think that the direction given to them as to the sufficiency of gratitude to the father or affection to the son was improper. As at present advised, I should also think that the intention to avoid the legacy duty would not be sufficient, for then the note would not be payable until after the donor's death, and a promissory note is not good as a *donatio mortis causa*. But if a second verdict should be founded on the latter consideration, the question may be put upon the record.

Rule absolute,†

† The cause was not tried again, a compromise having taken place between the parties.

*504] *HELSBY, et al., v. MEARS, TOMLINSON, SALISBURY, et al.

Where *A.*, the keeper of a coach-office, and a part owner in several coaches, made a contract with *B.* for the carriage of parcels which he was in the habit of sending from that office to various places: Held, that this bound the owners of all the coaches in which *A.* was a part owner, and as well those who became partners after the making of the contract, as those who were so before.

ASSUMPTION against the defendants (who were common carriers) upon an undertaking to carry a box containing watch-cases, from *Chester* to *Liverpool*, and there deliver the same to the plaintiffs. Breach, that the defendants did not safely carry the same and deliver it; but, through the negligence of defendants and their servants, the box and its contents were wholly lost. Plea, the general issue. At the trial at the *Chester* Summer assizes, 1825, it appeared in evidence, that the plaintiff was a watch-case maker at *Liverpool*, and the defendants proprietors of the mail-coach travelling between that place and *Chester*. On the 15th of September, 1824, the box in question was sent by the plaintiffs from *Liverpool*, to one *Walker*, the assay master at *Chester*, with gold and silver watch-cases, of the value of 185*l.*, to be assayed. On the 16th the box, with the same cases, was sent by *Walker*, to the mail-coach-office at *Chester*, which was kept by Mrs. *Tomlinson*, directed to the plaintiff's at *Liverpool*. The box was lost, and there was reason to suspect that it was stolen out of the coach-office at *Chester*. The defendants had put up a notice in the office, that they would not be accountable for any parcel or package whatever above the value of 5*l.*, unless the same were entered and paid for accordingly, at the time of delivery of such parcel to them or their agents. *Walker*, did not enter and pay for the box in question as being of more than 5*l.* value; but in order to take the case out of the operation of the notice, *Walker* proved that he was in the habit of receiving boxes of the same description from various places, which were conveyed by coaches, of which the defendant, *Tomlinson*, was a proprietor. Three years before, a similar box, containing watch-cases that had been sent to him from *Coventry* to be assayed, had been lost. He then applied to Mrs. *Tomlinson*, one of the defendants, who was then a proprietor of the *Coventry* mail, and also of the *Liverpool* mail, and she made the loss good. On that occasion she told him,

that the proprietors were incurring a great risk in carrying such valuable parcels as his, that the carriage was not an equivalent for it; and they must decline carrying them in future. *Walker* said, if that was persisted in there must be an end of all their other arrangements with him. She then said, "Is our carrying them any accommodation to you?" to which he answered, "Certainly; whatever accommodates the trade accommodates me." She replied, "If that be the case, we will continue to carry them as usual." Nothing more than the charge for carriage of an ordinary parcel was then paid for the boxes with watch-cases. After that conversation, *Walker*, continued to send such boxes as before, and settled the accounts for the carriage of all such boxes annually. He paid for the carriage to *Chester*, and charged it to the respective owners of the property. Some of the defendants had become partners in the *Liverpool* mail, after the time before mentioned, and *Salisbury*, did not become a partner until after the last settlement of accounts between *Walker*, and the coach proprietors at *Chester*. For the defendants it was contended, that as this conversation related to another coach, it was no evidence of a special contract to be "responsible for valuable parcels sent by the *Liverpool* mail, [506 unless insured, and that it could not be evidence against any persons not then partners in the concern, and certainly not against *Salisbury*, who did not become a partner until after the last annual settlement of accounts. Secondly, that the loss proved was by a felony, and not by the negligence of the defendants. The learned Judge left it to the jury to say, whether there was a special contract to carry goods of this description sent by *Walker*, at the ordinary rate of carriage, without insurance, and they found that there was. The jury were then asked, whether the loss was by a felony or by negligence, in order to give the defendants' council an opportunity of taking the opinion of this court, as to whether the defendants were liable if the loss were by felony. The jury found that the loss was by felony, and not by negligence. A verdict was thereupon entered for the plaintiffs, the defendants having leave to move to enter a nonsuit. In *Michaelmas* term, a rule *nisi* for that purpose was obtained, and now

Temple and *Parke*, showed cause. There was evidence of a special contract fit for the consideration of the jury, and they were warranted in finding for the plaintiffs upon that point. Mrs. *Tomlinson*, a partner in several coaches, agreed to carry the boxes sent by *Walker*, the assay master, at the ordinary rate of carriage, notwithstanding the notice. That contract bound the partners in each coach by which they were sent, of which Mrs. *Tomlinson*, was a proprietor. *Walker*, could not tell who were the other partners. Then the annual settlement of accounts upon the footing of that contract proves the recognition of it by the new partners, who "came into the concern [507 before the last settlement. *Salisbury*, also was bound; for a person coming into a firm must be bound by all the equities attaching upon it at that time. If, then, the notice does not affect the question, the plaintiffs are clearly entitled to recover; for the defendants, by suffering the box to be stolen, were guilty of negligence in law.

Cross, *Serjt.*, and *J. Williams*, contra, contended, as at the trial, that the conversation with Mrs. *Tomlinson*, was not evidence to affect those who afterwards entered into the concern. It did not even relate to the *Chester* and *Liverpool* mail, nor was there any evidence that the notice was put up before that time. If it was not, then the plaintiffs, or their agent, *Walker*, who was aware of the notice, must be taken to have dealt upon the terms pointed out by that notice. Secondly, the jury having found that the box was stolen, and that the servants of the defendants were not guilty of negligence, all those cases where negligence was relied upon to destroy the effect of the notice are inapplicable.

BAYLEY, J. I am of opinion that this rule for a new trial must be discharged. There is no doubt that common carriers may limit their responsi-

bility by a notice, that they will not be answerable for goods of more than a certain value ; but they may, notwithstanding a general notice of that description, be bound by a special contract made with any individual. Now it seems to me, that from the conversation between Mrs. Tomlinson and Walker, if that were believed, the jury might very well infer that she undertook to carry all parcels sent by Walker, as assay master, by any coaches of which she *508] *was a proprietor, at the ordinary rate of carriage. If it proved a contract, I have no difficulty in saying it would bind all the partners at that time, and all who might afterwards become so, until some notice of an intention to rescind the contract was given to Walker. It does not distinctly appear when the notice was put up ; if it was put up before this conversation with Mrs. Tomlinson, that would take it out of the notice ; if it was introduced at a subsequent period, it was the duty of Mrs. Tomlinson, if she meant to vary the course of dealing with Walker, to give him special notice of such intention. For these reasons, it appears to me that the verdict found for the plaintiffs ought not to be disturbed.

HOLROYD, and LITTLEDALE, Js., concurred.

Rule discharged.

The KING v. NORTH PETHERTON.

A register of baptism *per se* is no evidence of the place of birth of the party baptized.

UPON appeal against an order of two justices, whereby a pauper, described as Joseph Rich, otherwise Coles, the son of Elizabeth Derham, formerly Rich, widow, was removed from the parish of North Petherton, in the county of Somerset, to the parish of West Monckton, in the same county, the court of quarter sessions set aside the order of removal, subject to the opinion of this court on the following case :

The pauper, who was proved to be the legitimate son of John and Elizabeth Rich, was born in the parish of West Monckton. In order to make out the settlement of the pauper's father, it was proved by the production of a *509] *copy of the parish register of Spaxton, that he was baptized in that parish. There was no other evidence of his having been born in that parish, and the court of quarter sessions thought, upon the authority of the case of Creech St. Michael v. Pitminster, Burr. S. C. 765., that they were bound to consider the register by itself *prima facie* proof of the place of his birth.

C. F. Williams and T. Cabbell, in support of the order of sessions. The register of the baptism of the pauper's father was sufficient *prima facie* evidence of his having been born in the parish where he was baptized. Creech St. Michael v. Pitminster, 3 Burr. S. C. 765, is in point. There the register of baptism was produced. There was evidence besides that the father and mother lived in Pitminster, but there was no evidence to show that they lived there, either before or at the time of, or shortly after the birth of the pauper, or that the pauper was born in Pitminster. The presumption *prima facie* is, that a party was born in that place where he was baptized. For by the ecclesiastical law, as far back as the reign of King Edward the Sixth, and again in the reign of King Charles the Second, "the pastors and curates are directed to admonish the people, that they defer not the baptism of infants any longer than the Sunday next after the child be born, unless upon great and reasonable cause declared to the curate, and by him approved." Gibson's Codex, Jur.

Ecclesiastici Baptism. tit. 18, c. 9. But the register of baptism is certainly evidence of the pauper's father being in the parish of *Spaxton*, and it is the only parish in which he is stated to have been; and is therefore his [^{*510} place of settlement, until the contrary be proved on the authority of the case of the parish of *Banbury* and the parish of *Broughton*, Comb. 364, in which *Holt*, C. J., is reported to have said, "where the child is first known to be, that parish must provide for it till they find another."

Erskine, (and *G. Barnard* was with him,) contra, was stopped by the court.

Bayley, J. The register of baptism *per se* is not evidence of the place of birth. If the age of the child at the time when it was baptized could be ascertained, the register might, in some cases, be evidence of the place of birth. If the child were then very young, the register would be presumptive evidence that it was born in that parish where it was baptized; but if the child were not then young, the circumstance of its having been baptized in a particular parish, would afford no presumption that it was born there. Here there was no evidence to show the age of the child when it was baptized. We think, therefore, that the case must go back to the sessions to be reheard, in order that they may ascertain by other evidence whether the father of the pauper was born in the parish of *Spaxton* or not. We do not say that a register of baptism is not evidence of the place of birth, when accompanied with proof of other circumstances, but that taken by itself it is not evidence of the place of birth.

Case sent back to the sessions.



*The KING v. The Inhabitants of WHEELOCK, in the County of [^{*511} CHESTER.

Where an order of removal is appealed against, and is quashed generally by the sessions, the appellant on the trial of another appeal may show by evidence the distinct ground upon which the former order was quashed.

COTTINGHAM moved for a rule *nisi prossedetur mandamus* to the justices of the peace of the county of *Chester*, directing them to make a special entry on their proceedings at the last *Easter* sessions, that the order of removal of the pauper from the above parish was quashed for want of proof of the chargeability of the person removed.

The affidavit on which this application was made stated, amongst other matters, that on the trial of the appeal, the court below being of opinion that there was not sufficient proof of chargeability of the person removed, refused to enter into the merits, but quashed the order generally; and, although much pressed, would not permit the clerk of the peace to make a special entry on their proceedings of the particular and only ground upon which it was quashed.

Bayley, J. The respondents are not, at all events, concluded by the judgment of the sessions, but may on the trial of another appeal against another order of removal of the same party, explain by evidence to the sessions the particular ground on which the former order of removal was quashed.

Horrocks, J., concurred.

Rule refused.†

† See *Rex v. Inhabitants of Knottingley*, 2 B. & C. 886.

*ALLEN v. BRYAN.

The assignee of a rent may maintain debt for arrears of the rent.

DEBT for rent. The declaration stated, that by an indenture bearing date *February 24th, 1814*, between *William Fell* and the defendant, the former demised to the defendant certain premises for fourteen years, at the yearly rent of *100l.* Covenant by the defendant to pay the rent. And afterwards, by another indenture between *Fell* and the plaintiff, the former assigned to the plaintiff the rent reserved by the said lease, the counterpart of the lease, and the benefit of the covenants for payment of the said rent therein contained, for the remainder of the term. That afterwards, to wit, on, &c., *50l.* for a half year's rent became due, and was still unpaid, &c. Demurrer and joinder.

Comyn, in support of the demurrer, stated, that the point intended to be raised for the defendant was, that the assignee of the rent could not bring debt for it, inasmuch as there was no privity between him and the tenant, but admitted, that *Robins v. Cox*, 1 Lev. 22, was an authority against him, and had never been overruled; and upon the authority of that case the court gave judgment for the plaintiff.

Judgment for the plaintiff.[†]

Parke was to have argued for the plaintiff.

[†] See *Knowles' case*, Dyer, 56; *Ards v. Watkin*, Cro. Eliz. 637; *Marls v. Flake*, 3 Salk. 118. In those cases the judgment proceeded upon the ground that the tenant having attorned the privity of contract was transferred, but attornment is now rendered unnecessary by the 4 Ann. c. 16, s. 9.



*LOGAN v. BURTON.

An inclosure act authorised the commissioners to stop up old roads in the parish, besides those over the lands to be enclosed, provided it were not done without the concurrence of two justices. *Sembly*, that under this clause, the concurrence of two justices was necessary to warrant the stopping up of any part of a public footway which passed through an old inclosure.

By the 41 G. 3, c. 109, s. 8, the commissioners are authorised to set out and appoint the public carriage roads and highways through and over the lands and grounds to be inclosed, and to divert, turn, and stop up any of the roads and tracks upon and over all or any part of the said lands and grounds: provided, that in case the commissioners shall be empowered by any local act to stop up any old or accustomed road passing or leading through any part of the old inclosures in such parish, the same shall in no case be done without the concurrence and order of two justices: Held, that, under this section, the commissioners were authorised to stop up or divert footways as well as carriage roads; and that the proviso at the end of the section was not confined to carriage roads, but extended to every species of ways, and, therefore, where the commissioners were empowered by the local inclosure act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held that in order effectually to stop up a public footway passing partly over the lands to be inclosed and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices, and no such order or concurrence having been obtained, it was held that a footway which the commissioners ordered to be stopped up had not been effectually stopped, but continued a public footway.

TRESPASS, for breaking and entering the plaintiff's close, in the parish of *Egham*, in the county of *Surrey*, called the *Farm Yard*, and abutting towards the west on a certain public highway there called *Prune Hill Road*, and towards the east on certain other closes there also situate, belonging to the

plaintiff. The second count stated that the defendant, on, &c., at, &c., broke and entered a certain other close of the plaintiff called the *Allotment*. Plea, first, a public footway over the closes at the time of the trespasses. Secondly, that at the time of the trespasses, &c. the defendant was seized in fee of a messuage and closes called *Bakeham House Farm*, near the said closes, in which, &c., and that defendant, and all those whose estate he had in the said messuage and closes immemorially had a footway for himself and themselves and servants, farmers and tenants, occupiers of the said messuage and closes from *Prune Hill Road*, towards and into, through, over, and along the said *closes in which, &c. unto and into *Rusham Green Road*, towards and [514] into the parish church of *Egham*, and from thence back again unto, into, through, over, and along the said *closes*, in which, &c., unto and into the said *Prune Hill Road*. The defendant, in another plea, claimed the way by a grant. The plaintiff having in his replication traversed the rights of way claimed by the defendant in his pleas, issue was joined thereon. At the trial before *Alexander, C. B.*, at the Spring assizes for the county of *Surrey*, 1824, it appeared, that the way claimed by the defendant extended from the *Prune Hill Road*, eastwardly, through *Rusham Farm Yard*, (the close in the first count mentioned, which was an old inclosure,) thence in the same direction over certain lands of the plaintiff, which had been allotted in 1814, under an inclosure act for inclosing lands in the parish of *Egham*, in the county of *Surrey*, to one *Mary Bartholomew*, the former proprietor of *Rusham Farm*, and thence over certain other lands called *Egham Field*, along a road called *Egham Field Road* which led into *Rusham Green Road*. The commissioners in their award did not notice the road over the farm yard, but set out a footway, beginning at the gate on the east side of the farm yard of *Mary Bartholomew*, and extending eastwardly over the allotments awarded to *Mary Bartholomew* and others respectively into the *Egham Field Road*, which said footway was set out for the use only of the proprietors or occupiers of *Bakeham House Farm*, belonging to *Thomas Burton*. On the production of the award, the Lord Chief Baron was of opinion, that the public footway, (if any such ever existed,) over the new inclosure, was extinguished by the award, and, *consequently, that there was no such public way as that claimed by the defendant in his pleas, viz. a way over the plaintiff's closes into *Rusham Green Road*; and, secondly, assuming that the defendant or the owners of his estate, before the inclosure and award, had a right of way by prescription, that the title by prescription was extinguished by the inclosure act and award, and that he ought to have claimed his way under the award. A rule *nisi* for a new trial was obtained in *Easter term*, 1824, and cause was shown against the rule at the sittings in banc, after *Trinity term*, 1824, and the court were of opinion, that it ought to have been left to the jury to find, whether, before the making of the award of the commissioners, the defendant had any private right of way by prescription or not: for if he had, then the award would not destroy, but confirm the old title. The rule for a new trial was made absolute, and upon the application of the defendant, it was made part of the rule, that he should be at liberty to amend his pleas; and that in case he should amend, and a new trial be had, the costs of the former trial were to be borne by the defendant, if he should not establish a right of way upon the pleadings as they stood at the time of the first trial. The defendant pleaded the following additional pleas: that before the time when, &c., and before the passing of the inclosure act, and the making of the award, there was a common and public highway from *Prune Hill Road* towards, into, through, over, and along the said *closes*, in which, &c., towards and into a certain other highway, for the king's subjects to pass on foot; that on, &c., at, &c., an act of parliament was passed, for inclosing lands in the parish of *Egham*, in the county of *Surrey*; that the commissioners for carrying the act into execution duly made their award, and, [516] among other things, awarded that a footway beginning at the gate entering the

farm yard of *Mary Bartholomew*, and extending eastwardly over the allotment awarded to the said *Mary Bartholomew*, into the *Egham Field Road*, should be set out for the use of the proprietors of *Bakeham House Farm*, belonging to *Thomas Burton*, Esquire Averment, that the footway so set out by the award was a footway into, through, and over the said *closes* in which, &c., in the same line and direction with the public footway thereinbefore mentioned; and that defendant, before and at the said times when, &c., was and is seized in his demesne as of fee, of and in, and was and is the proprietor and occupier of the said *Bakeham House Farm*; and having occasion to use the footway to pass, &c. over the said closes, committed the supposed trespasses. Replication, that the supposed footway so alleged to have been set out was not nor is a footway into, through, over, and along the said closes in which, &c. in the same line and direction with the public footway, in manner and form, &c. Upon that issue was joined. Another plea stated, that before and at the time of the trespasses, and before the passing of the inclosure act, and the making of the award of the commissioners, defendant was seized in his demesne as of fee, of and in, and was the proprietor of *Bukeham House Farm*, and then prescribed for a private footway for the defendant and his servants, farmers and tenants, occupiers of the said farm over both closes, before the making of the award. It then stated the passing of the inclosure act, the making of the award, and that the footway set out by the award was a footway over the *closes* in which, &c. in the same line and direction as in the last plea. Upon this plea the same issue was taken and joined. There then followed two similar pleas to the first count of the declaration, as to the way over the farm yard, upon which the same issues were also taken and joined. There were also two similar pleas pleaded to the second count, as to the way over the allotment, upon which the same issues were taken and joined. The cause was tried again at the Spring assizes for the county of *Surrey*, 1825; and the jury found, that before the passing of the inclosure act, and the making of the award of the commissioners, there was a public way over the closes in which, &c., but that there was not any private way by prescription.

A verdict was entered for the plaintiff, with liberty to the defendant to move to enter a verdict for him on all or any of the issues. *Marryat*, in *Easter* term, obtained a rule nisi to enter a verdict for the defendant on the issues joined on all the special pleas except those which traversed the rights of way by grant and prescription as annexed to the defendant's estate, and he contended that the public way which existed before the inclosure act, and which passed partly through an old inclosure and partly through the lands inclosed, had not been duly stopped up by the commissioners under the inclosure act, inasmuch as it did not appear to have been done with the concurrence and by the order of two justices. The local act 54 G. 3, c. 153, s. 1, authorized the commissioners to stop up old roads in the parish besides those over the lands to be inclosed, "provided it were not done without the concurrence of two justices." The road through the *Farm Yurd*, was an old road, passing over other lands than those to be inclosed. But even assuming that this was not a case within that clause of the local act, at all events it was a case within the proviso in the eighth section of the general inclosure act 41 G. 3, c. 109, which enacted, that in case the commissioners should be by the local act empowered to stop up any old or accustomed road passing or leading through any of the old inclosures in the parish, the same should not be done without the concurrence or order of two justices. Here the footway claimed by the defendant, was an old or accustomed road passing through a part of the old inclosures in the parish. Secondly, he contended, that at all events the defendant was entitled to have the verdict entered for him on some of the issues on the new pleas, in which it was alleged, that the way set out by the commissioners was a way in the same line and direction as the way which was used before the inclosure act.

The case came on for argument at the sittings in banc, after *Trinity* term, 1825, and the court then decided that the defendant was entitled to have the verdict entered for him upon the issues joined upon the pleas, which alleged that the commissioners by their award had set out over the *allotment* a footway in the same line and direction as the ancient way. *Marryat*, then insisted that the defendant was entitled to the costs of the first trial under the rule of court, for that the defendant ought to have the verdict entered for him upon the issue raised upon the second plea, which alleged, that *at the time of the trespasses there was a public highway over both closes*. That point was argued at the sittings *in banc, after *Hilary* term, 1826, by *Barnewall*, for the plaintiff, and *Marryat* and *Chitty*, for the defendant. The argument [519] on the part of the plaintiff was in substance as follows: the clause of the local act, which requires the concurrence of two justices in case the commissioners stop up old roads in the parish *besides those over the lands to be inclosed*, applies only to cases where the road to be stopped up passes *wholly* over other lands exclusively of those to be inclosed, and not to this case, where it passes partly over the land to be inclosed and partly over other land which was not to be inclosed. The proviso in the eighth section of the general inclosure act does not apply to footways, but to carriage roads and highways, which the legislature deemed to be of greater importance to the public, and therefore required, that before such roads were stopped up or diverted, the commissioners should have the concurrence of two justices. By that section the commissioners are authorized "to set out and appoint the public *carriage roads and highways*, through and over the lands to be inclosed, and to divert, turn, and stop up any of the *roads and tracks* upon such lands, so as such *roads* and *highways* shall remain thirty feet wide at the least." The term *footway* is not mentioned in this section, and there is no other section which authorizes the stopping up of any *public* footway. It must, therefore, be included under the word *track*, for it could not be intended to be included in the word *roads*, for they are directed to be thirty feet wide. The term *road, ex vi termini*, applies rather to a way used for the purpose of riding than of walking, and it seems in this section to be generally "used to denote carriage roads. Section 10. authorizes the commissioners to set out private ways, and there bridle ways and *footways* are expressly mentioned. If the term *road* in this section was not intended to comprehend a footway, the proviso at the end of it must be taken to apply to carriage roads only, and not to footpaths, and if that be so, then the commissioners had the power to stop up the footway over the old inclosure without the concurrence of two justices, and not having set it out as a public way, the right which the public once had was extinguished by the award, *Rex v. The Commissioners of Dean Inclosure*, 2 M. & S. 80. It has not in practice been considered necessary where a footway passes partly over the lands to be inclosed and partly over lands already inclosed, to obtain an order of justices to stop it up. The way not being set out in the award of the commissioners has been considered to operate as an extinguishment of it. If this should be held now to be an ineffectual mode, it will necessarily have the effect of re-opening many roads over inclosures which have in practice been discussed for a long time.

The argument on the part of the defendant was in substance as follows: the 21st section of the local act ought not to be confined in construction to roads which pass *wholly* over other lands in the parish exclusively of those about to be inclosed, but it comprehends roads passing partly over the lands to be inclosed, and partly over other lands in the parish. Secondly, the footway is included in the term *road* in the proviso in the 41 G. 3, c. 109, s. 8. The object of the legislature *was, and in any case where the public were interested in any road passing through an old inclosure, they should [521] have the same security against its being improperly stopped as they have in an ordinary case, viz., that it should not be done without the concurrence of two

justices. Now, as the public may be as much interested in the continuance of a footway as in that of a carriage way, this is a case which the legislature clearly had in view ; but the Court of Exchequer decided in the case of *Harber v. Rand*, 9 Price, 58, that under the 8th section of the general inclosure act, the positive concurrence and order of two magistrates are absolutely necessary for the stopping up of roads, whether they be public roads or private or bridle or footways. That case is expressly in point, and must govern the present.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the court.

This was an action of trespass for entering one close called the *Farm Yard*, and another close called the *Allotment*. The defendant justified under a private right of way by prescription or grant, which was negatived, and under a public right of way, which was found for him ; but the public right was stated in two ways : first, as continuing down to the time of the trespass ; and, secondly, as continuing down to the time of an inclosure act of the 54 G. 3, and from that time as being converted from a public into a private right ; and as certain costs will depend upon which of these is the subsisting right, it is necessary to decide this question. The closes are in the parish of ^{*522]} *Egham*, and one of them was inclosed under the 54 G. 3, c. 153, entitled an act for inclosing lands in *Egham* ; and the other is a *Farm Yard*, and was an old inclosure long before that act. Before the passing of that act there was a public footpath from *Egham* over the uninclosed lands unto and through the *Farm Yard*. The *Farm Yard* opened on the opposite side upon a common road. The commissioners under the inclosure act set out what had previously been this public footpath over the land to be inclosed as a private way for the occupiers of the defendant's farm, and whether this put an end to the public footpath over the *Allotment* and also over the *Farm Yard* is the point in question. It was contended for the defendant that the public way continued over both, the concurrence of two magistrates being, as the defendant's counsel insisted, essential to prevent its continuing a public road ; and there having been no such concurrence. The plaintiff insisted that the public way was at an end as to both, or at least that it was so as to the *Allotment* ; and if it was at an end as to either, it was sufficient for his purpose. The point depends upon the construction of sections 8, 10, and 11, in the 41 G. 3, sess. 2, c. 109, and 54 G. 3, c. 153, s. 21. The 8th section of the 41 G. 3, directs the commissioners to set out and appoint the public carriage roads and highways over the lands to be inclosed, and to divert and stop up any of the roads and tracks over such lands, with a proviso that they shall stop up no old or accustomed road leading through any part of the old inclosures in such parish, township, or place, without the concurrence of two justices. The 10th section requires them ^{*523]} to set out such private roads, bridle ways, and footways, in, over, or by the sides of the allotments as they shall think requisite ; and section 11, provides that after such public and private roads and ways shall have been set out, all roads, ways, and paths over such lands, (i. e. the new inclosed lands,) which shall not be set out as aforesaid shall be for ever stopped up and extinguished. I shall afterwards refer more particularly to the language of that act, because the decision of the court depends on the construction to be put upon it. By 54 G. 3, c. 153, s. 21, the commissioners may stop up old roads in the parish, besides those over the lands to be inclosed, provided it be not done without the concurrence of two justices. It is, therefore, either under this latter clause in the 54 G. 3, or under the 8th section of the 41 G. 3, c. 109, that the concurrence of two magistrates can be required. The clause in the 54 G. 3, is either confined to such roads as pass wholly over other lands in the parish, exclusive of those to be inclosed, and not passing in any part over the lands to be inclosed, and then it is inapplicable to this case, or it also extends to such roads as pass as well over the lands to be inclosed as over other lands in the

parish, and then it applies here; and I incline to think it extends to both. There might have been some old roads in the parish wholly unconnected with the lands to be inclosed, but there might be others leading over the lands to be inclosed, and also over other lands in the parish, and the latter parts of such roads might be called roads *not passing over the lands to be inclosed*; and though the language be not very accurate, "roads *besides* the roads which passed over the lands to be inclosed;" there "might be public footways [524] leading from one village to another, passing through old inclosures in the parish of *Egham* to the lands to be inclosed, and leading from those lands passing through other inclosures in the parish of *Egham*; and if such public footways are not within the power and the protection of this clause, the commissioners will be able without the concurrence of two justices to stop up such a road and deprive the public of the use of it, if the 41 G. 3, c. 109, gives them such power; and if the 41 G. 3, c. 109, does not give the power, they will not be able to interfere with it at all; and it can hardly be supposed that either of these results was intended. If the construction be doubtful, that construction should be adopted which, whilst it gives the greatest power to the commissioners, most effectually guards the rights of the public. We are therefore disposed to think, that under the 54 G. 3, the concurrence of two justices was necessary to warrant the stopping up that part of this road which was beyond the limits of the land to be inclosed, i. e. the part over the *Farm Yard*.

But under the 41 G. 3, c. 109, we think in this case the concurrence of two magistrates necessary, as well for that part of the road which was over the land to be inclosed, as that which led through the farm yard. This depends mainly upon section 8. That section, in some parts of it, seems to have in view exclusively carriage roads; but in others, particularly in that part which relates to the diverting and stopping up of roads and tracks, it appears to apply to every description of road, whether a bridle or foot road only, or a carriage way also, and we think the proviso at the conclusion of [525] that clause is not confined to carriage ways, but extends to every species of road. The eighth section provides "that the commissioners, before they proceed to make any of the divisions or allotments directed by any such act, (viz. the local act,) shall set out and appoint the public carriage roads and highways, through and over the lands and grounds intended to be divided, allotted, and inclosed." So far the words are applicable to carriage roads. Then it goes on to direct, that "they are to divert, turn, and stop up any of the roads or tracks, upon or over any part of the lands and grounds as they shall judge necessary." There the language is altered from roads and highways, to *roads and tracks*. Then there comes a provision, which I think applicable to "carriage roads and highways," as contradistinguished from the "roads and tracks." That provision is, "so as such roads and highways shall be and remain thirty feet wide at the least." It is impossible to say that that provision is applicable to those roads and tracks which may be diverted, turned, and stopped up. I consider the section as if the words, "divert, turn, and stop up, &c." were written in a parenthesis; and it should be read, "that the commissioners shall have power to set out and appoint public carriage roads and highways, so as those roads shall be and remain thirty feet wide at the least, and so as they shall be set out in such mode and direction, as in the whole should be most convenient to the public." The words there, "so as they shall be set out," show that the words roads and highways, which are to remain thirty feet wide at the least, are applicable to roads which are to be set out, and not applicable to those roads and tracks which are to be diverted, turned, or stopped up. The question in this case turns materially on [526] the meaning to be attached to the words "roads and tracks" in that part of the section which authorises the commissioners to divert, turn, or stop up. If this provision is applicable to carriage roads only, it would be singular that the legislature should have introduced the phrase *roads and tracks*, and not have

continued the phrase *roads and highways*, which had been before used. And adverting to the other clauses of the act, it appears that there is no provision applicable to roads and tracks not being carriage roads or carriage tracks, unless the words *roads and tracks* be applicable to every description of roads. There is no express provision with respect to public bridle ways or public footways, but they must be subject to the general provision in the eleventh section, and if the justices have no power to set them out, and they are not protected by this proviso, they must of necessity be stopped up. The eighth section then provides, that there shall be a map in which the intended roads shall be accurately laid down and described; and it speaks of carriage roads, as being those to which the attention of the legislature appears to have been particularly directed. Then comes the proviso, "that in case such commissioner or commissioners shall by such bill be empowered to stop up any old or accustomed road passing or leading through any part of the old inclosures in such parish, township, or place, the same shall in no case be done without the concurrence and order of two justices of the peace." It does not say "any old or accustomed *carriage road*," but uses the word *road* generally. Now, if the former part of *527] the section, or any part of it, particularly that which relates to stopping up ways, applies not only to carriage ways, but to bridle ways and footways also, then the proviso must have the same application; and, therefore, when the commissioners are empowered to stop up an old carriage road, an old bridle way, or an old footway, passing or leading through any part of the old inclosures, they must have the concurrence and order of two justices of the peace for that purpose. The tenth section of the act seems to apply to private bridle ways and private footways. The eleventh section provides, that all roads, ways, and paths which are not set out shall be forever stopped up and extinguished, but that applies only to such roads as pass over the lands and grounds to be inclosed. Those ways which passed partly over lands to be inclosed, and also over other inclosures, are within the protection of the eighth section. One question therefore is, are the commissioners empowered by the 34 G. 3, to stop up *any* old or accustomed road passing through any part of the old inclosures in the parish? I have already expressed our opinion, that they may stop up such as are unconnected with and pass over no part of the land to be inclosed, and that they may stop up such as are connected with it, and form a part of it; and if it were doubtful whether this act in the latter case gave an *express* power, we think from the manner in which the road over the land to be inclosed is connected with the road through the *Farm Yard*, that it gave the commissioners an implied power to stop it up, which is equivalent. But that power cannot be exercised without the concurrence of two magistrates, which in this case was not obtained.

*528] "The consequence is, that the defendant is entitled to enter his verdict on the pleas, which justify under a public right of way.

Rule absolute.



DICKINS v. JARVIS and SMITH

Where a cause and all matters in difference were referred by order of nisi prius, and the arbitrator by his award found "that nothing is due to the plaintiff." Held, that this must be considered as a finding, that the plaintiff had no right to recover in the action. The arbitrator had power to enlarge the time for making his award, by indorsement on the order of reference; that order, together with two indorsements, enlarging the time, was made a rule of court: Held, that on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.

By the order of reference, costs were to abide the event; there were two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The master taxed the whole costs of the cause, and the reference in one sum to the other defendant, by whom payment was demanded of the plaintiff. The court refused to grant an attachment for nonpayment of those costs. Query, Whether the master had power to tax costs for the two defendants separately.

ASSUMPTION. Plea, the general issue by each of the defendants separately. By an order of *nisi prius* the cause and all matters in difference were referred to an arbitrator, and it was stipulated that the costs of the cause should abide the event; and that the arbitrator might from time to time enlarge the time for making his award by indorsements on the order of reference. The arbitrator after enlarging the time twice, made his award, "that there is nothing due to the plaintiff." *Jarvis* did not appear by counsel when the cause was called on for trial, nor did he attend or take any part in the proceedings before the arbitrator. Upon this award the master taxed the costs of the cause and of the reference to *Smith*, who demanded them as the costs of the said cause and reference, according to the master's *allocatur*, which was for 56*l.* and made no distinction between the costs of the trial and those of the reference. Upon the plaintiff's refusing to pay them, the order of *nisi prius*, together with the indorsements enlarging the time for making the award, was made a rule [529] of court, and a rule *nisi*, for an attachment for non-payment of the costs, was obtained upon an affidavit stating that the plaintiff had been served with copies of the award, the master's *allocatur*, and the rule of court, but it did not state that any affidavit of the due enlargement of the time was shown to him, nor was any such affidavit produced on moving for the rule.

Cresswell, showed cause, and contended, first, that the affidavit on which the rule was obtained, should have shown that the time for making the award was duly enlarged, *Halden v. Glasscock*, 5 B. & C. 390. Secondly, the award had not determined the action in favor of the defendants, the finding being, "that nothing is due," not that nothing was due at the time when the action was commenced. Thirdly, that *Smith*, alone could have no right to demand the costs. That *Jarvis*, had pleaded to the action, and that the award being general, in favor of the defendants, the judgment would be joint; that the master had not affected to tax separate costs to the two defendants, but had taxed the whole to *Smith*, and that according to *Jordan v. Harper*, 1 Str. 516, and *Duthy v. Tito*, 2 Str. 1203, a plaintiff defeated in an action brought against several persons, could not be compelled to pay costs to any one singly, but might pay costs to any one of them at his election.

D. F. Jones, contra, contended, First, that the affidavit was sufficient, for that the enlargement of the time would not have been made part of the rule of court, unless there had been an affidavit that it was duly made. Secondly, that it did not appear that any matters were in difference between the parties except the action, and, therefore, the award that nothing is due, must be taken to mean that the plaintiff was not entitled to recover in the action. Thirdly, that as *Jarvis*, did not appear or incur any expense, either at *nisi prius* or on the reference, the costs were properly taxed to *Smith* alone. [530]

BAYLEY, J. I have no doubt that this plaintiff would have been liable to an attachment, but for the objection to the mode of taxing and demanding the costs. I take it to be a matter of course, that where a submission to arbitration contains a power to enlarge the time for making the award, and an enlargement of the time is made a rule of court, that is sufficient for the purpose of obtaining an attachment, just as if the award had been made within the time originally granted. This case differs from that which has been referred to, for there the time was enlarged by a judge's order, and that did not appear on the face of it to be made by the consent of the parties; it appeared to be made *proprio vigore judicis*, and, therefore, was not binding. Here the parties agreed that an enlargement by the arbitrator should be valid. The court must have

credit for not making it a rule of court without a sufficient affidavit. If that were otherwise, every rule for an attachment for disobedience to a rule of court, must be a rule *nisi*. It was next objected, that the award decided nothing as to the right of action, at the time when the submission was made. But I think the finding that nothing is due, sufficient. It is to be presumed, that things remain in *status quo*, from the time of the submission, unless the contrary be shown by affidavit; that objection, therefore, fails. The only difficulty that I feel is upon the third objection that was raised. It appears that all the costs were taxed together, at the sum of 5*l.* By the submission, costs were to abide the event; that being in favor of the defendants, the costs would accrue to them both jointly or to each separately. Whether there could be a separate taxation and a separate adjudication of costs to each defendant, I am not prepared to say; I believe that in all cases hitherto, costs have been taxed to defendants jointly, leaving the distribution to themselves. If there could be separate judgments for the costs, the plaintiff would be liable to separate executions, which would be a great hardship. But, admitting that the costs might be so taxed, I am not clear that there has been such a taxation in this case as to entitle *Smith* to claim the costs by himself. If the master had taxed the costs of the trial and the reference separately, *Smith*, alone might have demanded the latter on his own account, and at the same time might have demanded the costs of the trial for himself and his co-defendant. Upon this *allocatur* it must be taken for granted that the master included the costs of the trial and the reference in one sum, and *Smith* does not negative the payment of those costs to *Jarvis*. Under such circumstances the rule for an attachment cannot be made absolute. Even supposing it possible to award costs separately to the different defendants, that power is so very questionable, that had it been done, we should not have been warranted in granting an attachment. The plaintiff ought to have an opportunity of putting the question upon the record. The rule must, therefore, be discharged, and no injury can be done by this, for if *Smith*, has a right to receive the costs which have been taxed, he may bring an action to recover them.

HOLROYD, and LITTLEDALE, Js., concurred.

Rule discharged.



CHADWICK v. BUNNING.

By the Middlesex court of conscience act, 23 G. 2, c. 33, s. 19, the defendant is entitled to double costs, if the jury find a verdict for less than 40*s.* Held, that in such case the verdict of the jury is conclusive, and a verdict having been found for 1*l.* 13*s.* in an action brought to recover the amount of an apothecary's bill, the court ordered a suggestion to be entered, although it appeared by affidavit that the debt originally exceeded 40*s.*, and had been reduced by partial payments on account, and although the plaintiff had failed in proving some of the items in his bill.

A RULE *nisi* had been obtained for entering a suggestion on the roll in this cause pursuant to the statute of the 23 G. 2, c. 33, s. 19. The affidavit in support of the rule stated, that the defendant at the commencement of the suit was residing and inhabiting in the county of Middlesex, and liable to be summoned to the court of requests for the county of Middlesex; and that the plaintiff obtained a verdict for 1*l.* 13*s.* 1*d.* and no more. The affidavit against the rule stated that the plaintiff was an apothecary, and that the action was brought to recover 9*l.* 17*s.*, the amount of a bill for medicine and attendance which had been delivered to the defendant at Christmas 1821, that that bill had been reduced by part payment to 6*l.* 5*s.*; that the plaintiff at the trial could

only prove items in the bill to the amount of $4l. 5s.$, although the whole amount of his bill had been incurred; that the defendant admitted at the trial that $1l. 13s.$ was due to the plaintiff, and gave evidence of part payments on account to the amount of $4l. 2s.$, although, in fact, the plaintiff had never received more than $3l. 12s.$ on account; but, that even assuming that $4l. 2s.$ had been paid, there would still have remained due to the plaintiff, a sum exceeding 40s.

**Russell* now showed cause. Here the original debt exceeded 40s. [523] In *McCollam v. Carr*, 1 Bos. & Pul. 228, which was a case upon this statute, it appears to have been the opinion of *Eyre*, C. J., that a suggestion ought not to be entered in any case where the original debt, being above 40s., has by a balance of accounts been reduced below that sum, upon this ground, that if it were, the most intricate point in accounts between merchant and merchant might come to be decided in the county court. In the *Southwark* court of requests act there is a clause, that it shall not extend to any debt for any sum being the balance of an account on demand, originally exceeding five pounds. A debt originally above five pounds, but reduced under that sum by partial payments, has been held to be within the exception of that act, *Fountain v. Young*, 1 *Taunt.* 80. It is true, that in *Baleman v. Smith*, 14 East, 301, it was held that the defendant was entitled to enter a suggestion under the statute, 23 G. 2, c. 33, s. 19, in a case where the plaintiff's demand having exceeded 40s., was, at the trial, cut down below that sum by the defence of infancy. But there is no authority to show that where the original demand being above 40s. has been reduced by payments on account, the defendant is entitled to his costs.

Abbott, C. J. The words of the statute 23 G. 2, c. 33, s. 19, are peculiar. They are, "if the jury upon the trial of such cause shall find a verdict for the plaintiff under 40s.," the defendant shall be entitled to recover double costs. The attention of the court was called to the language of this statute in *Baleman v. Smith*. "There Lord *Ellenborough*, C. J., says, "The jury having found a verdict under 40s., the defendant is entitled to double costs by the very words of the act." I think it is not possible to put any other construction upon those words, and the jury in this case having found a verdict for $1l. 13s.$ only, the defendant is entitled to recover double costs. The rule for entering a suggestion must therefore be made absolute.

Rule absolute.



GRAZEBROOK et al. v. DAVIS.

Debt on bond conditioned for the performance of an award to be made on a day therein named. One of the terms of the submission was, that the arbitrator should examine the witnesses produced by the parties in differences. Plea, that the arbitrator made several appointments for proceeding with the reference, and examined witnesses produced by the plaintiff, and occupied the whole of the time of the meetings respectively in so doing; that plaintiffs, on the day when the time for making the award expired, closed their cases, and defendant was called upon to enter upon his defence; that at that time an insufficient time remained for the defendant to bring forward and examine his witnesses; that he requested the arbitrator to allow him reasonable time to bring forward and examine his witnesses, which the arbitrator refused, without the consent of the plaintiffs, and which consent the plaintiffs, although requested by the defendant refused to grant, and the arbitrator refused to allow the defendant any further time although he had several material witnesses to examine, of which the arbitrator and the plaintiff had notice: Held, upon general demurrer, that this plea was bad.

Debt on bond. Plea first, after craving over of the bond and of the condition, *non est factum*. The condition recited that differences had arisen, and were then depending between the defendant and the plaintiffs, and an action at

law having been commenced in the Court of King's Bench by the plaintiffs against the defendant, and the parties being then at issue therein, and the case being set down for the *London* sittings, 1824, in order to put an end to such differences and disputes, and to avoid the expense of proceeding to the trial of the suit, the parties had agreed to submit all matters so at issue to the arbitration of *A. E.*, who was to examine the *witnesses to be produced by the parties, upon oath, &c. The condition was for the performance of the award of the arbitrator, to be made on or before the 8th of *November* then next. Second plea, that the arbitrator in the condition of the bond mentioned, after the making thereof, to wit, on the 26th of *July*, 1824, at, &c. took upon himself the burden of the reference, and afterwards and between the making of the said supposed writing obligatory, and the 8th of *November* next ensuing the date thereof, being the day thereby appointed for making his award, made divers, to wit, six appointments for proceeding with the reference, to wit, on, &c.; and on those days and times examined divers, to wit, five witnesses brought forward to the arbitrator to be examined, touching the matters referred, by and for and on behalf of the plaintiffs, and occupied the whole of the time of the said meetings respectively in so doing, to wit, at, &c. Averment, that at the last of the said meetings, to wit, on the said 8th of *November*, 1824, the plaintiffs closed their case before the arbitrator, and the defendant was then called upon by the arbitrator to enter upon his defence thereto; that at the time the plaintiffs closed their case before the arbitrator, a short and insufficient time, and not a reasonable or proper time, to wit, twelve hours only then remained for the defendant to bring forward and examine his witnesses before the arbitrator upon the merits of his case, and the defendant then requested the arbitrator to allow to him further and reasonable time to enable him, the defendant, to bring forward and examine his witnesses, which the arbitrator refused to do without the consent of the plaintiffs; and which consent the plaintiffs, although requested by the defendant, refused to grant, and the arbitrator altogether refused *536] to allow to the defendant any further or "reasonable time to bring forward his witnesses to be examined before him, the arbitrator, although the defendant had divers, to wit, four material witnesses to bring forward and examine on his part and behalf, of which the arbitrator and the plaintiffs had notice. And, thereupon, the defendant afterwards, to wit, on the said 8th of *November*, 1824, by deed revoked his said submission, and afterwards and before the arbitrator made his award, gave him due notice of such deed. Demur-
rer and joinder.

Campbell, in support of the demurrer. The pleas are bad, for they admit that there has been a revocation of the submission; and no event can enable the party to revoke the submission without incurring the penalty of the bond. In the year-book of the 5th Ed. 4, cited in *Vinior*'s case, 8 Co. 162, and in *Warburton v. Storr*, 4 B. & C. 103, it is said, "If I am bound to stand to the award which *J. S.* shall make, I cannot discharge that arbitrament, because I am bound to stand to his award." In a late case of *Brown v. Tanner*, 1 Mac. & Younge, 464, a revocation of a submission to arbitration before award made was held to be, in effect, a breach of an agreement to stand to abide and perform an award. There is no case or *dictum* where a plea of this sort has been held to be pleadable, nor a precedent of any such plea to be found in any of the books of entries. If an award had been made, and an action had been brought upon the bond for non-performance, a plea impeaching the award would not have been good, 1 Wms. Saund. 228, n. 3.

G. R. Cross, contra. A revocation of the submission is not always a breach of the condition of the bond. In **Curtis v. Potts*, 3 M. & S. 143, Lord *537] *Ellenborough* said, speaking of a general submission without any limitation of time, that it was open to the parties to have requested the arbitrators to proceed within a reasonable time, and if after such request the arbitrators had neglected or refused to proceed, the parties might revoke the authority.

And if not making an award within a reasonable time after request is a good ground for revocation, *a fortiori* the refusal to examine witnesses after request on one side is. So in answer to an action upon the bond matter impeaching the conduct of the arbitrator may in some cases be pleaded, *Mitchell v. Stavely*, 16 East, 58. One of the terms of the submission in this case was that the witnesses should be examined; but here they were not examined, and the plaintiff having occupied, in proving his own case, the whole time originally allowed, refused to consent to the allowance of further time to the defendant. Now it is a clear principle of law that if there be a feoffment on condition, the non-performance of the condition by the feoffee is excusable, if the performance of it be rendered impossible by the act of the feoffor. In *Braddick v. Thompson*, 8 East, 344, indeed, it was held that partiality or improper conduct in an arbitrator, in making his award, without hearing the defendant and his witnesses, could not be pleaded in bar to an action on the bond conditioned for the performance of the award, but was only matter for application to the equitable jurisdiction of the court to set aside the award.

BAYLEY, J. That case is an authority in point. This is not like the case put of a feoffment upon "condition, for the plaintiff in this case has done [**538] no act to prevent the arbitrator from making his award, but the defendant by revoking the submission has done such an act. Besides, the pleas are bad in form. It is not sufficient for the defendant to say that he was ready to bring forward his witnesses, he ought to have alleged that he had them there, and to have shown all performance in his power at all events.

HOLROYD, J. I am of the same opinion. The plea shows a demand of more time, but there is no allegation that proof of the necessity of more time was given.

Judgment for the plaintiffs.



The KING v. J. S. S. COOKE.

Indictment against four for a conspiracy; two pleaded not guilty, one pleaded in abatement, to which plea there was a demurrer, and the fourth never appeared. Before the argument of the demurrer, the record was taken down to trial; one of those who pleaded not guilty was acquitted, and the other was found " guilty of conspiring with him who pleaded in abatement." The demurrer was afterwards argued, and judgment of *respondeat custeri* given, whereupon a plea of not guilty was pleaded: Held, that the court might, before the trial of that defendant, pronounce judgment upon the one that had been found guilty.

THIS was an indictment against *James Stamp Sutton Cooke*, *Richard Stafford Cooke*, *James Russell Miles*, and *Richard Jenkinson*, for a conspiracy to disquiet and disturb Sir *George Jerningham*, Bart., in the possession of certain estates, by unlawful means and devices; to molest his tenants, and to obtain money from his tenants by falsely pretending that the title of *Richard Stafford Cooke* to the estates had been admitted by Sir *George Jerningham* to be valid. To this indictment which was found at the Summer assizes, 1823, and removed into King's Bench at the instance of the prosecutor; *James Stamp Sutton Cooke*, and *Richard Jenkinson* pleaded, not guilty; and **Miles* never appeared. The defendant *Richard Stafford Cooke* [**539] pleaded in abatement. To this plea there was a demurrer and joinder. While the demurrer was pending, viz. at the Spring assizes, 1824, for the county of *Gloucester*, the issue joined between the Crown and the two defendants who had pleaded the general issue, came on to be tried, when the jury

returned a verdict, which was recorded in the following terms: "J. S. S. Cooke guilty of conspiring with his brother Richard Stafford Cooke; Jenkins not guilty." The demurrer was argued before three of the Judges of this court at their sittings after Easter term, 1824, when judgment was given for the crown, and R. S. Cooke required to answer over to the charge; and in the following Trinity term he pleaded the general issue. The record was not taken down for the trial of R. S. Cooke; but judgment was in Trinity term moved for against J. S. S. Cooke on the conviction; and was postponed from term to term on affidavits of the defendant's illness, until Michaelmas term, 1825, when Campbell obtained a rule nisi for staying the judgment, on the ground that the verdict of the jury negatived all the conspiracy charged, except with R. S. Cooke, who was still to be presumed innocent, who had pleaded not guilty, and whose acquittal, if he should be tried hereafter, would be a virtual acquittal of J. S. S. Cooke, and render any judgment passed on him erroneous. Against this rule in last Hilary term

Taunton, Oldnall Russell, and Talfourd, showed cause.

The finding of the jury, that J. S. S. Cooke, was guilty of conspiring with R. S. Cooke, does not acquit him of conspiring with other persons. But supposing it to have that effect, still the court may proceed to pass judgment [540] upon the defendant, who has been found guilty. All the authorities are against this application to stay the judgment. In *Rex v. Kinnersley and Moore*, 1 Str. 193, who were indicted for a conspiracy, the former alone appeared, pleaded to issue, and was found guilty, and the court, after argument, proceeded to sentence: and in *Rex v. Nicolls*,^t the defendant was convicted of conspiring with one Bygrave, who was then dead, and being found guilty, the court passed sentence, and recognised the case of *Rex v. Kinnersley*. So, also, in *Rex v. Scott, and Hams*, 3 Burr. 1262, six were indicted for a riot, two died before trial, two were acquitted, and Scott and Hams, were found guilty. A motion was made in arrest of judgment, on the ground that two persons alone could not be guilty of a riot. Lord Mansfield, said, "Six were indicted, two of them are acquitted, two are dead, untried. The jury have found these two guilty of a riot, consequently it must have been together with those two who have never been tried, as it could not otherwise have been a riot;" and the rule was discharged. It is not to be assumed that the other defendants will be acquitted, merely because that is possible, and the jury having found this defendant guilty of a complete offence, even supposing the verdict to be a negation of the conspiracy with any but R. S. Cooke, the court ought to pronounce judgment. There are many cases besides those already cited which warrant such a course. In Thody's case, 1 Vent. 234, he and two others were indicted for a conspiracy. Thody pleaded, and was found guilty, the others not having pleaded; and upon a motion to stay the judgment, [541] Lord Hale, said, "If one be acquitted in an action of conspiracy, the other cannot be guilty; but where one is found guilty, and the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon the verdict against the other." And he cited 24 Edw. 3, 34., which is directly in point. In Thody's case, the 14 H. 6, 25, was cited, as an authority for the defendant, but no judgment was given in that case.^t

^t 2 Str. 1227, better reported in 13 East, 412, n.

^t In the report of this case in the Year Book, 14 H. 6, 25, b. it is said that a writ of conspiracy was brought against two, one pleaded in abatement of the writ, the other to the action. Issue was taken on the plea in abatement, and found for the plaintiff, and the damages assessed at 60L. The plaintiff prayed to have judgment for those damages against him who pleaded in abatement, and offered to release the action as to the other defendant. But it was said that could not be done, as one could not be guilty of conspiracy; and then the case was adjourned. Supposing that report to be correct, the offer to release the action as to the defendant who pleaded in bar might be considered equivalent to an admission, that he was not guilty of the conspiracy; and then there would be good reason for saying, that the plaintiff could not have judgment against the other defendant. The

**Campbell*, contra. The court ought not to proceed now to give judgment against the defendant, who has been found guilty. The jury, by their finding, negatived the charge of conspiring with any person but *R. S. Cooke*. [Abbott, C. J. Did *R. S. Cooke*, plead not guilty before or after the trial?] After the trial; but there is neither case or dictum to be found, that where there is an indictment against two for a conspiracy both plead, and one has been tried but not the other, the court can proceed to give judgment against the one. In *Rex v. Kinnersley and Moore*, the latter had not pleaded, and, therefore, could not be tried; and although a repugnancy might afterwards have appeared on the record, had he pleaded and been tried and acquitted, yet the court thought that very remote possibility, not sufficient cause for staying the judgment. In *Rex v. Scott, and Hams*, no repugnancy could appear on the record, for the two with whom the defendants were found to have committed the riot were dead, and, therefore, could not afterwards be acquitted. *Thody's* case, was precisely like that in *Strange*; he was found guilty, and the other two who were indicted with him had not pleaded; and Lord *Hale*, puts the two cases of co-defendants not coming in or being dead, but he does not appear to contemplate the case of a co-defendant having pleaded *but not having been tried. So in the case cited from 24 *Edw. 3*, 34, which [*543] was a civil action, the defendant against whom the judgment was given was the only one that had pleaded.† In the case of principal and accessory, although the latter may be compelled to answer before the principal has appeared and answered, yet the plea cannot be tried before such appearance, or the attainder of the principal, unless he desires it himself: *Hawk. P. C. b. 2, c. 29, s. 45*, 7th edition. [Bayley, J. Suppose the accessory chooses to be tried before the principal has pleaded and he is convicted, what is the consequence?] Judgment may then be given; but here the defendant could not object to being tried separately. The law in high treason is analogous to that in felony; a person cannot be tried for harboring a traitor until the latter has been convicted; *Foster's Cr. Law*. 348.

ABBOTT, C. J. I am of opinion that this rule must be discharged. Two points have been made in argument, first, that the jury have negatived any conspiracy between the defendant and any other persons except *R. S. Cooke*. I is by no means clear that their verdict does imply such a negative, but it is necessary to pronounce an opinion upon that point. Leaving that question doubtful, the case stands thus. There is an indictment against the defendant now before the court, and *R. S. Cooke*, for a conspiracy; it is said that the latter has pleaded not guilty, and that this case is by that circumstance distinguished from all those which have been cited. But he first pleaded in abate-

same case is thus reported in *Fitz. Abr. Coosp. pl. 1.*: "Conspiracy was brought by one against two, one pleaded in abatement of the writ upon which the plaintiff and he were at issue; the other pleaded in bar, to which the plaintiff demurred; and the issue was found for the plaintiff, and the bar found against him; and it was the opinion (sc. of the court) that the plaintiff should have judgment against him who pleaded to the writ, although the other had been acquitted, because he was not acquitted by verdict, but by plea; and it might be that they both conspired together." This case, then, is far from being an authority for saying, that judgment cannot be given against one of two persons for a conspiracy before the other has been tried. The opinion expressed at the end of the case, if intended to be taken generally, and without reference to the matter pleaded, is somewhat singular, and is inconsistent with another case, the conclusion of which is found in 8 *H. 4*, 6, and the beginning in 9 *H. 4*, 9. That was conspiracy against one *Elchestony* and thirteen others for conspiracy to indict the plaintiff in the Marshalsea. *Elchestony* pleaded that he was bailliff, and in obedience to a writ from the sheriff, summoned the jury, and being in attendance on the court, was compelled to be sworn, and say what he knew o. the transaction. Twelve justified, on the ground that they were jurymen, compelled to their oath and the authority of the law to do what they did. The other pleaded to issue and was found not guilty. Upon demurrer to the other pleas, judgment was given for the twelve jurymen, and thereupon it was held, that the plaintiff could not recover against *Elchestony*, because he alone could not be guilty of conspiracy.

† He was the only person against whom the action was brought, the charge being, that he and others conspired.

^{*544]} ment, to "which plea there was a demurrer, and he did not plead not guilty until *Trinity* term, 1824. In the mean time, at the Spring assizes in that year, the record was taken down to trial, and *J. S. S. Cooke*, was convicted. At that time there was no plea of not guilty by *R. S. Cooke*, upon the record, nor had judgment of *respondeat custer* been given upon the demur-
rer. Then the jury found that *J. S. S. Cooke*, was guilty of conspiring with *R. S. Cooke*. It is said, that peradventure *R. S. Cooke*, may be acquitted, and that then there will be a repugnancy upon the record if judgment is pro-
nounced against the other defendant. That is certainly possible, but are we to presume that it will be so against the verdict that has been found? I think that the court would not be warranted in coming to such a conclusion, or in forbearing to pronounce judgment upon the defendant who has been found guilty.

BAYLEY, J. I am entirely of the same opinion. The question of delaying the judgment is not put by way of appeal to the discretion of the court, but as matter of law. I consider the case of *Rex v. Kinnersley and Moore*, as an authority directly in point. The very objection now made was then urged, and the report shows that *Moore*, did afterwards come in and plead, for it is stated, that in *Trin. 5 G. 1. Kinnersley*, was sentenced, and *Moore*, in *Easter* term following, he having *ad interim* been tried and convicted. The verdict in the present case concludes nothing against *R. S. Cooke*, but the question is, whether it concludes the fact as against the defendant now before us, and I think that it does. It is true as stated that an accessory cannot be tried "before the ^{*545]} principal, unless by his own consent, but if an accessory be tried at his own request before the principal, he is liable to sentence, although if the principal be afterwards acquitted, the judgment against the accessory falls to the ground; in the same manner as the reversal of the attainer of a principal *ipso facto* reverses the attainer of the accessory, *Hawk. P. C. b. 2, c. 29, s. 40*, 7th edition. But I think we are not warranted in presuming that the other defendant in this case will be acquitted.

HOLROYD, J. I also think that the defendant *J. S. S. Cooke*, is not entitled, by matter of law, to have the judgment arrested or stayed. The verdict is at the present time conclusive against him. The authorities fully prove this. The same argument *ab inconvenienti* that has been now urged, would apply if one person were indicted and found guilty of conspiring with *A.*, for then *A.* might be afterwards separately indicted and acquitted, and yet the possibility of such an event would not prevent the court from giving judgment against the person convicted.

LITTLEDALE, J. I am of the same opinion. It was for the jury to consider whether the defendant, who was upon his trial, was guilty of the charge contained in the indictment. They have found that he was guilty of conspiring with *R. S. Cooke*, and that is sufficient to prevent the application of the rule of law that one cannot be guilty of a conspiracy. If the other defendant *R. S. Cooke*, shall hereafter be acquitted, perhaps this judgment may be reversed.

Rule discharged.†

† There is a case in the *Year Book*, 18 Ed. 4, 9, B., which shows, that although the reversal of an attainer of a principal *ipso facto* reverses the attainer of an accessory, that is not always sufficient to relieve an accessory previously convicted. The case is as follows: "A man was indicted in the King's Bench as principal, and another as accessory, and the principal was outlawed, and the accessory was taken, and pleaded to the indictment, and was found guilty and hanged; and then the principal came in and reversed the outlawry, and was arraigned upon the indictment, as it behaved, and pleaded not guilty, and was found not guilty; and yet it cannot be intended that the accessory was guilty, inasmuch as the principal was acquitted." There is also a case in 2 R. 3, 21, B., from which it may be concluded, that it was not at that time considered at all improper to hang the accessory, although the principal might afterwards be acquitted. In the King's Bench an exigent was taken against one, of felony, as against an accessory, for this, that the principal was outlawed upon an appeal. (As to this process, see 2 Hale's

P. C. 200.) It was then objected, that there was error in the outlawry, and that the accessory ought not to be compelled to answer, whereupon the following discussion took place. "Fairfax. Although this which you speak of were error, but it seems to me that it is not, yet the accessory shall be put to answer; *car si n'est inconvenient* that the accessory shall be hanged and the principal acquitted. As if the principal be attainted upon an outlawry, and perchance erroneously, and then the accessory be outlawed and be taken, there he shall be hanged, and yet the other may come in after the reversal of his outlawry, and plead to the felony, and be found not guilty. So here, although it were error, yet the accessory ought to answer; for if it be error, the outlawry should be reversed by writ of error, for the principal himself could not reverse it by plea, but by writ of error; so it seems to me that the accessory should be put to answer." Vaviser, thought that the accessory should not be put to answer, unless the principal were lawfully attainted; but Hussey, C. J., was of a different opinion; and, finally, all the justices agreed that the accessory should answer, and a day was appointed.

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
TRINITY TERM,
IN THE
SEVENTH YEAR of the REIGN of GEORGE IV., 1826.

LAUGHER v. POINTER.

Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person: Held, by Abbott, C. J., and Littledale, C. J., that the owner of the carriage was not liable to be sued for such injury, Bayley, and Holroyd, Js., diss.

CASE. The first count of the declaration alleged that the plaintiff was possessed of a horse, and defendant was possessed of a carriage, and two horses harnessed to and drawing the same, and which carriage and horses were under the care, government, and direction of a person, *being the servant of the defendant* in that behalf, who was driving the same, yet that the defendant, by his said servant, so negligently and improperly drove and directed his said carriage and horses that by the negligence and improper conduct of the defendant, by his said servant, the carriage ran and struck against the plaintiff's horse, &c. The second count differed from the first, only, by omitting to state that the defendant was possessed of the horses. The third and last count alleged [548] that the defendant was "possessed of a carriage drawn by two horses under the care, government, and direction of the defendant, yet that the defendant so negligently and improperly drove, governed, and directed the carriage and horses, that, by the negligence and improper conduct of the defendant, the carriage ran and struck against the plaintiff's horse, &c. At the trial before Abbott, C. J., at the London sittings after Michaelmas term, 1823, it appeared in evidence that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable keeper ac-

cordingly sent the pair of horses and a person to drive the same. The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose. The driver had no wages from his master, but depended upon receiving a gratuity from the persons whose carriages he drove; the defendant gave him 5s. as a gratuity for his day's work, but the driver had no power to demand any thing. The Lord Chief Justice, thought that the evidence did not support the declaration, and directed a nonsuit. A rule nisi for a new trial was afterwards granted, and upon the argument, there being a difference of opinion on the bench, the case was directed to be argued before the twelve judges, all of whom (except the Lord Chief Baron) met for that purpose in *Sarjeant's Inn Hall*, on the 2d of February, 1825, when

Tindal, showed cause against the rule. The person who drove the defendant's carriage was not his servant. If that relation had subsisted, the driver ought to have had a right to demand his wages, but had the defendant refused to give him any thing, there would have been no remedy in this case. The defendant could only employ him in the specific work for which he was engaged. If the relation of master and servant subsisted in this case, why should it not between the hirer of post horses for a stage and the driver, or between the hirer of a hackney-coach and the coachman? In *Chilcot v. Bromley*, 12 Ves. 114, where testator left a legacy to each of his servants, it was held that a job coachman was not entitled. The principle upon which the master is held liable for the acts of his servant is laid down in *Pothier on obligations*, part 1, c. 1, s. 2, num. 121, *Evans' Translation*, p. 72.: "Masters are also answerable for the injury occasioned by the wrongs and negligence of their servants, &c. This has been established to render masters careful in the choice of whom they employ." So also *Mollov*, b. 2, c. 3, s. 13, states the reason why the master of a ship is answerable for the acts of the mariners to be, that they are of his choosing. In *Lane v. Cotton*, 12 Mod. 488. 1 Salk. 17. Carth. 487, S. C. which was an action against the postmaster-general to recover the value of some exchequer bills which had been inclosed in a letter sent by the post, and lost, the principle as above laid down was not disputed, although Lord *Holt*, differed from the other three judges in the application of it, and thought that the defendant was liable to the action: and the same principle was recognized in *Nicholson v. Mounsey*, 15 East, 384. It would be extremely inconvenient both to individuals and the public, if the hirer were held liable. Persons hiring job horses for a short time, as in this case, cannot have any knowledge of the driver, or any control over him, and the public would undoubtedly suffer if the liability were transferred to the hirer, probably unknown, from the owner of the horses, who may easily be discovered. In *Debn v. Bronthwaite*, 5 Esp. 35, and *Summell v. Wright*, 5 Esp. 263, it was held that where horses are let for the day, the owner is liable for accidents produced by the misconduct of the drivers; and in a case tried before Lord *Ellenborough*, at *Warrick*, the declaration was similar to that in the present case, and the action appearing to have been brought against the party to whom the carriage belonged (Sir H. *Houghton*,) but who had hired the horses, the plaintiff was nonsuited. At the next assizes, an action was tried against the owner of the horses, and the plaintiff recovered. (Cited *ex relatione Coplay, A. G.*) The failure of one of those actions, and the success of the other is decisive of this question. It will be said that there is a difference between a hiring for a stage, or for a day, i.e., between a hiring for space or for time, but if the ground of liability be that the master has the power to choose the servant, that cannot make any difference. There certainly are cases in which it has been held that persons who have hired others to perform some specific work are liable for their misconduct, although a perfect relation of master and servant was not constituted, as in *Bush v. Steinman*, 1 B. and P. 404. But there the party for whom the work was

done, was held to adopt all the acts done in the progress of it. If any act were done, not in furtherance of the work, but beyond the implied authority, the party for whom the work was done would not be liable. *Heath*, J., certainly puts the case of a job coachman, as one in which the hirer would be liable for his acts, but that question was not before the court, he cites no authority in support of that position, and it does not appear to have been adopted by the rest of the court.

Abraham, contra. First, the coachman was the servant of the defendant. Secondly, if that was not so, still the injury having arisen through an act done for the benefit of the defendant, he would be liable according to *Bush v. Steinman*. Thirdly, this case is distinguishable from that of a hired post-chaise or hackney-coach. It appeared that no wages were paid by the owner of the horses to the coachman; he depended upon receiving a gratuity from the defendant, who, if he had thought proper, might have selected a particular person to drive him. The decision in *Nicholson v. Mounsey* proceeded on the ground, that the captain had no power to appoint the lieutenant in whose watch the accident happened. Here the defendant had power to discharge the servant, there he had not. Then, secondly, according to *Bush v. Steinman*, the master was liable for any thing done in the execution of the work for which the servant was employed. In that case it did not appear that the bricklayer's laborer was under the control of the person whose house was under repair; yet *Heath*, J., says, that in law, he was to be considered as his servant; and he observes, that whatever may be the doctrine of the civil law, our law carries such liability much farther than the mere relation of master and servant. Thirdly, this is very different from the case of a post-chaise hired for a stage, or a hackney-coach. There the hirer has only a qualified use of the thing hired; he has it for a specific purpose. Here he might have ordered the coachman to drive wherever he pleased. The cases of *Dean v. Branwhait*, and *Sammell v. Wright* are consistent with this defendant's liability; they merely show that the owner of the horses is liable, not that the hirer is not also liable for any injury sustained in consequence of misconduct in the driver; and in a later case, *Hall v. Pickard*, 3 Camp. 187, Lord *Ellenborough* held, that where horses were let on a job, they were not in the possession of the owner, and that he could not maintain trespass for an injury done to them. So in *Croft and another v. Alison*, 4 B. & A. 590, where the plaintiffs had hired a chariot for the day, it was held, that they were properly described as the owners in an action for an injury sustained by the negligence of the defendant's servant in driving against the chariot.

Tindal, in reply. That case only proves that a person, having a special property in a chattel, may maintain an action for an injury done to it.

Cur. adv. vult.

And now the Judges not being agreed in opinion, proceed to give judgment *separatim*,

LITTLEDALE, J. This was an action brought to recover a compensation in damages occasioned to a horse belonging to the plaintiff, and which, as he said, sustained an injury by the negligent conduct of the defendant's servant in driving a carriage and horses of the defendant. The cause was tried before the Lord Chief Justice of this court, and the plaintiff was nonsuited. A rule nisi was afterwards obtained to set aside the nonsuit, and the Judges of this court not being agreed in opinion, and the case being one of difficulty and of extensive consequences, it was argued in *Serjeants' Inn* before all the Judges, except the Lord Chief Baron of the Exchequer, and there being a difference of opinion amongst the other Judges, it now remains for the Judges of this court to deliver their judgment upon the case. The plaintiff was owner of the horse that was injured, the defendant was owner of the carriage, and he having occasion to use it, applied to a jobman, who supplied him with a pair

of job-horses and a coachman for a day. The jobman did not give any thing to the coachman for the day's work, but the defendant paid him 5s.; this 5s. was not, however, paid in pursuance of any contract or engagement either with the jobman or coachman, but was merely given as a gratuity to the coachman, who had no employment relative to any business of the defendant except the driving of the carriage in question. In the course of driving the carriage, the coachman by his negligent conduct occasioned the injury; and the question for the consideration of the court is, whether the defendant be liable. According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence; and he is also answerable for acts done by the negligence of those whom the law denominates *his servants*, because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant.

For the acts of a man's own domestic servants there is no doubt but the law makes him responsible, and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master either personally or by those who are entrusted by the master [554 with the hiring of servants, and he is therefore selected by the master to do the business required of him.

This rule applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself or by a person specially deputed by him, if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under workmen, and he pays them on behalf of the owner. These under workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer. This, however, is not the case of a man employing his own immediate servants, either domestic servants or others, engaged by him to [555 conduct any business, or employment, or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired to the defendant; he had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they are not the less the servants of the innkeeper; they are not servants upon wages, but servants upon expectation of gratuities. And, therefore, if the defendant is in this case to be answerable for the acts of the driver provided by the jobman, it must be upon this princ-

ple, that if a man either for his benefit or pleasure employs an agent to conduct any business, such agent is to be looked upon in the same light as if he was the immediate servant of the employer, and that the owner of the property by employing such an agent to transact his business, confides to him the choice of the under workmen, and then the principle must go on to this, that such agent and under workmen are to be considered in the same light as the foreman or manager of a person in conducting his business, and as the workmen selected by such foreman or manager; and that it makes no difference to persons who receive an injury in what light the offending party stands to the principal, whether as an under workman employed by an agent, or an under [556] *workman employed by the foreman of the principal. And that the only thing to be looked to is, whether in the end the principal pays for the employment in the course of which the injury is occasioned.

But I think that, upon principle, this rule cannot be carried so far. In *Bush v. Steinman*, 1 Bos. & Pul. 407, indeed, Mr. Justice *Heath* expresses it as his opinion, that if a person hires a coach upon a job, and a job coachman is sent with it and does any injury, the hirer of the carriage is answerable. That is certainly entitled to great weight, as being the opinion of a very able judge. It was, however, only an *obiter dictum*, and in a case where, like the present, there is a difference of opinion amongst the judges, the question must, if possible, be determined upon principle and decided cases. If a man charters a ship for a voyage or for time, and the master and mariners are appointed by the owner, this ship is employed for the benefit and for transacting the business of the charterer, just the same as if he had a ship of his own employed in the same service, and it might be said that he deputes to the owner the selection of the master and mariners; but in such a case the law has never considered the charterer liable to third persons for the negligence of the master and mariners. In *Fletcher v. Braddick*, 2 N. R. 182, the owners had chartered the vessel to the commissioners of the navy, who were to put an officer on board, under whose direction the master was to act, and though there was a king's pilot on board, yet the owners were nevertheless held liable for running down the plaintiff's ship. In *Nicholson v. Mounsey*, 15 East, 384, a captain of a [557] man of war was held *not liable for the default of the lieutenant whose watch it was when an injury was committed. Suppose a man has a ship or a carriage or other thing to repair, and he, instead of having the repairs done on his own premises and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed; these are employed by a person who may be considered the agent of the principal, and yet the law would not hold the principal liable. If a man hires a carriage and horses to travel from stage to stage, the carriage and horses are employed for the benefit or pleasure of the traveller, instead of using his own, which he may not do either from inability to keep horses or a desire of expedition, and yet the law has never considered the traveller liable. There is no difference in principle between a man's travelling by the stage or travelling by the day. In one case and the other the traveller is using the carriage and horses for his benefit; he pays so much by the day instead of so much by the mile; he pays the coachman a gratuity in one case, and the postillion in the other case, and yet the traveller has never been held liable. As to this latter point, there are some decisions in point. *Sammell v. Wright*, 5 Esp. 263, where the horses were hired to go to *Windsor*, and the owner of the horses was held liable, because they were under the care and direction of his servants. The carriage belonged to the traveller, who was the *Marchioness of Bath*. The case of *Dean v. Branthwaite*, 5 Esp. 35, arose [558] on a dispute between the owner of the carriage and the owner of the *horses, which were hired to go to *Epsom*. Lord *Ellenborough* says, a person who hires horses under such circumstances has not the entire manage-

ment and power over them, but that they continue under the control and power of the stable-keeper's servants who were entrusted with the driving; and that he would be answerable for any accident occasioned by the post boy's misconduct on the road, and then he mentions a case which had occurred of that kind. In this case, also, the party travelling had his own carriage. The same rule would apply to a hackney-coach; a man, instead of hiring his own carriage and servants, employs a hackneyman to drive him; there it is for the profit or convenience of the person riding in the coach, and yet the person so riding is not liable.

The cases referred to before Lord *Ellenborough* only show, indeed, the owner of the horses to be liable, but it may be said the traveller is liable also. I think not. The coachman or postillion cannot be the servant of both. He is the servant of one or the other, but not the servant of one and the other; the law does not recognize a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you cannot have two separately liable; you must bring your action either against the principal, or the person who commits the injury, *Stone v. Cartwright*, 6 T. R. 411. There it was held that an action for an injury sustained through the improper working of a mine, must be brought against the owner of the mine, or against the workmen who did the injury, but that it could not be brought against an agent who hired the workmen. *The allowing two principals to be [559] severally liable would tend to a multiplicity of actions, because if the traveller was liable, he might have an action against the stable-keeper for supplying improper drivers and horses, and then the stable-keeper might have an action against his own drivers. If, indeed, several persons are concerned in a trespass, or other tortious act, they are liable jointly or severally, at the election of the party injured, but the several liability arises from the joint liability, and from the rule of law that a party injured need not sue all who are guilty of the wrongful act; but what I say is, that two persons cannot be made separately liable at the election of the party suing, unless in cases where they would be jointly liable: and there cannot be any ground for saying that the hirer of the horses and the jobman would be jointly liable. There are, however, cases which have been determined upon principles not altogether consonant to what I have before considered are those upon which the liabilities of parties should be determined, where persons have been held liable for the negligence of individuals who were not their own immediate servants, but the servants of agents whom they had employed to do their work. In *Bush v. Steinman*, 1 Bos. & Pul. 404, the owner of a house had employed a surveyor to do some work upon it: there were several sub-contracts, and one of the workmen of the person last employed put some lime on the road, in consequence of which the carriage of the plaintiff was overturned; and it was held that the owner of the house was liable, though the person who occasioned the injury was not his own immediate servant. So in *Sly v. Edgley*, 6 Esp. 6, a person had employed a bricklayer to make a sewer, who left it open; in consequence of which the plaintiff fell in, and broke his leg. The person [560] who employed the bricklayer was held liable, upon the principle of *respondeat superior*, that he had employed the bricklayer, and was answerable for what he had done. These cases appear to establish that in these particular instances the owner of the property was held liable, though the injury were occasioned by the negligence of contractors or their servants, and not by the immediate servants of the owner.

But supposing these cases to be rightly decided; there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own

immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. But as to *Bush v. Steinman*, 1 Bos. & Pul. 404, there are some observations to be made. Lord Chief Justice *Eyre*, in the first place at *Nisi Prius*, was of opinion the action was not maintainable; and when the case came before the court, he says in the beginning of his judgment, "that he finds [561] great difficulty in stating with accuracy the grounds on which it is to be supported. The relation of master and servant as commonly exemplified in actions brought against the master is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." And in the conclusion he also says, that he still feels difficulty in stating the precise principle on which the action is founded. This case, therefore, does not rest upon the same basis as it would if no such doubt had been expressed. The case is mainly grounded upon that of *Littledale v. Lord Lonsdale*; but in that case the defendant had a foreman or steward paid by him, and he engaged all the under-workmen, who were paid out of the funds of the defendant. All the machinery and utensils belonging to the defendant, and all the persons employed were his own immediate servants, just as much as his domestic servants engaged and hired by his house steward. There is the case of *Leslie v. Pounds*, 4 Taunt. 649, which has some resemblance to the last cases. Lord Chief Justice *Mansfield* says that it is a very singular case. The tenant of a house was bound to repair it, but the landlord superintended the repairs; and, on being remonstrated with by the commissioners of pavement as to the dangerous state of the cellar, had promised to take care of it, and had put up some temporary boards as a protection to the public, but they proved insufficient; and an accident having happened, he was held liable. That was decided on the ground of the defendant's personal interference about his own property. It may be said that the defendant in the present case was [562] owner of the carriage, and that therefore the principles of these latter cases apply; but, admitting these cases, the same principle does not apply to personal moveable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is entrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it is not sufficient to render the owner liable. Moveable property is sent out into the world by the owner to be conducted by other persons: the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it. And in the instances of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons, who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. And I think that there cannot be any difference, in point of law, as to the liabilities of these persons arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do if it had been sent to be repaired by a coachmaker who, in the course of repair, had occasioned any damage to other persons; but if the injury arises from the driver, it is he, or the person who

appoints him, that is to be *responsible. It may be said that, according to this doctrine, a person who hired job-horses and a coachman for a year would not be answerable for the negligence of the coachman: if the coachman remain the mere servant of the jobman, not otherwise employed in the service of the hirer, I think the hirer would not be liable for whatever time he hired the coachman and horses; but where the coachman is hired for a year, it will very often happen that he is employed in other services besides the mere attention to the coach and horses; and if, by such circumstances, he becomes the servant of the hirer, besides being the servant of the jobman, the case might then admit of a different consideration. In *Chilcot v. Bromley*, 12 Ves. 114, testator bequeathed to all his servants 500*l.* each; and it was held, that a coachman supplied by a jobmaster, together with a carriage and horses which were hired by the year, was not entitled to be considered a servant.

This, however, is not the case of a servant employed for a year or a month, and upon the whole of the circumstances of this case, I am of opinion that this defendant is not liable for the damage that has occurred, and that the rule for setting aside the nonsuit should be discharged.

There are many cases where questions have arisen upon the liabilities of postmasters, of captains of ships of war, and of owners of ships who have taken pilots, and of factors who have acted for their principals, and others, as to what degree of possession is kept by the owner. These I have not thought it necessary to notice, because I think the sole question here is, whether if a man employs another to do work respecting *personal moveable property, and that other furnishes a servant, that servant is to be considered in the same light as a servant appointed by the person himself.

HOLROYD, J. This was an action on the case to recover a compensation in damages for an injury done to the plaintiff's horse, by the negligent driving of a barouche or carriage and horses. (The learned Judge then stated the pleadings, and proceeded as follows:) In proof of this declaration, it appeared in evidence, that the defendant, at the time when the accident happened, was riding in a barouche, being his carriage, which was drawn by a pair of horses, driven by a person pursuant to the defendant's orders. The driver and horses being hired by the defendant of one *Bryant*, for a day, to go where the defendant pleased; for hire, to be paid by the defendant to *Bryant*, and for which driving the defendant afterwards voluntarily paid the driver a gratuity of 5*s.*, and the question on the trial was, whether the defendant under such circumstances was by law answerable in this action for the negligence of the driver, as his servant, in such driving. It was contended in the argument, not only that the defendant was not responsible for the driver, but that the plaintiff could not recover on this declaration, each count of which contained as a material allegation that the act was done by the defendant's servant, whereas the driver could not be considered as his servant. But my mind has come to the conclusion, that the defendant is responsible for the driver's negligence, and responsible too upon this declaration, the driver being to be considered, in my opinion, for this purpose as, in law, his servant. It appears to me, that the defendant stands in the same situation of responsibility as if the horses had been driven by *Bryant* himself, or as if they had been driven by a person chosen by the defendant himself, for the driving is equally under the authority and orders of the defendant, and equally for his profit, benefit, or pleasure, and the driver is, I think, equally the defendant's servant for that purpose, whether the driver be *Bryant* himself, the person directly hired and employed by the defendant, or be another person selected and appointed by the defendant himself, or a person selected and appointed by *Bryant*, under the authority or permission of the defendant. The question is not whether *Bryant*, as the owner of the horses and the immediate master of the driver, might or might not have been made responsible for the driver's negligence, nor is this

the case of a letting for a particular purpose only, such as going to a particular place, as in *Dean v. Branthwaite*, 5 Esp. 35, and *Sammell v. Wright*, 5 Esp. 263, where the hirer was considered not to have the entire management and control over the things so hired; from which cases the present is distinguishable, because the present hiring was for no such particular purpose, but to go with the carriage where the defendant chose, and to be under his general authority and orders in that respect for a certain time. By such a letting for a certain time the defendant became possessed in law of the horses so let to him whilst he was using them under such letting. It would be so clearly, if they had not been retained in the custody of a driver provided by *Bryant*, according to the doctrine of Lord *Ellenborough*, in *Lotan v. Cross*, 2 Camp. 464, *566] where he says, "Show a letting" (sc. of the chaise) for a certain time to *Brown*, and "the possession would be in him;" and in *Hall v. Pickard*, 3 Camp. 187, where by the horses being let to hire to Dr. *Carey*, for a certain term, he, and not the owner, was deemed to be the person in possession of them, as he Dr. *Carey*, had a right to retain them till that time was expired, though in that case indeed Dr. *Carey*, is stated to have been driving them by his own servants when the mischief was done. But in the present case, although the horses were continued in the custody of a driver provided by *Bryant*, yet as the horses and the driver were to be for the use and subject to the general directions of the defendant, and as the defendant had a right to retain them till the time for which they were hired was expired, and as they were at the time the mischief was done in the use and under the directions of the defendant, I think that the driver was for this purpose in the employ, and in law, the servant of the defendant, and that the defendant was in law answerable for the driver's negligence in the execution of the defendant's orders in such employ, in whatever situation the driver might also stand with respect to *Bryant*, with regard to *Bryant's* responsibility for him, at the election of the plaintiff. A person may stand in the relation of servant to two different persons as his masters, in two different respects with regard to the same thing, and this even though the service done, or to be done, be special and limited to a single act, as appears in 2 *Rolls's Abr.* 556, pl. 14.; though that indeed was a case in which the party employing the officer, who was considered as his servant, would not be responsible for the conduct of the officer as his servant, but that would be so on account of the duties and "obligations upon the officer, and upon grounds not applicable to the question of the defendant's responsibility in the present case." There it is said, "If a serjeant of London, or bailiff in a county, take a man upon a *capias* in process at my suit, and J. S. rescue him out of his possession, I may have a general writ of trespass against him, because the serjeant is as well my servant to this purpose as the servant of the king;" (that is, as it is expressed in *Hobart*, 180, minister as well to the person suing out the process as to the court;) "and therefore, the taking out of the possession of the serjeant, who is my servant, is a taking out of my possession." T^r. 15, Ja. entre *Wheatley* and *Stone*, adjudged in a writ of error at *Serjeant's Inn*. So in the present case, I think the horses were to be considered in law as in the possession of the defendant, and the driver as the defendant's servant, for the purpose for which he was sent to the defendant; and I think, that a taking of the horses or driver away from the defendant's service during the time for which he had hired them, would have been a taking them away from him, for which he might have maintained an action of trespass, as for a taking them out of his possession and service; and, consequently, that he was answerable for the driver's negligence in driving him, the defendant, whilst under his, the defendant's orders, and it is to be considered, I think, as the defendant's driving of the carriage and horses by his servant. That the responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen,

is established by the case *of *Bush v. Steinman*, 1 Bos. & P. 404, [568] where the owner of a house having contracted with a surveyor to repair the house for a stipulated sum, and the surveyor having contracted with a carpenter to do it, who employed a bricklayer, who contracted for a quantity of lime with a lime burner, the owner of the house was held responsible for the damages occasioned by the lime burner's servant improperly laying that lime in the high road. The principles on which that case was decided, apply I think, directly to the present case, and show the responsibility of the present defendant; and, indeed, *Heath*, J., puts the very case, that where a person hires a coach upon a job, and a job coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though (as the judge is there made to say,) he is not his servant. But under the circumstances of the present case the defendant was, I think, liable for the negligence of the driver as his servant, driving the defendant pursuant to his orders, (the driver being, in law, his servant, in my opinion, for that purpose according to the declaration,) and, consequently, that the nonsuit ought to be set aside and a new trial granted.

Bayley, J. The question in this case is, whether the owner of the carriage is answerable for the negligence of the driver. This is not the case of a driver, where, according to established usage, carriage and horses and driver belong, not the person driven, but to another master, who may easily be discovered, as in the case of a hackney-coach; nor is it the case of a driver, where, according to established usage, neither horses or driver belong to or are commonly in the service of the person driven, but belong to another master, [569] who is either known, or may easily be discovered, as in the case of post-horses; but it is the case of a person who hires a pair of horses for the day to draw his own carriage, and leaves it to the owner of the horses to send such person to drive them, as such owner may think fit. There is nothing from usage or otherwise to imply that the horses are not the defendant's, and the driver his regular servant; nothing to designate or to make it easy to discover to whom the horses and driver belong. The general rule in the case of master and servant, as laid down in *Boson v. Sandford*, 2 Salk. 440, is, that the man who employs another is answerable for him. Had the defendant hired the driver, can there be a doubt but that he would have been defendant's servant? If he leaves it to the owner of the horses to hire him, is he not, in substance, hired by the defendant? If I hire horses of *A.* and hire *B.* to drive, *B.* is undoubtedly, for the time, my servant. Is the driver less my servant for the time, because I hire him and the horses under one bargain, and allow the owner of the horses to select him? He is employed for me; that cannot be disputed. He drives where I direct, and so as I require nothing contrary to my contract with the owner of the horses, he must obey my reasonable commands. He must go where I order; must stop where I require; must go to the place I specify. Though the owner of the horses is, to a certain extent, his master, I am, to a certain extent, his master also. Though the former is his master in general, he has, for a time, let him out to me; and a master is liable for the acts of one who is in his service *or employ, though the master who is to be charged is not his immediate employer, but employs him through the medium of another. If [570] I hire the driver, I am answerable for him, if I employ *J. S.* to hire him, am I not still answerable? I exercise my own judgment in the one case, I leave it to *J. S.* to exercise a judgment for me in the other, but still it is for me that the judgment is exercised. The service is performed for me. It is my work the driver does. In *Bush v. Steinman*, 1 Bos. & P. 404, the man who did the wrong was not selected by the defendant, was not immediately employed by him, he was only employed through the medium of one who contracted to do the work for the defendant, but he was doing the defendant's work. He was (through the medium of the contractor indeed, but still he was) working for the defendant, and on that account the defendant was held liable. "If a deputy has

power to make servants, the principal will be chargeable for their misfeasance, for the act of the servant is the act of the deputy, and the act of the deputy is the act of the principal." Per Holt, C. J., in *Lane v. Cotton*, 1 Ed. Raym. 666. The owner of a ship is answerable for the misfeasance of mariners, though he leaves it to the master to select the crew. The owners of a coach will be liable, though they leave it to J. S. to select the driver and horses, or though they employ as driver the man who owns the horses. In many instances one proprietor hires a coach for one stage, another for a second, and so on, and in some instances the man who finds the horses, finds the coachman also. Shall this take away the liability of all the proprietors? Shall it be said, if *the coach does an injury upon a given stage, that the proprietor [571] who finds the horses and driver for that stage shall alone be answerable? The horses and driver are found by the one to do the work of all, they are employed upon the work and for the benefit of all, and therefore, all are responsible. Nor does it appear to me to make any distinction whether the driver and horses are hired for a single day only, or for a longer period. Had they been hired by *the year*, can there be a doubt but that the hirer would have been answerable? What if they had been hired for a month or for a week? Would the difference of period for which they were hired make a difference in the responsibility? Can any legal principle be adduced to make the period the criterion of being answerable or not? The driver is equally employed on account of the hirer, to do the work of the hirer, to obey the lawful commands of the hirer, and to be the temporary servant of the hirer, whether he is engaged for the day, the week, the month, or the year, and the hirer bears the appearance for the time of standing in the relation of master to the driver, and these are circumstances which in my judgment make the hirer responsible. Upon these grounds, therefore, that the driver in this case was in the temporary employ and service of the defendant, and that this is not a case in which according to the known and established course of proceeding, *it is notorious* that the person *driven* does not stand in relation of master to the driver, and it is matter of easy discovery who does stand in that relation, as in the cases of hackney coaches and post horses; and that there was nothing in this case to rebut the *prima facie* presumption that the horses were the defendant's, and [572] the driver his servant, I am *of opinion that this defendant was liable to the action, and that the nonsuit was wrong.

ABBOTT, C. J. This was an action upon the case brought to recover damages for an injury done to a horse of the plaintiff by the negligent driving of a carriage against it in one of the streets of London. (The Lord Chief Justice, after stating the pleadings, proceeded as follows:) At the trial before me the plaintiff was nonsuited; a rule was obtained for setting aside the nonsuit, and the case was argued first in this court, and afterwards before us and the judges of the other courts at *Serjeants' Inn*; but a difference of opinion has existed both in this court and among the other judges.

I take the question to be, whether either of the counts in the declaration was sustained by the evidence given at the trial. The evidence given was that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent a pair of horses and a man to drive them, being the horses and driver mentioned in the declaration. The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose.

I thought at the trial that the driver could not be considered as the servant of the defendant, so as to sustain either of the first two counts; and also that the horses were not under the care, government, and direction of the defendant, nor driven, governed, and directed by him, so as to sustain the last count. And, with all due respect for such of my learned brothers, both in and on

*of this court, who think otherwise, I must say that I still entertain the same opinion.

I will first advert to the authorities quoted on the one side and the other. The decisions cited for the plaintiff were, the judgment of the Court of Common Pleas, in *Bush v. Steinman*, 1 Bos. & P. 404, as furnishing a principle; and the observation of Mr. Justice *Heath*, referring to a supposed case like the present, and assuming that the owner of the carriage would be answerable. *Hall v. Pickard*, 3 Camp. 187, and *Croft v. Allison*, 4 B. & A. 590.

On the part of the defendant were cited *Chilcot v. Bromley*, 12 Ves. 114, *Dean v. Branthwaite*, 5 Esp. 35, *Samsell v. Wright*, 5 Esp. 263, and the case of Sir *Henry Houghton*, before Lord *Ellenborough*, at *Warwick*. Reference was also made to *Pothier's Treatise on Obligations*, part 1, No. 121.

Bush v. Steinman, was an action against the owner of a house, under repair and not inhabited, for causing a quantity of lime to be placed on the high road, whereby the plaintiff's chaise was overturned and damaged. The defendant, who had never occupied the house, had contracted with a surveyor to repair it for a fixed sum. The surveyor contracted with a carpenter to do the whole, the carpenter employed a bricklayer, the bricklayer contracted with a lime-burner for a quantity of lime, and the servant of the latter laid the lime in the road. At the trial before Lord C. J. *Eyre*, the plaintiff was nonsuited, but his Lordship afterwards changed his opinion, and concurred with the other judges of the court in granting a new trial, though he confessed he found a difficulty in stating with accuracy the grounds on which *the action could be supported. He appears, however, to have been influenced chiefly by the two cases of *Stone v. Cartwright*, 6 T. R. 411, and *Littledale v. Lord Lonsdale*, 2 H. Bl. 299. These were actions for injury done to a dwelling-house, by the improvident working of a colliery under it. In the first case the owner of the colliery was an infant; the action was brought against an agent and manager, appointed by the Court of Chancery, who hired and dismissed the workmen at his pleasure, but took no personal concern, was not present, and had given no particular directions for working the mine in the manner that occasioned the mischief. The defendant in this case was held not to be answerable; and Lord *Kenyon* said, I have always understood that the action must be brought against the hand committing the injury, or against the owner for whom the act was done. The latter was an action against such owner, and was held maintainable. These cases establish the principle, that the owner of a mine is answerable to the person whose property may be injured by the improvident manner of working it. And if to these we add the case of *Bush v. Steinman*, the principle will be carried no further, it will only be applied to the owner of a house, and render him answerable for an improvident act taking place in the repair of it. The case of *Hall v. Pickard*, was a question as to the proper form of action, whether trespass or case. It was an action for injury to a horse belonging to the plaintiff, but let by him for a term to a gentleman whose carriage it was drawing, and by whose servant it was driven. And it was held, that case and not trespass was the proper *form of action; for the plaintiff had neither the legal nor actual possession of the horse, so as to maintain trespass. The case of *Croft v. Allison*, was an action for injury to a carriage. The plaintiff, a stable-keeper, had hired the carriage of a coachmaker for a day; had furnished horses, appointed a coachman, and then let it out to a third person for the day. Under these circumstances it was held, that the plaintiff was the proprietor of the carriage *pro tempore*.

On the other hand, the case of *Dean v. Branthwaite* was decided upon the principle, that the owner of horses let to draw the defendant's carriage to *Epsom* races, under the conduct of postillions appointed by the plaintiff, had not thereby put the horses into the possession of the defendant, so as to preclude himself from maintaining an action of trespass against the defendant for

an injury done by him to one of them. The case of *Sammell v. Wright* was an action brought against a stable-keeper, who had let four horses in the usual way, to draw a lady's carriage to *Windsor*, and the defendant was held liable to the action. The case of *Sir Henry Houghton* was that of horses hired by him to draw his carriage, travelling post, and he was held not to be answerable. It is true, that all the three were decisions at *Nisi Prius*, but they were the decisions of a very great Judge, and were not afterwards brought before the court. The case of *Chilcot v. Bromley* was a suit for a legacy, under a will, whereby a legacy was given to each of the testator's servants. The testator hired a carriage and horses for a year of a job-master, who also supplied a coachman, and paid him 9*s.* a week. The testator paid him 12*s.* a week for board wages, and he received a livery with the other men servants. The question was, whether this coachman was a servant of the testator [576] within the meaning of the will. The Master of the Rolls held that he was not; and appears to have founded his judgment principally on the ground that there was no contract between the testator and the coachman, the contract being with the job-master, who might change the coachman, if he should think fit, without a breach of his contract, if he substituted another, of whom the testator could not have reason to complain.

Upon this review of the decisions, they appear to me to predominate in favor of the defendant. The three cases of *Stone v. Cartwright*, 6 T. R. 411; *Littledale v. Lord Lonsdale*, 2 H. Bl. 299; and *Bush v. Steinman*, 1 Bos. & Pull. 404, do not in my opinion afford a rule by which the present case ought to be governed. Whatever is done for the working of my mine or the repair of my house, by persons mediate or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another. But does it follow from this that I have the care, government, or direction of horses hired by me of another person, who sends a servant of his own choice to conduct and manage them, because I have hired the horses to draw my carriage?

The opinion given by Mr. Justice *Heath* on this subject, in the case of *Bush v. Steinman*, was extra-judicial. It has the weight properly belonging to the opinion of a very learned Judge, but it could not be revised, and has not the authority of a judgment. The cases of **Dean v. Branthwaite*, 5 Esp. 35, and *Sammell v. Wright*, 5 Esp. 263, and the case of *Sir Henry Houghton*, were decisions at *Nisi Prius*, but they were the decisions of a very learned Judge: they were capable of revision: they were not afterwards questioned; and the last of the three bears directly upon the question in the present case.

Having made these remarks upon the former cases, I will now proceed to make some observations upon the case as it might stand independent of prior decisions. I admit the principle, that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given to them, and, also, (which is the same thing in other words,) that whatever is done by his authority is to be considered as done by him. I am sensible of the difficulty of drawing any precise or definite line as to time or distance. But I must own that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about *London* for a day, and hiring them to draw it for a stage on the road I am travelling, the driver being in both cases furnished by the owner of the horses in the usual way; nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions, and hiring a carriage with them of their owner. If the hirer be answerable in the present case, I would ask on what principle can it be said that he shall not be answerable if he hires for an hour or for a mile? He has the use and benefit *pro tempore*, not less in the one case than in the other. If the hirer is to be answerable when he hires the

horses only, why should he not be answerable if he hires the carriage with them? He has the equal use and benefit of the horses in both cases, and has not the conduct or management of them more in the one case than in the other. If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between hiring them with or without a carriage, must not the person who hires a hackney-coach to take him for a mile, or other greater or less distance, or for an hour, or longer time, be answerable for the conduct of the coachman? Must not the person who hires a wherry on the *Thames* be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked if any one should affirm the hirer to be answerable in either of these cases. Will it be said that the hirer is not answerable in either of these cases because the coachman and the wherryman are ready to attend to the call of any person who will employ them? I answer, So, also, is the stable-keeper. If it be said that they are obliged to obey the call of any person when they are on the stand, or at the stairs, I would ask, Will there be any difference if they are spoken to beforehand, and desired to attend at a particular hour? which is not an unusual occurrence where persons have an engagement to go out at an early hour in the morning. If the personal presence of the hirer will render him responsible, why should he not be equally so if he is absent, and has hired the horses or carriage for his family or servants? Does his presence give him any means of superintending or controlling the driver? Can any legal obligation depend upon such minute distinctions? If the case of a wherry on the *Thames* does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the ocean to carry such goods as the charterer may think fit to load, and such only. Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer, though he is to some purposes the *dominus pro tempore*, and the voyage is made not less under his employment, and for his benefit, whether he be on board or not, than the journey is made under the employment, and for the benefit of the hirer of the horses. Why, then, has the charterer of the ship, or the hirer of the wherry, or the hackney-coach, never been thought answerable? I answer, Because the ship-master, the wherryman, and the hackney-coachman have never been deemed the servants of the hirer, although the hirer does contract with the wherryman and the coachman, and is bound to pay them, and the pay is not for the use of the boat, or horses, or carriage only, but also for the personal service of the man. In the case now before the court, the hirer makes no contract with the coachman: he does not select him; he has no privity with him; he usually gives him a gratuity, but he is not by law obliged to give him any thing; and from thence I conclude that the coachman is not the servant of the hirer. And if the coachman is not the servant of the hirer on such an occasion, but is chosen and entrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses. If the coachman is in such a case the servant of the hirer, he may, at any moment, require him to quit the charge of the horses, and deliver them over to another, and must be obeyed; but I think it cannot be said that the coachman may not lawfully refuse, and ought not in most cases to do so. It does not seem to be doubted that the injured party may sue the owner of the horses; is there, then, any rule of law, or any principle of convenience, requiring that he should have his choice of suing either the stable-keeper or the hirer at his election. Generally speaking, the one is as well able to pay damages as the other, and may be as easily found out and known, and more easily if the carriage and horses are hired together. Should the hirer be held responsible in the first instance, he must certainly have his remedy over against the letter, so that the letter will in the end be

answerable, and there will be a circuity of action, which is inconvenient, and to be avoided if possible.

I have acknowledged the difficulty of drawing a line with reference to time or distance ; and I think we must look to other circumstances in order to ascertain the obligation of the hirer. Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman. The payment of board wages and the furnishing a livery may also be circumstances worthy of attention, because they also may in some cases be considered as evidence of a choice and a contract. I do not pronounce upon any case of this kind. I speak only of the present case, and of the evidence given at the trial , and not being able to find any reason satisfactory to my own mind, by which the defendant in this cause can be made answerable in the present action, I think myself bound to say that, in my opinion, the rule for setting aside the nonsuit ought to be discharged.

Rule discharged.



Where a party had joined in a bond with the grantor of an annuity, to secure the payment of it, and afterwards obtained his discharge under the insolvent act, having duly inserted the bond in his schedule : Held, that he could not be arrested upon the bond for arrears of the annuity afterwards becoming due.

A RULE had been obtained calling upon the plaintiff to show cause why the bail-bond taken in this case should not be given up to be cancelled, upon filing common bail. The rule was obtained upon an affidavit that defendant, in 1820, was discharged under the act for relief of insolvent debtors ; that he inserted in his schedule a sum of 1167 $\frac{1}{4}$, being the amount of 600 $\frac{1}{4}$, the consideration money mentioned in an indenture bearing date the 5th of October, 1810, whereby an annuity was granted by one E. M. to the plaintiff, and also the principal sum mentioned in a bond, wherein defendant became bound with the said E. M. for payment of the annuity ; that notice was given to plaintiff, and defendant duly discharged, and afterwards arrested by the plaintiff for four years' arrears of the annuity accruing after his discharge.

Hutchinson, showed cause, and contended, that the 1 G. 4, c. 119, s. 10, did not apply to sureties, but only to principals, and, consequently, that defendant could not, by his discharge under that act, be relieved from his responsibility. The bond could not be enforced against the surety until the principal made default ; and therefore s. 28, of the 1 G. 4, c. 119, leaves the plaintiff's rights untouched by the discharge ; for that only says, that after a party has been discharged, no execution shall issue upon any judgment before then obtained against him, for any debt or cause of action arising before his imprisonment. The 3 G. 4, c. 123, s. 13, does not vary the case. In *Baxter v. Nichols*, 4 Taunt. 90, the party arrested was treated as principal and on that account held to be discharged by bankruptcy and certificate.

D. Pollock, contra, was stopped by the court.

Abbott, C. J. We must assume that the bond given in this case was in the common form ; and that there was nothing said in it to show which was the principal and which was the surety. The money now sued for was at the time of the defendant's discharge money payable by way of annuity at a future

time by virtue of the bond, and I think that the statute 1 G. 4, c. 119, s. 10,^t entitles the defendant to his discharge.

Rule absolute.

^t Whereby it was enacted, "That all and every creditor and creditors of any such prisoner, for any sum or sums of money payable by way of annuity or otherwise at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, may be and shall be entitled to be admitted a creditor or creditors, and shall be entitled to receive a dividend or dividends of the estate of such prisoner, in such manner and upon such terms and conditions as such creditor or creditors would have been entitled unto by the laws now in force if such prisoner had become bankrupt; the amount upon which such dividend shall be calculated, and the terms and conditions on which the same shall be received, being first settled by the court, and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by a creditor under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission."



*ELMORE v. KINGSCOTE.

[*583]

The note or memorandum in writing of the bargain in the case of a sale of goods for the price of 10*l.* or upwards, required by the statute 29 Car. 2, c. 3, s. 17, must state the price for which the goods were sold.

INDEBITATUS assumpit for horses sold and delivered. *Quantum valebat.* Plea, *non-assumpit.* At the trial before Abbott, C. J., at the Middlesex sittings after last term, it appeared that this was an action brought to recover the price of a horse alleged to have been sold to the defendant. Proof was given that on the 18th of June, there was a verbal contract of sale made between the plaintiff and defendant, by which the plaintiff had agreed to sell to the defendant the horse, warranted five years old, for the sum of two hundred guineas. In order to take the case out of the statute of frauds, the plaintiff gave in evidence the following letter, written by the defendant on the 18th of June: "Mr. Kingscote, begs to inform Mr. Elmore, that if the horse can be proved to be five years old on the 18th of this month, in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him." The Lord Chief Justice was of opinion that this was not a sufficient note or memorandum in writing of the bargain within the statute of frauds, and he directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a verdict.

Scarlett, now moved accordingly, and contended, that as the defendant's letter was an acknowledgment by him that he had bought the horse on the 13th of June, it was a note in writing of a bargain for the purchase of a horse, and that it was competent to the plaintiff to prove the value of the horse by parol evidence, and to recover the amount under the count for *quantum valebat.* But

Per Curiam. There must be a note or memorandum in writing of the bargain. The price agreed to be paid constitutes a material part of the bargain. If it were competent to a party to prove, by parol evidence, the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent.

Rule refused.

DOE dem. EVANS v. EVANS.

Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold : Held, that at the expiration of the two years the copyholder might maintain an ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency, and the estate would not vest in the lord without any act done by him.

EJECTMENT for copyhold lands in *Somersetshire*. Plea, the general issue. At the trial before *Gasee*, J., at the *Somerset* Summer assizes, 1825, it appeared that the lands in question were holden of the manor of the vicarage of *Chew Magna* and *Dundry*, in the county of *Somerset*, by copy of court-roll, bearing date the 26th of *November*, 1783, by which it appeared that one *F. King*, and *J. Evans*, the father of the lessor of the plaintiff, surrendered their lands, and took a new grant to *F. King*, for life, and after his decease to *J. Evans* for life; and after his decease, to his wife, *Jane Evans*, *J. Evans*, their son, (the lessor of the plaintiff,) and *T. Evans* their son, (the defendant,) as joint tenants, for the term of their lives, and the life of the longest liver. *F. King*, died in 1807, and *J. Evans*, the father, in 1818; *Jane Evans*, was still alive. In 1808, the lessor of the plaintiff was convicted *of larceny, and sentenced to seven years' transportation. In 1814, he was capitally convicted of being at large in this country before the period of his transportation had expired, and was thereupon attainted, but he received a pardon under the sign-manual, on condition of being imprisoned for two years, which time expired before the day of the demise. Ouster was admitted. For the defendant it was objected, that by the attainder the lessor of the plaintiff was under a civil incapacity to make a demise. The learned Judge reserved the point, and the plaintiff had a verdict, subject to a motion to enter a nonsuit. A rule for that purpose having been obtained,

Meredith and *Erskine*, now showed cause. The question in this case turns upon the capital conviction in 1814. The forfeiture of a copyhold estate is to the lord, and not to the king; *1 Wat. Copy. tit. Forfeiture*, 341, *Kean v. Kerby*, 1 Mod. 200, *Margaret Podger's* case, 9 Co. 107. Now the forfeiture was from the time when the offence was committed; *Co. Lit.* 390 b., *Com. Dig. Forfeiture*; (B. 6.) from that time, therefore, the joint-tenancy was severed. The attainer did not follow until some time after, so that the defendant could have no claim by survivorship, the joint-tenancy having been severed before the civil death of the felon. The joint-tenancy having been severed, the lord might have entered and seized; but as he did not, the lessor might still hold the estate; *Rex v. Haddenham*, 15 East, 463. The case of *Benson v. Strode*,† may be relied on for the defendant; but there, by the form of the grant, the right of the remainder-man accrued on the forfeiture. Then *586] as to the disability of the lessor, there can be no doubt that it was removed by the pardon. The statute 6 G. 4, c. 25, s. 1, enacted, "That in all cases in which His late Majesty, or the King's Majesty that now is, his heirs or successors, hath been or shall be pleased to extend his or their royal mercy to any offender convicted of any felony, whereby the offender was, is, or shall be excluded from the benefit of clergy, and by warrant under his or their sign-manual, countersigned by one of his or their principal secretaries of state, hath granted or shall grant to such offender either a free pardon, or a pardon upon condition of transportation, imprisonment, or any other punishment, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition, in case of conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony whereof he

† *T. Jones*, 190. 3 Lev. 94, S. C. by the name of *Strode v. Denison*.

or she was so convicted." Here the lessor of the plaintiff was discharged out of custody in 1816, the condition of his pardon having then been performed - the pardon, therefore, operated from that time.

W. E. Tunton, contra. It is not necessary for the defendant to contend that the lessor's interest in the estate survived to him. It is sufficient if the lessor is under a civil incapacity to make a lease. The case of *Rex v. Haddenham*, was very different. That was a settlement-case; the lord had granted to the pauper after the attainer and pardon; and the court held that he was estopped by the grant. In *Co. Lit. 2 b.* it is said, that an attainted felon cannot hold lands; if so, he cannot demise. The provision of the 6 G. 4, c. 25, s. 1, is "certainly very extensive, but it could not in this case restore the capacity of the lessor; for upon the attainer the interest which was before in him vested in the lord, and the pardon could not divest that, and vest it in the felon; *Com. Dig. Pardon*, (F.) That was adjudged, amongst other things, in *Benson v. Strode*, Sir T. Jones, 190. 2 Show. 180. [Abbott, C. J. It does not appear that the lord had entered in this case.] In *Benson v. Strode*, it was held, that entry was not necessary to vest the estate. [Abbott, C. J. The remainder-man had been already virtually admitted.] [Bayley, J. In the report of that case, in *Skin. 29*, the court say, that he, in remainder shall enter.] That only means that he shall have the land.†

Abbott, C. J. There is no doubt that the pardon by virtue of the 6 G. 4, c. 25, restored the felon to his competency to hold lands; but it has been properly urged that it could not divest an interest which had previously been vested in another. That introduces another question, whether after the forfeiture it was necessary that any thing should be done by the lord to vest the estate in him. As at present advised, we think that some step by the lord was necessary; but if upon further consideration we alter our opinion, we will mention the case again.

Rule discharged nisi.‡

The case was never mentioned again.

† See the report of a former argument of the case in *Skin. 8*.

‡ A provision in an act of attainer, that the person attainted shall forfeit his lands does not vest in the king any freehold in deed or in law, but only vests a right or title in the king as an attainer of treason at "common law does. It does not vest the possession in the king, nor give him entry without office found. Till it appears of record what land a person attainted had, the common law will never adjudge the freehold in deed or in law of any land to be in the king till office found. Had the forfeiture only vested the possession in the king, the 33 H. 8, c. 20, in case of treason would have been in vain. Till office found, the freehold and fee-simple are in the person attainted so long as he lives; for, as he has capacity to take land by a new purchase, he has power to retain his ancient possessions, and shall be tenant to every præcipe. But when the person attainted dies, the land cannot descend to his heirs because of the corruption of blood, nor will it be in the king because no office is found; but if it be held of a common person, it shall escheat to him, (a) and he shall be tenant in law to every præcipe until office is found for the king. If it be held of the king, the freehold shall be in the king in the nature of a common escheat until office found. If tenant in fee lease for life, with condition that the lessee shall have the fee if the lessor die without issue, and then the lessor is attainted, (in a case to which 33 H. 8, c. 20, does not apply,) and dies without issue, the lessee shall have the fee; at least if the attainer is by act of parliament, and the act saves the right and interest of all persons not included in the attainer. Lord *Level* was seized in fee, and leased to *Wright* for life; and if he, Lord *Level*, should die without issue of his body, then *Wright* should hold in fee. Lord *Level* was afterwards, 1 H. 7, attainted of treason by act of parliament, and it was enacted that he should forfeit all his lands. In trespass, plaintiff claimed under the attainer, defendant under the lease to *Wright*; the statute had a saving to all persons other than such as were thereby attainted, and their heirs, of such right, title, action, or interest in the premises as they ought to have had had that act not been made. Lord *Level* died, and on demurrer the question was, whether Lord *Level*'s attaintees gave title preferable to *Wright*'s, and it was adjudged it did not, for the attainer, until office, did not divest Lord *Level*'s estate; and if *Wright*'s interest should otherwise have been destroyed, the saving preserved it. *Nichols v. Nichols*, Plowd. 466.

(a) This is denied to be law in *Hawkins's case*, 3 Q. 10. b.

*BURNETT et al., Executors of the last Will and Testament of Sir ROBERT BURNETT, deceased, v. W. D. LYNCH.

In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it: Held, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease. The lessee, by *deed-poll*, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee: Held, that the lessee might maintain an action upon the case founded in *tort* against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. It was averred in the declaration that the defendant continued in possession until the end of the term, and whilst he was in possession as such assignee, suffered the premises to be out of repair. The proof was that he had ceased to be assignee before the expiration of the term: Held, that this was not any variance.

DECLARATION stated that the plaintiffs, as executors, before the making of the assignment, and also before the committing of the grievances thereafter mentioned; to wit, on, &c. at, &c. were lawfully possessed for the residue of a certain term, whereof at the time of making such assignment seven years were unexpired, of and in certain premises with the appurtenances, together with the use of certain household goods, furniture, fixtures, and other things mentioned in a schedule or inventory annexed to an indenture of demise or lease thereof made to Sir Robert Burnett, by O. P. Meyrick, Esq., bearing date the 30th of August, 1804, under and subject to certain rents and certain covenants therein contained by Sir R. Burnett, his executors, administrators, and assigns, to be performed. The following covenants were then set out: "To paint the outside wood-work of the house, and the iron railing, &c. once in every five years, to repair during the term, and to yield up the premises sufficiently repaired at the expiration of the term, and to keep in proper order and condition the *garden and gravel walks, preserve the fruit trees therein, and [590] to replace such shrubs and fruit trees as might die or decay with others of an equally good or better sort; and at the end of the said term leave the garden walls properly planted with fruit trees, and the kitchen-garden ground properly planted with vegetables and roots." Averment, that defendant had notice of all these premises. And the plaintiffs being so possessed of the demised premises, afterwards, and before the committing of the grievances by the defendant as thereafter mentioned, to wit, on the day and year last aforesaid, at, &c. at the request of the defendant, all the estate and interest of the plaintiffs of and in the demised premises, with the appurtenances, was duly assigned to the defendant, to hold to the defendant, his executors, &c. from the 29th of September, 1817, for the residue of the term by the indenture demised as aforesaid, under and subject to the payment of the rents thereby reserved, and to the performance of the covenants therein contained, on the part and behalf of the said Sir Robert Burnett, since deceased, his executors, administrators, and assigns, from the said 29th of September, 1817, to be performed and kept. By virtue of which assignment the defendant entered into and upon the said demised premises, and was possessed thereof for the residue of the term so to the said Sir Robert Burnett demised, and continued so possessed thenceforth for a long space of time, to wit, unto the end and expiration of the term so demised as aforesaid, to wit, at, &c.; whereupon it then and there became and was the duty of the defendant, as such assignee of the demised premises from the 29th of September, 1817, to perform all and singular the rents and covenants in the said *indenture contained for and during so much of the [591] residue of the term as he, the defendant, should remain possessed of the demised premises as such assignee as aforesaid. Nevertheless, the plaintiff

say that the defendant, not regarding his said duty in that behalf, but contriving, &c. to injure the plaintiffs in this behalf, did not, nor would, after he became possessed of the said demised premises, and after the said 29th of September, 1817, during the time he remained and continued possessed of the said demised premises, as such assignee thereof, at his own cost and charges, in a good and effectual manner, once in every five years of the said residue of the said term, paint all the wood-work of the outside of the said mansion-house and offices, &c. Breaches of the covenants to repair were then alleged to have been committed by the defendant, by suffering the premises to be out of repair whilst he was assignee, and so to continue for a long space of time, to wit, until and at the end and determination of the demised term. The declaration then proceeded as follows: By reason whereof, and of the said several breaches of covenant, the said *O. P. Meyrick* in *Hilary* term, in the fifth year of the reign of our lord the now king, in the Court of King's Bench, at, &c. impleaded the plaintiffs as such executors in a plea of breach of covenant for the damages sustained on occasion of such several breaches of covenant as aforesaid; and such proceedings were thereupon afterwards had in the said action, that in *Easter* term, in the sixth year of the reign of our lord the now king, it was by the said court considered that the said *O. P. Meyrick* should recover, and the said *O. P. Meyrick* recovered against the plaintiffs as such executors 1165*l.* for his damages, as well *by reason of the said several breaches of covenant [592] as for his costs and charges about his suit in that behalf expended. By means of all which said several premises the plaintiffs as such executors were forced and obliged to pay, and afterwards, to wit, on, &c. at, &c. did actually pay the said sum of 1165*l.* so recovered against them as such executors, and were necessarily put to and incurred certain costs and charges amounting to 500*l.* in and about their defence in the said action, to wit, at, &c. To plaintiffs damage as such executors as aforesaid of 2000*l.* Plea, the general issue.

At the trial before *Best*, C. J., at the Summer assizes for the county of *Surrey*, 1825, the plaintiffs proved that the original lease, which had been granted by *Meyrick* to Sir *R. Burnett*, had been delivered to the defendant *Lynch*, and they proved the execution of the counterpart by the testimony of the subscribing witness. The defendant's counsel then put in the lease itself, which was produced by the solicitor of one *Daniel*, to whom the defendant had, as was proved, assigned the term by a deed reciting the lease; and it was then insisted, on the authority of the case of *Gordon v. Secretan*, 8 T. R. 548, that it was incumbent on the plaintiff to prove the execution of it by calling the subscribing witness; but *Best*, C. J., was of opinion, that as the lease was produced on the part of the defendant, who had taken a beneficial interest under it by accepting the assignment, proof of the execution of it by the subscribing witness was unnecessary. It was then proved that the plaintiffs, as executors of the lessee, had by deed poll, on the 5th of September, 1817, assigned the lease to the defendant, subject to the payment of the rent, and *the performance of the covenants contained in the lease; that he, (defendant,) executed an assignment of his interest in the lease to *Daniel* on the 28th of September, 1824, two days before the term expired; that the latter had, in fact, taken possession of the premises in 1819, and occupied them till the expiration of the term. It was then objected that the plaintiffs had failed in proving the allegation in the declaration, viz. that the defendant continued possessed of the demised premises until the end and expiration of the term; and it was insisted, that in this form of action, which was founded upon a breach of duty, that allegation was material; for as the breach of duty alleged was, that whilst the defendant continued possessed as assignee, he suffered the premises to be out of repair, and to continue so until the end of the term, it would be an answer to the action to show, that the premises were well and sufficiently repaired at the expiration of the term, although that would be no answer to an action of covenant where the assignee might be liable for breaches committed on each

successive day of the term. *Best*, C. J., was of opinion, that as the defendant had accepted the assignment, subject to the performance of the covenants contained in the lease, he was liable in damages to the plaintiffs for all those breaches of duty, (which, in the lessee, would have been breaches of the covenants in the lease,) committed during the time he, the defendant, continued assignee of the term. In order to maintain the action it was necessary for the plaintiffs to aver in the declaration, and to prove at the trial, that the defendant was assignee during the time when some breach of duty was committed : the allegation was material so far as it import ed that the defendant was assignee ; and it was sufficient for the plaintiffs to prove in support of it, that any breach of duty was committed during the time he continued assignee : the allegation might be material with reference to the *quantum* of damages, for the plaintiffs would not be entitled to recover damages from the defendant for any breach of duty committed after the period at which he ceased to be assignee. A verdict having been found for the plaintiffs for 135*l.*, *Taddy*, Serjt., in last *Michaelmas* term, moved for a new trial, and in arrest of judgment. The grounds upon which he applied for the new trial were, first, that there was a variance between the allegation in the declaration, and the proof ; and, secondly, that the lease had not been duly proved. The grounds alleged for arresting the judgment were, that, as between the lessee and the assignee, the law did not by implication raise any duty in the latter to perform the covenants in the lease, but that it required an express contract to render an assignee liable to the lessees for breaches of those covenants ; and he contended, first, that no action at all was maintainable by the lessee against the assignee, there being no contract between them that the latter should indemnify the former against any breaches of covenant ; and, secondly, assuming that from the fact of the defendant's having accepted the premises assigned, subject to the payment of the rent and the performance of the covenants, the law would imply a covenant or promise to indemnify, then, either covenant or *assumpsit* was the proper form of action. The court were of opinion that the allegation in the declaration was sufficiently proved. But on the other two points they granted a rule *nisi* for a new trial, or for arresting the judgment.

*595] **Marryat*, *Barnewall*, and *Starr*, showed cause. The lease was sufficiently proved. First, proof of the counterpart by the subscribing witness is evidence of the original lease, where it appears that it has been assigned to the defendant, *Per Tracy, Com. Dig. Testmoigne*, (B. 4.) Secondly, it was not necessary to prove the execution of it by the subscribing witness, because it was produced by one to whom the defendant, who had taken a beneficial interest under it, had delivered it. This case is not distinguishable in principle from *Pearce v. Hooper*, 3 *Taunt.* 60, and *Orr v. Morrice*, 3 *B. & B.* 139. And here the delivery of the lease to another person is an additional acknowledgement by the defendant of its validity. Besides, in this case the defendant has admitted the lease and the assignment indorsed upon it to be valid, by the recital of them in his deed of assignment to *Daniel* ; and that of itself is sufficient against him, *Ford v. Grey*, 1 *Salk.* 285. *Com. Dig. Testmoigne*, (B. 5.) There is not, then, any ground for a new trial, neither ought the judgment to be arrested, for the action is clearly maintainable. The defendant having accepted the assignment of the lease, subject to the performance of the covenants, there was a legal obligation upon him to perform those covenants ; and he having wrongfully neglected to perform them, and thereby caused a damage to the plaintiffs, is answerable in an action on the case founded upon a breach of duty. For covenant does not lie upon an agreement without deed, but an action upon the case, *Fitz. N. B.* 145, *Com. Dig. Covenant*, (A. 1.) *596] The assignment by the plaintiffs to the defendant is not the deed *of the defendant, but a deed-poll, and therefore, only the deed of the assignors, *Co. Lit.* 363 b. There are, indeed, some cases where a party not sealing has been held to be bound in covenant ; but these are exceptions to the general

rule, and differ in every respect (except the absence of sealing) from the present case. Thus in *Brett v. Cumberland*, Cro. Jac. 521, Queen Elizabeth, by letters patent, let to one *William Cumberland*, a water-mill, &c., wherein were these words: "And the said *William*, and his assigns shall repair, and leave in repair, the said water-mill," &c.: the question was, whether these words in the patent, to which the queen's seal only was affixed, should enure as a covenant to bind the lessee; and it was resolved that they should, "for the lessee takes thereby, because it is matter of record, although in show they are the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact, and shall bind him as strongly as if it had been a covenant by indenture." But this assignment is neither a record nor an indenture, nor does it contain words of express covenant. Also in the report of that case in 2 *Roll. Rep.* p. 63, a case is cited from the 38 Ed. 3, 8,† three persons were *enfeoffed* by deed, and there were several covenants in the deed on the part of the *feoffees*, and only two sealed the deed, yet inasmuch as the third *entered* and *agreed* to the estate conveyed by the deed, he was held to be bound in a writ of covenant by the sealing of his companions. There it was the intent of the parties that all the three *feoffees* should execute the deed, and the third did agree to *it, and entered, and this was considered tantamount to his executing it. In the present deed-poll of assignment it was [597] never intended that the defendant should execute it: there is no express covenant on the part of the defendant, and no companion by whose sealing he can be bound. But, if covenant would lie, it does not follow that case will not also lie; for in *Kinkyside v. Thornton*, 2 W. Bl. 1111, it was held that case, in nature of waste, would lie against the tenant for years after the expiration of his term as well as covenant. This action is not an action on the case in the nature of waste. In order to maintain that action, it is necessary for the plaintiff to have a reversionary estate: an assignor has no reversion. But this is an action on the case founded upon the relation constituted by this deed-poll of assignment between the plaintiffs and the defendant: the latter stands, with respect to the former, in the situation in which they originally stood to the lessor, who having, under the express covenants in the lease, recovered damages against the plaintiffs, it is fit that those damages should be reimbursed to the plaintiffs by the defendant who took the premises from them, the breaches of covenant having been committed during the time he continued assignee. It has been said that in equity an assignee is in such a case as the present liable to the lessee, and that he cannot, having taken the premises subject to the performance of the covenants, insist that the lessee, as assignor, should, in his place, be subject to perform the covenants, *Staines v. Morris*, 1 Ves. & Beames, 8. The language of this declaration is that which is adopted by the common law when it seeks to raise an equitable liability into a legal duty. The defendant accepted the assignment, subject *to the performance of the covenants in the lease: [598] it became his duty to perform them, and he has been guilty of a breach of that duty, by reason of which the plaintiffs have been damaged. There is a wrongful act done by the defendant, and a consequential damage to the plaintiffs, and, consequently, an action on the case founded upon that wrongful act is maintainable. It may be true that *assumpsit* is, also, maintainable; but that is because the law implies a promise to do that which a party is legally liable to perform. It was competent to the plaintiffs in this case to declare either in tort or *assumpsit*, and to describe their cause of action, either as founded on a breach of duty, or on a breach of promise implied by law from that duty.

Tuddy, Serjt., and *Platt*, contra. The general rule is, that it is incumbent on a party to prove the execution of a deed by the testimony of the subscribing witness. The exception to that rule is, that where an instrument comes out of the possession of an adverse party, who, at the time when he produces

† According to the report in the Year-book, this was an action of debt.

it, is possessed of a beneficial interest under it, proof of the execution of it is unnecessary. This is not a case within the exception, because the defendant was possessed of no beneficial interest under the lease, either at the time of the trial or at the determination of the term when the plaintiffs' cause of action accrued. Then as to the right of the plaintiffs to maintain this action, the law does not imply any duty in the assignee of a lease towards the assignor to perform the covenants in the lease. The assignee is liable to the lessor for any breach of covenant by reason of privity of estate. But there is no privity of estate between a lessee and the assignee, for the former by *assignment parts with his whole interest. The assignee [599] cannot become bound to the lessee to perform the covenants without an express contract. That has been the understanding in the profession; for it has been the general practice for the assignor of a lease to take a bond or deed of indemnity from the assignee. But assuming that some action is maintainable, an action upon the case founded upon a breach of duty is not the proper form of action, but either covenant, which is founded upon a contract under seal, or *assumpsit*, which is an action on the case founded upon a promise not under seal. The lease was assigned to the defendant subject to the performance of the covenants, and he took possession of the premises demised by the lease under that assignment. The law may thence imply a covenant or promise on his part to perform the covenants, and the assignment in this instance being by deed, the law will imply a covenant on the part of the assignee. In 1 *Rolle's Abr.* 516, *Cov.* (B.) *pl. 1*, it is laid down, that covenant lies for breaking a covenant by the lessee in the king's patent, though the lessee did not seal any counterpart, for his acceptance charges him; and in *Co. Litt.* 231 *a.*, if a lease be to *A.* and *B.* by indenture, and *A.* seal a counterpart, and *B.* agrees to the lease but does not seal, yet *B.* may be sued for covenant broken. Here the assignee has agreed to the assignment, for he has taken possession of the premises intended to be conveyed to him. He is therefore liable in covenant, although he did not seal the deed. *Kinltryside v. Thornton*, 2 Sir W. Blackst. 1111, is relied upon as an authority to show that case will lie as well as covenant. There an *action on the case in the nature of waste was brought [600] by the lessor against a tenant for years after the expiration of his term, for breaches of covenants contained in the lease. The foundation of that action was that the lessor was injured in his reversion, but here the plaintiffs, having assigned their whole interest, had no reversion. In *Jones v. Hill*, 7 Taunt. 391, the lessee had covenanted to repair the premises during the term, and to yield up the same at the end of the term as well repaired, and in as good condition as the same should be when finished under the direction of *J. M.* It was held that an action on the case in the nature of waste could not be supported against the assignee of the lessee for suffering the premises to be out of repair during a part of the term, and after the expiration of the term wrongfully yielding them up in a much worse condition than when the same were finished under the direction of *J. M.* Thirdly, assuming that covenant will not lie against the assignee, because he has not bound himself by deed under seal to perform the covenants in the lease, still, if there be any remedy, the law may, from the fact of his having accepted the possession of the premises subject to the performance of the covenants, imply a promise on his part to perform those covenants; and then *assumpsit*, which is an action upon the case founded upon a promise, ought to have been the form of action adopted.

ABBOTT, C. J. I am of opinion that this rule ought to be discharged. The ground of the application for a new trial was, that, although the lease made to the testator of the plaintiffs was produced, either by the *defendant or a person claiming under him, it could not be used in evidence by the plaintiffs, without calling the subscribing witness to prove the execution of that instrument. I am clearly of opinion that as against the present defendant it was unnecessary, both with reference to the subject-matter of the lease, and

with reference to the parties. It was proved at the trial that the plaintiffs' testator had executed a lease, and that the plaintiffs, his executors, had assigned that lease to the defendant, and that the latter had executed a deed by which that lease was again assigned to one *Daniel*, which deed so executed by *Lynch*, recited the lease which had been granted to the testator of the plaintiffs. That recital was, as against *Lynch*, abundant evidence of the existence of the original lease. Upon that short ground, I think the lease was sufficiently proved. Upon the other ground, also, I think, that the evidence was sufficient, because, although the defendant had quitted possession before the lease expired, still he had held under the very lease during part of the term.

Then as to the motion in arrest of judgment, the facts appear to stand thus: A lease had been granted to Sir *Robert Burnett*, whereby he had covenanted to pay rent and perform the other covenants contained in the lease. The plaintiffs (his executors) afterwards assigned that lease to *Lynch*, the defendant, and by the terms of that assignment *Lynch* was to hold, subject not only to the payment of rent but to the performance of the covenants. It is true he entered into no express covenant or contract that he would pay the rent and perform the covenants. But he accepted the assignment subject to the performance of the covenants; and we are first to consider whether any action will lie against him. If we should hold that no action will lie, this consequence will follow, that a man having taken an estate from another, subject to the payment of rent, and the performance of the covenants, and having thereby induced an understanding in that other, that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense show that that never could be intended; and if the law of *England*, allowed any such consequence to follow, in that case it would cease to be a rule of reason. Then, if some action will lie, the next question arises, What must be the form of the action? It has been contended that if any action will lie, it must be an action of covenant. I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person who, by himself, or some other person acting on his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as those mentioned in *Co. Litt.* 231 a.) has agreed by deed to do a certain thing. Here the defendant has not engaged by deed to perform the covenants, and, consequently, covenant will not lie. Then will an action of *assumpsit* lie? I think it would; but why? Because the defendant has, by taking the estate subject to the payment of rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants; and if by neglecting that duty a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty, and in that case the action of *assumpsit* will lie. But it by no means follows, that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable. *Kinlyside v. Thornton*, is an authority from which it may be inferred that either *assumpsit* or case will lie. The only case which militates against the plaintiffs is that of *Jones v. Hill*, 7 *Taunt.* 392, the facts of which were very similar to the present. But I think the attention of the court was not called to the true ground on which the plaintiffs' case was founded. It was contended for the plaintiffs that an action on the case was not maintainable for permissive waste. The court did not decide that point, but merely that it was impossible it should be waste to omit to put the premises into such repair as *A. B.* had put them into. *Kinlyside v. Thornton*, was there cited; but it was not argued that by the acceptance of the assignment it became the duty of the assignee to do the very thing, the omission to do which was made the subject of complaint. The case was not put on the ground that a duty had arisen. Here that ground has been taken; and I think that a duty

did arise when the defendant accepted the assignment of the lease, subject to the performance of the covenants, and that as a breach of that duty has been committed, a special action on the case may be maintained. The rule for a new trial, and for arresting the judgment, must, therefore, be discharged.

BAYLEY, J. I agree with my Lord Chief Justice upon both points. My opinion upon the first point is founded upon this, that the deed came out of the possession of a party who must be considered as identified *with the defendant, and that it was a deed under which the defendant and the party claiming under him had taken all the interest which they professed to take. A distinction has been taken between this and the other cases cited in argument, on the ground that the defendant at the time when the deed was produced in this case had no longer any existing interest under the deed: I think that is immaterial. My opinion is, that it is not competent to a party, who has taken under a deed all the interest which that deed was calculated to give, to dispute its due execution.

Upon the other point it is not necessary to decide whether *assumpsit* or covenant will lie; but I have no difficulty in saying, that an action upon the case founded upon the tort will lie, on this ground, that from the facts stated in this declaration the law raises a duty in the defendant to perform the covenants, that there has been a breach of that duty, and that damage has accrued to the plaintiffs in consequence of that breach of duty. In this case the defendant took the lease as the assignee of the plaintiffs, subject to the payment of the rent and the performance of the covenants. Sir R. Burnett, (or his representative,) in the character of lessee, was liable by express covenant to the lessor for the performance of the covenants in the lease. The latter had a right from time to time to claim from Sir Robert Burnett, the rent and a compensation for the non-performance of the covenants. As soon as the lessee assigned, the lessor then had his option to claim his rent or a compensation for the non-performance of the covenants either from the lessee or his assignee. The lessee could not be hurt if it was claimed of him, if he in that case had his remedy over against the assignee, and the assignee could not be hurt *because he had taken the property subject to the payment of rent and the performance of the covenants. And if he has been guilty of negligence with reference to those conditions, and the plaintiffs have been damaged by that negligence, they have thereby acquired a right of action. There is a duty from the defendant to the plaintiffs implied from the very nature and state of things which existed between the parties. That duty appears to me to be very accurately stated in the declaration, where it is described as commensurate with the time during which the assignee had an interest in the premises. It is unnecessary to go through the cases in which it has been decided, that although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty. In *Dickson v. Clifton*, 2 Wils. 319, the plaintiff, an owner of a ship, declared that he had retained and employed the defendant in his service to be master and commander of the vessel, and to receive on board at *Brough*, in the county of *York*, fifty-six quarters of malt, and to carry and convey the same by water from thence to a place called *H.* in *Yorkshire*, and at *H.* to deliver the same to *A. B.* Now there can be no doubt that an action of *assumpsit* might have been maintained against the captain for not receiving and carrying the corn, or for not taking care of the cargo; but there the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty. That could only be because the express contract between the parties created a duty, for *the breach of which an action of tort might be maintained. The decision in *Bretherton v. Wood*, 3 B. & B. 54, and other cases, are all founded upon the same ground. This is not an action upon the case in the nature of waste, but an action brought by a party to recover compensation in damages, because

the defendant has not performed that duty which between him and the plaintiff he was bound to perform. They were in the relative situation of lessee and assignee; and the assignee having accepted the premises subject to the performance of the covenants, there was a duty imposed upon him by law to perform those covenants; there was a neglect of that duty, and a damage accruing therefrom to the plaintiffs. To recover a compensation for that damage, I think the action was maintainable.

HOLROYD, J. I think that the lease was properly received in evidence without proof of execution by the subscribing witness, inasmuch as it came out of the hands of the defendant or of a person who claimed under the defendant, and had enjoyed the premises under it. Coming from such parties, I think it might be taken as evidence without any other proof. The other question lies in a very narrow compass. The plaintiffs, as the representatives of the testator, were subject to the payment of rent and the performance of the covenants contained in the lease. The declaration alleges that the defendant knew of those circumstances. The plaintiffs assigned the lease to the defendants, subject to the payment of the rent and the performance of the covenants, and the defendant entered into possession. The consequence was, that he thereby "took away the tenancy from the original lessee, and it became vested in him as assignee. He had the benefit of the estate, and then upon the maxim, *qui commodum sentit onus et sentire debet*, he is liable. Unless there had been an express covenant, the lessor could not sue the original lessee for a breach of the covenants committed after he had assigned. Then what is the effect of the assignment? The assignee by virtue of it stands in the situation of the lessee, and becomes bound to pay the rent and to perform the covenants. By accepting the assignment, he states that he is subject to the rent and the performance of the covenants. I think, therefore, that he is bound to perform them not merely by a moral obligation, but by a legal obligation, created by the common law, from the facts stated in the declaration. The assignee standing in the situation of the original lessee is liable by the common law to all the duties which were cast upon the lessee by means of his covenants in the lease. And if that be so, the consequence seems to follow that an action on the case will lie against the assignee when he neglects to discharge those duties. I think that is the proper remedy. I have considerable doubt whether covenant would lie; but even if it would, that would not take away from the plaintiffs the right to maintain an action upon the case. If neither case nor covenant is maintainable, the consequence would be that the plaintiffs who have been sued, and who have paid large damages for breaches of covenant committed after they assigned, would have no remedy. And the defendant, although he had the benefit of the estate, would not be bound either to pay rent or perform the covenants. It would be pregnant with great injustice if we were compelled so to decide. I think, however, that we are "justified, by the principles of the common law in holding that the defendant is liable in this form of action." [608]

LITTLEDALE, J. I think sufficient evidence was given of the execution of the lease, for the reasons already stated by the court. The next question is, whether an action be maintainable at all; and if it be, then whether, in point of form, it should have been case or covenant. Upon the question, whether any action be maintainable, under the circumstances stated in the declaration, by the original lessee against the assignee, I own, for some time I had considerable doubt. There is no instance of any such action in any of the books. On the first view of it, there does not appear to be between the lessee who assigns his whole interest, and the assignee, that privity which is necessary to maintain any action whatever. The practice in the profession has been for the lessee to take from the assignee a bond or a covenant to indemnify, and not merely to assign by a deed-poll. But at the same time, it appears to me that, on principle, an action on the case may be maintained by an original

lessee against his assignee. If an action were not maintainable where no bond or covenant has been taken, the consequence would be, that if the original lessor chose to sue the lessee, and not the assignee, the lessee would be left without any remedy whatever, and would have to pay the rent during the whole term, and be answerable for breaches of covenant, although the assignee occupied, and committed those breaches. There does, therefore, appear to be very good reason why such an action should be maintainable. Then it is said, if any action will lie, it must be an action of covenant; but it appears [609] that in this case the assignment has "been made by deed poll executed by the assignor, and not by the assignee. I therefore think that covenant will not lie. An action of covenant will lie by the lessee against the lessor upon the word "*demise*" in the lease; but that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term, and therefore if the lessee be ousted during the term, an action of covenant will lie by him against the lessor; but the word *assign* in this deed poll does not import any covenant or contract on the part of the assignee, but is a mere description of the interest conveyed. It is true that the lessee does not assign the term generally, but that he assigns it subject to the payment of the rent and the performance of the covenants. The assignment being by deed poll does not however contain any contract on the part of the assignee, and in order to enable the assignor to maintain covenant against the assignee, there must be a contract under seal by the latter. But it is said that the plaintiff ought to have brought *assumpsit*, that being the form of action best adapted to his case. *Assumpsit* lies where a party claims damages in consequence of a breach of promise not under seal. That promise may either be express or it may be implied from a legal obligation to do a particular act. Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action. But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, [610] still an action on the case founded in *tort* is the "more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action; and that form of action in which the real cause of action is most accurately described, is the best adapted to every case. If the plaintiffs in this case cannot say that the defendant undertook to pay the rent and to perform the covenants, and has not done so, *assumpsit* is not the form of action the best adapted to his cause of complaint. If a regular contract to indemnify had been executed, or there had been any express promise by the assignee to pay the rent and perform the covenants, and a breach of that promise, then an action of *assumpsit*, founded upon that breach of promise, would lie by the lessee by reason of the damage thereby sustained, and would be the more proper form of action. The very ground of the action would be that the plaintiffs were damaged by reason of their having to perform that which the assignee ought to have performed. But in that case the action would be founded upon the promise to indemnify. Here there having been neither an express contract to indemnify, nor any express promise to perform the covenants, I think an action on the case, founded upon a breach of duty, is more proper than an action of *assumpsit* founded upon the breach of a supposed promise. The ground of the present action is the damage resulting to the plaintiffs from a default of duty by the defendant. The duty was not to be performed to the plaintiffs, but to the original landlord in respect of the land. But the interest which the defendant had was derived from the plaintiffs, and it is in consequence of the neglect of duty by the defendant that the plaintiffs

*have been damned, the original landlord having recovered against them damages by reason of breaches of covenant contained in the lease, committed after they assigned to the defendant. A breach of duty in the defendant, and a damage resulting therefrom to the plaintiff, is a proper subject for an action on the case in *tort*. For these reasons I agree that the rule for a new trial, or for arresting the judgment, must be discharged.

Rule discharged.

JOHN FROST, Clerk to the Commissioners under the Local Paving Act, 12 G. 3, c. 69, v. JAMES BOLLAND, et al., Assignees of MARSH, STRACEY, FAUNTLEROY, and GRAHAM, Bankrupts.

Where, by statute, it was enacted, "that in case any treasurer, collector, officer, or other person appointed by the commissioners having the control of the pavements of any places mentioned in the act, for the collection and receipt of moneys to be collected and received by virtue of any rates and assessments, &c., shall happen to become bankrupt before he shall have fully paid and satisfied all moneys received by him or them, for or in respect of any such rates or assessments, or for or on account of the commissioners, &c., the assignees shall pay in full all the money due to such commissioners, (if the bankrupt's estate be sufficient,) in preference to all debts, except those due to the king: Held, that bankers employed by the commissioners, without any actual appointment, were within the words "other persons" used in this section, as being in the nature of treasurers, and that inasmuch as the statute did not require the appointment of treasurers, collectors, &c. to be in writing, the employment was equivalent to an appointment.

The same statute enacted, that the commissioners might sue in the name of their clerk for the recovery of any penalty or rate, or any other sum or sums of money at any time due and payable from or by any water or gas company, or commissioners of sewers, or any other person or persons, due or payable by virtue of any local act or that act: Held, that the commissioners might sue in the name of their clerk to recover from the assignees of their banker the balance in his hands at the time when he became bankrupt.

DEBT by the plaintiff, as clerk to the commissioners appointed to carry into execution the local paving act 12 G. 3, c. 69, against the defendants, who are assignees of *Marsh, Stracey, Fauntleroy, and Graham*, bankrupts under separate commissions, to recover the "sum of 1070*l.* 12*s.* due, as received by the bankrupts to the use of the commissioners, and which the defendants, it was insisted, were liable, as such assignees, to pay under provisions in the general metropolis paving act 57 G. 3, c. 29, s. 51, and which entitles commissioners for paving to a preference to other creditors. The declaration contained special counts, and also a general *indebitatus* count, founded on the 57 G. 3, c. 29, s. 120. The defendants pleaded the general issue *nil debent*, on which issue was joined. At the trial before *Abbott, C. J.*, at the *Westminster* sittings after last *Trinity* term, a verdict was found for the plaintiff for 1070*l.* 12*s.*, subject to the opinion of this court upon the following case. The local and public act 12 G. 3, c. 69, appoints commissioners for paving or otherwise improving certain streets, and other public passages and places in the parish of *St. Pancras, Middlesex*. The 4th section enacts, "that it shall and may be lawful to and for the said commissioners, (the previous section nominating the commissioners at the time of passing the act, and directing the appointment of commissioners in future,) or any seven or more of them, at any meeting to be held in pursuance of that act, to appoint one or more treasurer or treasurers, clerk or clerks, collector or collectors, surveyor or surveyors, with such allowances as they shall judge reasonable, and may also from time to time appoint such other officer or officers as they shall find necessary and convenient, and

shall or may take security from all such persons for the due execution of their respective offices, and may from time to time remove all or any of the said officer or officers, or other person or persons, and appoint others in the room of such of them as shall be so removed." The 76th section enacts, "that *613] the collector or collectors of the rates and assessments aforesaid shall pay the money as he or they shall receive the same, to the treasurer or treasurers for the time being to the said commissioners." The 77th section enacts, "that as soon as conveniently may be after the treasurer or treasurers of the said commissioners shall at any time have received the sum of 500l. of the moneys appointed to be received by him or them, by virtue of and for the purposes of this act, he or they shall from time to time pay the same into the hands of such banker or bankers as the said commissioners, or any seven or more of them, shall for that purpose direct, in the name and on the account of the said commissioners; and the same shall be disposed of by order of the said commissioners, or any seven or more of them, for the purposes of this act, and not otherwise." The 79th section enacts, "that four times at least in every year an account, from the book or books to be kept by the collector or collectors, of the sum or sums of money as shall be so assessed, shall be fairly stated and signed by the collector or collectors, and delivered by him or them to the said commissioners, who are hereby empowered to give a discharge to the said collector or collectors for all such moneys as he or they shall have truly accounted for; and in case any treasurer or treasurers, collector or collectors, officers or other persons, shall happen to die or become bankrupts, before he or they shall have fully paid and satisfied all the moneys by him or them received by virtue of this act, then and in every such case the executors, administrators, or other legal representatives, person or persons possessing the estate and effects of every such treasurer or treasurers, collector or collectors, officer or officers, or *614] other person or persons, or the assignee or assignees of such bankrupt, shall, out of such estate and effects, pay unto the treasurer or treasurers for the time then being to the said commissioners, all such sums of money as shall be in the hands of such persons respectively at the time of his or their death, or at the time of suing out any commission of bankrupt against him or them, and not paid over; or so much thereof as the said estate or effects will extend to pay, &c.; and in case of non-payment of the same by the space of ten days after the same shall have been demanded, it shall and may be lawful to and for the treasurer or treasurers for the time being to such commissioners, and he and they are hereby directed and required, in his or their own name or names, to commence one or more action or actions in any of his majesty's courts of record at *Westminster*, against such executors, administrators, assignee or assignees, or other persons as aforesaid, for the recovery of the same." The general metropolis paving act 57 G. 3, c. 29, s. 47, enacts, "that the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district within the jurisdiction of this act, may at any meeting or meetings appoint a clerk or clerks, and may appoint one or more collector or collectors of the rates and assessments, and an inspector or inspectors of the pavements within their parochial or other districts, and such other officer or officers for the execution of this act or of the local act or acts of parliament relating to the paving of such parochial or other district exclusively, or jointly with any other matters or objects, as such commissioners, trustees, or other persons shall think proper; and may from time to *615] time remove them, or any of them, and appoint other persons in his or their stead as they shall think it necessary or convenient." The 51st section enacts, "that in case any treasurer, collector, officer, or other person appointed by the commissioners or trustees, or other persons having the control of the pavements of the streets and public places in any parochial or other district within the jurisdiction of this act, for the collection and receipt of the moneys to be collected and received by virtue of any rates and assessments

which may be made for or towards the expenses of paving and keeping in repair the pavements of any streets and public places within such parochial or other district, either exclusively or jointly with, or for, or towards any other objects or purposes, shall happen to die or become bankrupt before he or they shall have fully paid and satisfied all moneys received by him or them for or in respect of any such rates, or assessments, or for or on account of the commissioners or trustees, or other persons by whom he or they shall have been appointed; then and in every such case, if such treasurer, collector, officer, or other person shall die, the executors, administrators, representatives, or other persons possessing the estate and effects of every such treasurer, collector, officer, or other person appointed by the said commissioners or trustees, or other persons having the control of the pavements of the streets and public places within such parochial or other district; or if he shall become bankrupt, then the assignee or assignees of the estate and effects of such bankrupt shall, out of such estate and effects, pay to the said commissioners or trustees, or other persons having the control of the pavements of the streets and public places within such parochial or other district as aforesaid, or to such person or persons as they shall *from time to time direct to receive the same, all [¶616 such sum and sums of money as shall have been collected or received by such treasurer, collector, officer, or other person appointed by the said commissioners or trustees, or other persons as aforesaid; and which shall be due and owing from him to the said commissioners or trustees, or other persons as aforesaid, by whom he or they shall have been so appointed, at the time of his death, or at the time of the suing out any commission of bankruptcy against him, and not paid over, or so much thereof as the said estate and effects of such treasurer, collector, officer, or other persons appointed by the said commissioners or trustees, or other persons as aforesaid, who shall so die or become bankrupt, will extend to pay, and in preference to any other debt or debts except debts due to the king's majesty, &c. And in case of non-payment of all and every such sum or sums of money by any executor, administrator, assignee, or other person as aforesaid, for the space of ten days after the same shall have been demanded by or on the behalf of the said commissioners or trustees, or other persons by whom such treasurer, collector, officer, or other person dying or becoming bankrupt had been appointed, it shall and may be lawful to and for the said commissioners or trustees, or other persons having the control of the pavements within such parochial or other district, by whom any such treasurer, collector, officer, or other person had been appointed, to commence one or more action or actions in any of his majesty's courts of record at Westminster against such executor or administrator, assignee, or other person as aforesaid, for the recovery of the same sum or sums of money." The 120th section enacts, "that the said *commissioners or trustees, [¶617 or other persons having the control of the pavements in any streets or public places, in any parochial or other district within the jurisdiction of this act, may sue and be sued in the name of their respective clerks for the time being; and that all actions or suits that the said commissioners or trustees, or other persons having the control of the pavements in any streets or public places, in any such parochial or other district, may at any time or times hereafter direct to be brought for the recovery of any penalty or rates, or any other sum or sums of money from time to time or at any time due or payable, from or by any water or gas companies or commissioners of sewers, or any other person or persons, due or payable by virtue of any local act or acts of parliament relating to their respective parochial or other district, or of this act, or for or in respect of any other matter or thing relating to such local act or acts of parliament, or to this act; may be brought in the name of such clerk or clerks respectively for the time being in any of his majesty's courts of record at Westminster by action of debt," &c. The 138th section enacts, "that neither any act or acts of parliament relating either exclusively to the paving or repairing

the pavement of the streets or public places in any parochial or other districts within the jurisdiction of this act, or relating thereto jointly with any other object or purpose, nor any clause, matter, or provision therein contained shall be hereby repealed."

On the 1st of *July*, 1819, the office of treasurer to the said commissioners became vacant by the death of *John Jones*, Esq., after whose death no treasurer was appointed by the said commissioners, and on *July 8th*, 1819, Messrs. *Marsh, Sibbald, Stracey, Fauntleroy*, and *Graham*, (the persons then composing the firm of *Marsh & Co.*) were appointed bankers to the said commissioners, by an appointment which was and is as follows : " Resolved, that Messrs. *Marsh, Sibbald, Stracey, Fauntleroy*, and *Graham*, of No. 6, *Berners Street*, be appointed bankers to this commission, and that the collector do weekly pay into their hands on the account of this board all moneys accruing to the commissioners ;" signed, " *John Frost*, clerk to the commissioners." This entry appears in the book of the proceedings of the commissioners, and the appointment was made at a meeting at which fourteen commissioners were present. In or about *September*, 1819, *Sir James Sibbald*, a partner in the said firm, died, and after his death the business was continued by the other partners. The said commissioners under the said local paving act, and as such commissioners, after the death of *Sir James Sibbald*, continued to employ the said Messrs. *Marsh, Stracey, Fauntleroy*, and *Graham*, but without any new appointment, as the bankers of the said commissioners, and in the course of such employment the said Messrs. *Marsh, Stracey, Fauntleroy*, and *Graham*, before the 16th of *September*, 1824, received moneys of and belonging to the said commissioners amounting to the sum of 1070*l. 12s.* for the use of the said commissioners, being moneys collected and received by the collectors of the said commissioners in virtue of the rates and assessments made under and by virtue of the said first-mentioned act. On the 16th of *September*, 1824, the said Messrs. *Marsh, Stracey*, and *Graham*, being respectively traders, and subject to the bankrupt laws, and having committed acts of bankruptcy, a valid commission of bankruptcy was issued against them on a sufficient petitioning creditor's debt, and they were duly declared bankrupts, and the said defendants were duly chosen and appointed and became *their assignees as such bankrupts ; and on the 29th of *October*, 1824, a separate commission was issued against the said *Fauntleroy*, and he was duly declared a bankrupt, and the said defendants were duly appointed his assignees on the 7th of *November*, 1824. At the times when the said Messrs. *Marsh, Stracey*, and *Graham*, and the said *Henry Fauntleroy*, respectively became bankrupts, they were indebted to the said commissioners in the said sum of 1070*l. 12s.* That the said defendants as such assignees of the said Messrs. *Marsh, Stracey, Fauntleroy*, and *Graham*, jointly as well as separately, have received and were possessed of from and out of the joint estate, and also out of the respective estates of the said Messrs. *Marsh, Stracey, Fauntleroy*, and *Graham*, more money than will be sufficient to pay and satisfy to the said commissioners and the said plaintiff the said sum of 1070*l. 12s.* On the 25th of *January*, 1825, the said commissioners by their then and present clerk, the said plaintiff, did duly in writing demand by and on the behalf of the said commissioners of and from the said defendants, so being such assignees as aforesaid, the payment of the said sum of 1070*l. 12s.*, and after ten days had expired from the time of such demand this action was commenced by the said plaintiff, who was then and still is the clerk of the said commissioners by them duly appointed, in his name by the express directions and authority of the said commissioners.

Chitty, for the plaintiff. Three objections were made at *Nisi Prius* to the recovery of the plaintiff. First, that he had no power to sue in this case. Secondly, that bankers are not within the 51st section of the *12 G. 3, c. 89. Thirdly, that the bankrupts were never duly appointed bank-

ers to the commissioners after Sir J. *Sibbald* died. As to the first, it is clear that the 120th section of the general act gives the commissioners power to sue in the name of the clerk for all debts due to them, and not merely for those which are particularly specified. Secondly, by the words "other persons," in the 79th section of the 12 G. 3, c. 69, the local paving act are sufficient to give the commissioners a prior claim in the event of the insolvency of a banker, having their moneys in his hands, as well as in the case of the officers particularly enumerated, and the 51st section of the general act clearly gives such priority. Thirdly, the statute does not require an appointment of bankers to be in writing, and therefore, the employment of *Marsh & Co.*, after Sir J. *Sibbald* died, is sufficient to make the assignees liable.

Bolland, contra. The 71st section of the 12 G. 3, c. 69, provides, that in case any treasurer, collector, officer, or other person shall die or become bankrupt, having the moneys of the commissioners in his hands, they shall have a priority of claim. Now the words "other persons" must apply to persons *eiusdem generis* with those specified, and such a construction will not include bankers. Then, secondly, the latter part of the same section provides that the treasurer shall sue in his own name, and although the act does not say what shall be done if there be no treasurer, (which in this case appears to have been the fact,) still the commissioners might sue in their own names. The general act, section 51, giving a priority of claim, does not expressly give it against the assignees of bankers, in that as well *as in the local act, bankers must, [*621 if at all, be included in the words "other persons." Section 120, of the 57 G. 3, c. 29, gives the commissioners power to sue in the name of their clerk for penalties and rates, and in certain other cases particularly specified, but this case is not amongst them. Thirdly, it appears that originally *Marsh & Co.*, had a written appointment as bankers to the commissioners, and no new appointment was ever made after Sir J. *Sibbald* died. Now when one of several partners retires, all contracts made with the old firm are at an end, *Weston v. Barton*, 4 *Taunt*. 673.

Abbott, C. J. I am of opinion that the power to sue in the name of their clerk, given to the commissioners by the 57 G. 3, c. 29, s. 120, cannot be limited in the manner contended for on behalf of the defendants, but that it includes the present case. With respect to the priority of claim given to the commissioners in certain events, I agree that the words "other persons," means persons *eiusdem generis* with those before mentioned, but it seems to me that bankers are so, being virtually, although not nominally, treasurers. Lastly, as the statute does not require that bankers shall have a written appointment, I think that a new appointment in writing was not necessary after Sir J. *Sibbald* died, but that the employment of the then firm as bankers was equivalent to an appointment, and sufficient to make their assignees liable to pay the present demand in full.

Postea to the plaintiff.

*JAMES DOUGAN, Clerk to the Commissioners for paving certain Parts of the Parish of ST. PANCRAS, v. BOLLAND, et al., Assignees of MARSH, et al., Bankrupts.

Where bankers employed by commissioners of pavements had received on account of the commissioners certain exchequer bills, which they afterwards sold, and received the proceeds, and before this money had been paid to the commissioners, became bankrupts: Held, that the commissioners were entitled, under the 57 G. 3, c. 29, s. 51, (set out in the last case) to recover in full from the assignees of the bankrupts the balance due to them; for that the section referred to was not confined to moneys received by virtue of rates or assessments, but included all moneys received "for and on account of the commissioners," and when the bankers sold the exchequer bills, they must be considered as having received the proceeds to the use of the owners of the bills.

DEBT brought by the plaintiff, as clerk of the commissioners appointed to carry into execution the local paving act 50 G. 3, c. 147, against the defendants, who are assignees of *Marsh, Stracey, Fauntleroy, and Graham*, bankrupts, under separate commissions, one against *Marsh, Stracey, and Graham*, and another against *Fauntleroy*, to recover the sum of 1999*l.* 11*s.* 5*d.*, as received by the said bankrupts to the use of the said commissioners, and which the defendants, it was insisted, were liable, as such assignees, to pay under the provisions in the general metropolis paving act 57 G. 3, c. 29, s. 51, which entitles paving commissioners to preference to other creditors. The declaration contained special counts, and also a general *indebitatus* count founded on the 57 G. 3, c. 29, s. 120. Plea, the general issue, on which issue was joined. At the trial, before *Abbott, C. J.*, at the *London* sittings in last *Trinity* term, a verdict was found for the plaintiff for 1999*l.* 11*s.* 5*d.*, subject to the opinion of this court upon the following case: The local paving act 50 G. 3, c. 147, appoints commissioners for forming, paving, and otherwise improving certain streets and other public passages *and places in the parish of *St. Pancras*, in *Middlesex*, which are or shall be made upon ground belonging to *Joseph Lucas, Esq.* The 3d section enacts, that the commissioners or any five of them shall put the act in execution. The 11th section enacts, that the commissioners shall by writing under their hands appoint a treasurer, clerk, and surveyor. The 64th section directs, that the commissioners may sue in the name of their clerk. The 51st section of the general public act 57 G. 3, c. 29, gives a preference to the commissioners of paving before all other creditors in the event of bankruptcy of the treasurer or other persons therein mentioned. (See the section set out in the last case.) On the 20th of *June, 1810*, at a meeting of the commissioners under the said first mentioned act, certain proceedings took place, of which the following is a copy, as entered in the book of the commissioners kept in pursuance of the act: "At a meeting of the commissioners held at the *Boot* public-house, on the estate, on *Wednesday*, the 20th of *June, 1810*, present (here the names of fourteen commissioners were inserted, and also a copy of a notice of the meeting which had been given,) Resolved, that Mr. *Fauntleroy*, be appointed treasurer to this commission." Then followed other resolutions, and the entry concluded as follows: "Resolved, that this meeting do adjourn to *Wednesday*, the 18th of *July*, at two o'clock precisely. (Signed) *James Burton.*" The said *Henry Fauntleroy*, from the 20th of *June, 1810*, until his bankruptcy, was and continued to be a partner in the late banking-house of Messrs. *Marsh & Co.*, consisting of the said *Marsh, Stracey, Fauntleroy*, and the other persons hereinafter mentioned.

The said commissioners under the local paving act also, as such *commissioners, employed Messrs. *Marsh & Co.*, as the bankers of the said commissioners as such commissioners, and a pass-book was kept, debiting *Marsh, Sibbald, Stracey, Fauntleroy, and Stewart*, to the commissioners for paving the estate of *Joseph Lucas, Esq.*, which pass-book was headed or entitled as follows:

"Drs.

Marsh, Sibbald, Stracey, Fauntleroy, The commissioners for paving the
and *Stewart.* estate of *Joseph Lucas, Esq.*"

Crs.

M. Stewart retired from the partnership in the year 1814, and Sir *J. Sibbald*, another of the partners above named, died in the month of *September*, 1819. *Graham* became a partner with the survivors on the 1st of *May*, 1814, and *Marsh, Stracey, Fauntleroy*, and *Graham* continued from that time to be employed as the bankers of the commissioners until the time of their bankruptcy; and, as such bankers, *Marsh, Stracey, Fauntleroy*, and *Graham*, on the 4th of *June*, 1824, received exchequer bills of and belonging to the commissioners, and for and on their account as such commissioners, amounting in value to the sum of 1750*l.* 17*s.* 2*d.*, and a clerk of the bankers delivered to the commissioners a receipt as follows:

"No. 6, Berners Street, 4th June, 1824.

Received on account of the *Lucas* paving, seventeen hundred pounds in exchequer bills.

For Messrs. *Marsh, Stracey, Fauntleroy*, and *Graham*, £1700.

Joe. GOLIGHTLY.."

Marsh, Stracey, Fauntleroy, and *Graham*, as such bankers of the commissioners, afterwards, and before they became bankrupts as hereinbefore mentioned, received the "proceeds of the said exchequer bills, amounting to 1750*l.* 17*s.* 2*d.*, which sum, on the 13th of *September*, 1824, being the time [625 of the bankruptcy of *Marsh & Co.*, remained in their hands, together with the further sum of 248*l.* 14*s.* 3*d.*, which latter sum was the balance of the banking account in favor of the said commissioners, and which sum of 248*l.* 14*s.* 3*d.* was collected and received by virtue of rates and assessments made under and by virtue of the said first-mentioned act. On the 18th of *September*, 1824, a commission of bankrupt duly issued against *Marsh, Stracey*, and *Graham*, and subsequently, on the 29th of *October*, 1824, another commission duly issued against *Fauntleroy*, and the defendants were duly appointed, and became assignees under both commissions, as stated in the declaration. The defendants, as such assignees of *Marsh, Stracey, Fauntleroy*, and *Graham*, jointly as well as separately, have received, and are possessed of, from and out of the joint estate, and also out of the respective estates of *Marsh, Stracey, Fauntleroy*, and *Graham*, more money than will be sufficient to pay and satisfy to the commissioners and the said plaintiff the said sums of 1750*l.* 17*s.* 2*d.* and 248*l.* 14*s.* 3*d.* On the 25th of *January*, 1825, the commissioners by their then and present clerk, (the plaintiff,) did in writing demand, by and on the behalf of the commissioners, of and from the defendants, as such assignees as aforesaid, the payment of the said sums of 1750*l.* 17*s.* 2*d.* and 248*l.* 14*s.* 3*d.*; and after ten days had expired from the time of such demand this action was commenced.

Chitty, for the plaintiff, was stopped by the court.

**F. Pollock*, contra, contended, that this case differed from the last, [626 because the eleventh section of the local act, 50 G. 3, c. 147, required a treasurer to be appointed, in writing under the hands of the commissioners; that the appointment of *Fauntleroy* not being signed was bad, and that the bankrupts, *Marsh & Co.*, could not be considered as treasurers, as they had no appointment. Secondly, that the plaintiff could not, in this action, recover the amount of the exchequer bills, for that it did not appear that the money was raised by rates and assessments; and if it was, still the proceeds could not be considered as money received on account of the commissioners: they should have brought *trover* for the bills.

Chitty, in reply, contended, that it was not necessary to show any appointment. That the case disclosed a dealing between the commissioners and the bankers in the ordinary manner, as between a banker and his customers, and

that the 120th section of the public act gave the commissioners a right to receive in full the balance in their favor, and that the money produced by the sale of the exchequer bills was money had and received to the use of the commissioners.

Cur. adv. vult.

The judgment of the court was, on a subsequent day in this term, delivered by

ABBOTT, C. J. In this case it appears that the bankrupts, *Marsh & Co.*, had no appointment in writing as bankers to the commissioners, but were employed by them in the same manner as by private individuals. *Fauntleroy* was appointed treasurer; it is true, that this appointment was not made under the hands of the commissioners, or in the manner pointed out by the eleventh *section of the local act, but an appointment in writing is not required [§ 627] by the general act 57 G. 3, c. 29. *Fauntleroy*, however, did not act as treasurer during the period in question; the moneys of the commissioners were paid into the house of *Marsh & Co.* The question then arises, whether a banker so employed is within the 51st section of the 57 G. 3, c. 29. That section shows clearly, that the legislature contemplated the payment of moneys belonging to the commissioners, to other persons besides treasurers and collectors; it speaks generally of *persons appointed by the commissioners*, and does not require such appointments to be in writing. The words are, "That in case any treasurer or collector, officer, or other person appointed by the commissioners, for the collection and receipt of moneys, &c. shall happen to die or become bankrupt before he or they shall have fully paid and satisfied all moneys received by him or them for or in respect of any such rates or assessments, or for or on account of the commissioners, &c.," the assignees of such bankrupt shall pay the commissioners in preference to any other debt, except debts due to the king. We think that this section does apply to bankers, and that the employment of them by the commissioners is equivalent to an appointment, the statute not requiring it to be in writing. Then comes the question as to the two sums. Upon reading the fifty-first section, we think it is not confined to money received by virtue of rates or assessments, but that it extends to all moneys received for or on account of the commissioners. Now with respect to the sum of 1750*l.* 17*s.* 2*d.*, it is stated, that on the 4th of June, 1824, *Marsh & Co.* received exchequer bills of and belonging to the commissioners, and for [§ 628] and on their account as such commissioners, amounting in value to 1750*l.* 17*s.* 2*d.* Afterwards, and before their bankruptcy, *Marsh & Co.* received the proceeds of the exchequer bills, amounting to the sum before mentioned, which remained in their hands at the time of the bankruptcy. When they sold the bills and received the proceeds, they must be considered as having received the money for the use of the owners of the bills. The other sum of 248*l.* 14*s.* 3*d.* was received on account of rates and assessments. We are, therefore, of opinion, that the plaintiff is entitled to recover both sums; and as this was a dealing between the commissioners and the house at large, the verdict may be entered against the defendants, as assignees of the joint estate.

Postea to the plaintiff.

STUDDY v. SANDERS, et al.

Where a contract was made between *A.* and *B.*, whereby *A.*, having a quantity of apples, agreed to sell his cider to *B.* at a certain price per hogshead, to be delivered at *T.* at a future time, and to lend such pipes as he had for the use of the cider, to be manufactured on his, *A.*'s premises, and to be paid for before it was removed, and *A.*, in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by *B.* to manufacture the cider on *A.*'s premises, and before the cider was completely manufactured, it was seized by the excise-officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as *B.*'s property, together with the casks, and in *assumpsit* for goods sold and delivered, brought by *A.* against *B.*, it appeared that the word *cider*, at the place where the contract was made, meant the juice of the apples as soon as it was expressed: it was thereupon held, that the contract must be construed to have been for the sale of cider in that sense of the word, and that the property passed to *B.* as soon as the apple juice was delivered to his servant. Secondly, that it was *B.*'s duty to enter the premises, and as through his default it became impossible for *A.* to deliver the goods at *T.*, the failure to do so did not bar his action. Thirdly, that *A.* might recover in this action the price of the casks lent to the defendant.

INDEBTATUS assumpsit, brought to recover the sum of 50*l.* 16*s.*, the sum of 38*l.* 16*s.*, part thereof, being the price of two hundred and twenty-one hogsheads of cider alleged to have been sold by the plaintiff to the defendant, the sum of 110*l.* 1*s.*, other part thereof, being for the loan or hire, and for the price of certain casks furnished by the *plaintiff, according to the contract set forth in the case, and the sum of 12*l.* being money paid by the plaintiff [629] to the use of the defendants. At the trial before *Burrough, J.*, at the *Devon* Summer assizes, 1823, a verdict was found for the plaintiff, subject to the opinion of this court, upon the following case. The plaintiff, in the year 1819, was possessed of a considerable quantity of apples, the growth of his own land, cultivated by himself; and he, on the 29th of *October*, 1819, entered into the following contract with the defendants, who were cider merchants, carrying on business at *Bristol*. "It is agreed, on this 29th of *October*, 1819, between *Thomas B. Studdy*, (the plaintiff,) and *W. Sanders & Co.*, (the defendants,) that the aforesaid *Studdy* has sold his cider at 35*s.* per hogshead, to be delivered at *Totness*, in the spring of the year 1820, and the cider or wine-pipes that he has empty for the use of the said cider, to be manufactured in premises of his, the said *Studdy's*; and for the lent of such casks the aforesaid *Sanders & Co.* are to pay 1*s.* per hogshead, in addition to the aforesaid 35*s.*, in all 36*s.* per hogshead; and the said 36*s.* per hogshead is to be paid, one moiety at *Christmas* next, and the other half before the cider, or any part, is taken from the said *Studdy's*. Signed, *Thomas B. Studdy, William Sanders & Co.*—N. B. The aforesaid *Studdy* is to put the said casks lent in good repair for working; and it is expected that the cider will be from two to three hundred hogsheads; if more, *Sanders & Co.* agree to take it. And if *Sanders & Co.* want to take or draw off the premises any of *Studdy's* casks, they are to pay 30*s.* per pipe for them." After the making of the above contract, the defendant, *Sanders*, engaged one *Hunt*, at a salary of 1*l.* per week, to *manufacture the cider for the defendants, and gave him directions to apply [630] for such articles as he might want to his, *Sanders'*, brother, and to other persons named by *Sanders*, and to obtain what money he wanted from the plaintiff; and *Hunt* accordingly obtained from the plaintiff sums of money to the amount of 12*l.* The apples were afterwards pounded, and the juice expressed by the plaintiff's servants; and the juice, or *cider*, as it is called in *Devonshire*, was by the plaintiff's servants then put into casks, partly belonging to the plaintiff, and partly provided by *Sanders*, and delivered to *Hunt* upon the plaintiff's premises, for the purpose of being manufactured there. *Hunt* was directed by *Sanders* to be particular in receiving the cider from the plaintiff's people, to see that he had the proper measure, and that the casks delivered to him were full. The whole process of manufacture was in the hands of *Hunt*,

and of a person employed by him, by the defendants' directions, and *Hunt* procured brimstone casks, and other articles required from the persons named by the defendant, *Sanders*, and according to his directions. *Sanders* occasionally attended, and gave directions to *Hunt* about the manufacture of the cider, and nothing remained to be done by the plaintiff to the cider after the delivery to *Hunt*, except what, if any thing, the contract required; but the plaintiff claimed to be entitled to prevent the removal from off his premises, until he should be paid the price. *Hunt* was on *Studdy's* premises manufacturing the cider for twelve weeks, when the same was seized as hereinafter mentioned; the racking was not finished, it was in different stages of its progress. Between the date of the contract and the time of the seizure hereinafter mentioned, two hundred and twenty-one hogsheads of cider had been expressed *by the plaintiff's servants, and delivered to *Hunt*, and he had, during that interval, been employed in manufacturing the cider. After the delivery of the cider to *Hunt*, nothing remained to be done to it by the plaintiff except as aforesaid; whatever was further required was to be done by *Hunt*. Cider, in the course of manufacture, diminishes in quantity after the average of six or eight gallons per hogshead.

By the statute of 3 G. 3, c. 1, s. 25, it is enacted, "that every person who shall, after the 25th of *March*, 1763, sell any quantity of cider or perry, or either of them, in less quantity than twenty gallons at a time, whether the same be made from fruit of his own growth, or from bought fruit, shall be deemed and taken to be a dealer in cider and perry, and a retailer thereof, and shall be subject and liable to the duty of four shillings per hogshead for such quantity of cider and perry so sold, over and above all other duties payable for cider and perry sold by retail; and that every dealer in and retailer of cider and perry, and other persons receiving into his custody any quantity of cider and perry, or either of them, for sale, and every person who shall buy any fruit to make into cider or perry, or either of them, for sale, shall make a true and particular entry in writing of the several and respective storehouses, rooms, cellars, vaults, and other place and places by him made use of for the making and keeping of cider and perry, or either of them, at the office of excise within the compass or limits whereof such respective storehouses, rooms, cellars, vaults, and other place or places shall be situated, on pain of forfeiting the sum of 50*l.* for every such storehouse, room, cellar, vault, or other place which, from and after the said 25th of *March*, 1763, shall be made use of by any such dealer or retailer, receiver or maker respectively, without making such entry thereof as aforesaid." And by the 42 G. 3, c. 93, s. 17, it is further enacted, "that in case any of the goods, wares, merchandize, or commodities for or in respect whereof any duties of excise are imposed by any act or acts of Parliament in force immediately before the passing of this act, shall be fraudulently deposited, hid, or concealed in any place or places whatsoever, with an intent to defraud his majesty of any of the duties of excise by any such act or acts of Parliament imposed for or in respect thereof, all such goods, wares, merchandizes, and commodities respectively shall be forfeited, together with the packages containing the same, and shall and may be seized by any officer or officers of excise." The plaintiff's premises were not entered. *Hunt*, never saw the plaintiff before he applied to him respecting the cider in question. At the time the communication took place between *Sanders* and *Hunt*, *Sanders* told him he had bought the plaintiff's cider, but that he, *Hunt*, might as well say to any body who enquired, that he, *Hunt*, was the plaintiff's servant, as defendants did not wish it to be publicly known that they had bought the cider, as they had given a longish price for it. An accident took place during the manufacturing of the cider, the floor gave way, and four or five hogsheads of the cider were lost, which are not included in the demand in this cause. On the 3d of *January*, 1820, the officers of excise came to the plaintiff's premises, and informed the plaintiff that they had come to search

for cider belonging to *Sanders*, a dealer, whereupon the *cider in question, amounting to two hundred and twenty-one hogsheads, was shown to them, and they were informed by the plaintiff that such cider had been sold by him to the defendants, but that he did not consider the cider as the property of *Sanders & Co.*, the defendants, until it was delivered according to the agreement, and that *Hunt* was his servant ; which statement *Hunt* confirmed. The officers seized the cider, and it was afterwards condemned in the Court of Exchequer, as being the property of the defendant, *William Sanders*, found in an unentered place, and a verdict for 750*l.* was obtained against *William Sanders*, on an information filed by his majesty's Attorney-General, for penalties under the statute of 3 G. 3, c. 1, s. 25, in respect of the omission to enter the premises where the cider was deposited ; and the same was paid by the defendants. After the making of the contract for the purchase of the cider, the same remained on the premises of the plaintiff, under the circumstances herein stated. After the seizure of the cider the plaintiff made an application to the excise for its restoration, stating the fact of sale to *Sanders* in his memorial, but claiming the cider to have been his property at the time of the seizure ; but his application was refused, *Hunt* was the servant of *Sanders*, for the purpose of receiving and manufacturing the cider, but was the servant of the plaintiff for the purpose of retaining the cider until payment should be made by the defendants of the price. The case was now argued by

Tindal, for the plaintiff. The only question is, whether the property was in the defendants at the time of the seizure. That depends upon whether any thing *remained to be done by the plaintiff before the delivery of the cider. If there was any thing to be done it became impossible by the wrongful act of the defendants. By the contract, it appears that the cider was to be manufactured on *Studdy's* premises. But although it is not expressly stated that it was to be manufactured by the defendants, yet looking at the whole of the contract, that is apparent. *Hunt*, who was to superintend the process, was the servant of the defendants. For the purposes of this contract the juice was to be considered as cider as soon as it was expressed from the apples, and the sale was complete as soon as it was put into casks to be further manufactured by the defendants. The stipulation that the cider should be delivered at *Totness*, may be relied on by the defendants, but that was only to fix the time of payment, and not the completion of the sale, for half the price was to be paid at *Christmas*, and the residue on removal. The agreement to remove the goods in the Spring, was only to show that the price should be payable at that time. But if those words imposed on the plaintiff a duty to deliver at *Totness*, then it is a sufficient answer that the defendants, by their own wrongful act, rendered it impossible. They cannot, therefore, set up as a defence that the cider was not delivered at that place, *Co. Lit.* 207, 1 *Roll. Abr.* 453, l. 50. The plaintiff was not in fault. The law does not require a man to enter a place where he merely presses the apples ; the defendants who made the cider ought to have made the entry. The record in the Exchequer being a proceeding *in rem*, is a finding that the property was in the defendants. That court had the exclusive right to determine the question ; the record is therefore conclusive, *Scott v. Shearman*, 2 W. Bl. 977, *Hughes v. Cornelius*, 2 Show, 232, and in many cases the record of a foreign court of admiralty has been held conclusive, See 1 *Stark. on Ev.* 238. [635]

F. Pollock, contra. The property never vested in the defendants ; the plaintiff, therefore, had not any right to sue by virtue of the contract, neither did the seizure and condemnation give him any such right. The plaintiff does not claim to be paid for that which during the process was lost by accident, and he cannot be in a better situation with respect to that which was lost by the seizure. Nothing was to be claimed until the manufacture was complete, and after that a delivery at *Totness*, was necessary in order to perfect the plaintiff's claim, *Astey v. Emery*, 4 M. & S. 262. The period of payment does

not touch the question. It is quite consistent that part of the price should be paid at *Christmas*, and the residue on removal of the goods from the premises, although the plaintiff was bound to make delivery at *Totness*. No cider existed at the time of the supposed vesting of the property. The whole contract was executory, the apples were merely the raw material. [Bayley, J. Suppose the defendants had taken away the goods in the first stage of the process?] Then they might have been liable to be sued for goods sold and delivered, but here they never had possession of the thing contracted for, and, therefore, according to *Tempest v. Fitzgerald*, 3 B. & A. 680, are not liable to the action. [Bayley, J. In that case there was no possession under the contract.] Neither was there here, the contract was to sell the cider when the process had been completed, and, "therefore, neither a count for goods sold and delivered, nor for goods bargained and sold, can be maintained. With respect to the seizure, it is clear that if there were any *crimen*, the plaintiff was *particeps*. But the record does not prove that the goods were the property of the defendants, they were not condemned as the goods of *Sanders*, but as goods deposited by him in an unentered place. The plaintiff stated a falsehood to the officers, which constituted the whole offence. The casks cannot be considered as goods sold and delivered, nor can the sum of 12*l.* be recovered, if both parties were in *pari delicto*.

BAYLEY, J.[†] If there had been any contrivance between these parties to hold the plaintiff out to the public as the manufacturer of cider for himself, I should have thought them in *pari delicto*; and if there had been any circumstances to satisfy a jury that the transaction was fraudulent, with a view to deceive the officers of the revenue, I should have thought the plaintiff could not recover. I do not say that the case is free from suspicion; but there is not sufficient to warrant an inference of fraud. The bargain was for the sale of the plaintiff's cider, at 35*s.* per hogshead, to be delivered at *Totness*, in the Spring of 1820, and to be manufactured on the plaintiff's premises. Now *cider* is an equivocal term. It may apply to the juice, when first expressed from the apple, or to the manufactured article when the whole process is complete. We must look to the condition and language of the parties to see what was meant. It is found in the case, that the juice, when first expressed from the apple, is in *Devonshire*, called *cider*, and, "therefore, any person looking at this contract, would suppose that to have been sold, and not manufactured cider. If it had been understood between the parties that the plaintiff was to manufacture the cider, it is probable that some contract as to the mode of carrying on the process would have been introduced. But on the contrary, when the bargain was made, *Hunt* was hired by the defendants, the juice was expressed and put into casks, part of which were the property of the plaintiff, and part were provided by the defendants. *Hunt* received from the defendant, *Sanders*, directions, which plainly show what the parties meant by the word *cider*. He was to take care that the casks were filled, when delivered to him, and was to pay according to the quantity of juice, and not of the manufactured article. The case then stands thus; the plaintiff bargains to deliver apple-juice; he bargains, also, that when it has been manufactured into perfect cider he will carry it to *Totness*; but it is not to be taken from his premises until the price has been paid. It was further agreed, that it should be delivered in the following Spring. The raw material may be considered as goods bargained and sold, or goods sold and delivered, and the plaintiff was entitled to recover, when the period fixed for payment arrived. It appears, then, that the juice was delivered to *Sanders*, upon the terms that it should be taken away and paid for in the Spring, and that *Studdy* should have a lien for the price. In the mean time a transaction occurred, by which possession of the article was taken from both parties, not by means of the wrongful act of

[†] Abbott, C. J., was sitting at *Nisi Prius*, in *London*.

the plaintiff, but of the defendants. It was their duty to enter the place where the cider was to be manufactured, and through their neglect it became impossible for the *plaintiff to carry the manufactured article to *Totness*; that [638 cannot take away his right to recover.

HOLROYD, J. I am of opinion that the plaintiff is entitled to recover. If this were a contract for the sale of cider in a manufactured state, the plaintiff would have been a dealer within the meaning of the statute, and must have entered the place and paid the duty accordingly. But no person seems to have thought him liable to that; in the understanding of the parties, the thing sold was the juice of the apples. The jury found that *Hunt* was the defendants' servant; and if so, there was not sufficient to show that the plaintiff was implicated in the fraud upon the revenue. But an objection has been taken to the form of the action, the contract being executory. I cannot accede to the argument; for I think it clear that although an action would lie upon the express contract, yet that when it was part executed and the thing delivered, *indebitatus assumpsit* was maintainable. In *Bull. N. P.* 139, it is said, "Although an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed, yet when that is done, it raises a duty for which a general *indebitatus assumpsit* will lie." I take this to be the reason for the common practice of introducing two counts in declaring upon the sale of a horse, one upon an executory and the other upon an executed contract, although it is clear the plaintiff might recover upon the last after delivery. There can be no doubt that immediately upon the delivery of the juice to *Hunt*, the property was altered, and any subsequent loss, not happening through the plaintiff's fault, must have been borne by the defendant. Then will an action lie for *the [639 price, the time fixed for payment having expired, but no delivery having been made at *Totness*? I think that does not bar the plaintiff's right of action, the default having been occasioned by the act of the defendants. If a party does all he can to perform the act which he has stipulated to do, but is prevented by the wrongful act of the other party, he is in the same situation as if the performance had been perfected. I think also that the action lies for the value of the casks; the defendant had them in use, and has not returned them.

LITTLEDALE, J. If there had been sufficient evidence to make out collusion between the plaintiff and defendants to defraud the revenue, the plaintiff could not enforce his contract in this court. But although there was ground for suspicion, fraud was not found, and we should not be warranted in presuming it. I think that the plaintiff's right to recover depends entirely upon the meaning of the word *cider*, as used in this contract. The word being ambiguous, parol evidence was admissible to explain it; and from the evidence given, I think that here it meant the apple juice, and that the property passed to the defendants as soon as possession of it was given to their servant *Hunt*. And this governs the whole case; for if the mere juice was sold, the defendant ought to have entered the premises. If the juice was sold, the payment would depend upon the quantity of that, otherwise the sum to be paid could not be ascertained until the process of making the cider was complete; and any loss in the interim would fall upon the plaintiff. The objection to the form of action depends also upon the same point; for if the juice was *sold, then as [640 soon as it was expressed from the apples, and delivered to the defendants, it was goods sold and delivered. For these reasons, I think the plaintiff is entitled to recover.

Postea to the plaintiff.

The KING v. MCKAY.

Upon a *quo warrantum* information for usurping the office of bailiff, (the being the returning officer,) of a borough sending burgesses to Parliament, but not a town corporate, judgment having been given for the crown: Held, that the relator was not entitled to costs by the 9 Anne. c. 20.

UPON an information in the nature of *quo warranto*, charging the defendant with usurping the office of bailiff, (the returning officer,) of Stockbridge, a borough sending members to Parliament, but not a town corporate, judgment had been entered for the crown; and thereupon the master of the crown-office allowed costs to the prosecutor. *Merewether*, obtained a rule for reviewing that taxation, and in *Easter* term, *Adam* and *Carter*, were heard against the rule, and *Merewether*, in support of it; but all the authorities then cited are so fully stated and considered in the judgment of the court, that it is unnecessary to report the arguments.

The judgment of the court was now delivered by

BAVLEY, J. The question in this case was whether, in an unincorporated borough sending members to Parliament, the returning officer, (the bailiff,) was within the statute 9 Anne, c. 20, and the case stood over, that the authorities upon the point might be referred to and considered. There had been a *quo warrantum* information against him, upon which the master of the crown-office had allowed costs; and the point was, whether cost were allowable or not.
 *641] This depended wholly on the statute 9 Anne, c. 20. That statute imports, by its title, to have passed to render the proceedings upon writs of *mandamus* and informations in the nature of a *quo warranto* more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs. The act recites that divers persons had intruded themselves into the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and places in *England* and *Wales*; and that where those offices are annual, it is difficult to bring the right to trial within a year, and where they are not annual, it is difficult to do so before they have done divers acts in their offices prejudicial to the peace, order, and good government within such cities, &c. It also recites that divers persons who had right to such offices, or to be *burgesses* or *freemen* of such cities, have illegally been removed or refused admittance, having no other remedy to procure admittance or restoration to their said offices, or franchises of being *burgesses* or *freemen*, than by writs of *mandamus*, the proceedings on which are dilatory and expensive; and then it provides for speedy obedience to such writs, for proceedings upon the returns thereto, and for damages and costs thereon. It then provides for *quo warranto* informations in respect of any of the said offices or franchises, it directs the mode of proceeding thereon, and provides for costs for or against the relator, and directs that the statute 4 Anne, c. 16, and all the statutes of *jeofails* shall extend to the proceedings on such writs of *mandamus* and *quo warranto* informations. The statute then recites a distinct and independent mischief, viz., the re-electing for successive years in divers counties, boroughs, towns corporate, and cinque ports, the mayor, bailiff, or other officer to whom it belongs to preside at the election, and make the return of members to serve in Parliament, where such officer is annually elected, and enacts and declares that no person who hath been in such office for one whole year shall be capable of being chosen for the year ensuing. Upon this statute the question is, whether those parts of it which relates to writs of *mandamus* and *quo warranto* informations extend to boroughs which are not corporations, and in which the officer or officers that exist have nothing to do with the government of the place, or whether they are confined to corporate places and corporate officers. The first case in which this question appears to have been mentioned, (as far as I have been able to

find,) is *Rex v. Boyles*, Fitz. 82. 2 Ld. Raym. 1559. Str. 836, where, upon a *quo warranto* information to show by what authority the defendant claimed to be one of the bailiffs of *Southwold*, which was described as an office of trust and pre-eminence, and touching the rule and government and the administration of justice within the said vill, it was urged for the defendant that the statute of *Anne*, was declaratory in what cases a *quo warranto* lay, and that this office, as described, was not within the preamble of the act. The court did not, as is supposed *arguendo* in *Rex v. Wallis*, 5 T. R. 375, decide that the office was within the statute, but denied that the statute was exclusive of cases not recited in the preamble, meaning probably that *quo warranto* informations would lie in other cases than those to which the act refers. The first important case is *Rex v. Williams*, 1 Burr. 402. The question there was not upon any distinction between corporations and boroughs which were not corporations, but upon the distinction in a corporation usurping a corporate office and "exercising a non-corporate right. The information there was to show by what authority the defendant held a court of record [*643 within the borough of *Denbigh*. The judgment was for the crown, and costs were awarded under the statute; and the question was whether the award of costs could be supported. There was no doubt but that the place, *Denbigh*, was a town corporate; but the defendant had not usurped a corporate office, he had merely exercised a non-corporate right. Lord *Mansfield* observed, that the act was meant to extend to all officers of corporations as such, but it was not within its reason or meaning that it should extend to all offices exercised within the limits of the corporation. The title could not control the body of the act, and there being no charge of usurping any office, the judgment as to the costs was wrong. *Denison*, J., stated, that "franchisees" in the act, meant corporate rights, or rights to freedom in corporations, and *Foster*, J., said it meant freedoms and rights to be members of the corporation. This case, therefore though it decides nothing expressly as to the distinction between corporations and boroughs which are not corporations, contains *dicta* that the act refers only to corporate rights, and if it be confined in corporations to corporate offices, it cannot extend to non-corporate offices in unincorporated places. In *Rex v. Marsden*, 3 Burr. 1812, *Yates*, J., says, "The statute 9 *Anne*, extends only to corporation offices." In *Rex v. Wallis*, 5 T. R. 375, the question was whether the statute applied to a *quo warranto* information against the defendants for usurping the office of constables of *Birmingham*. *Birmingham*, is not a corporation or borough, but it is a place, and the "9 *Anne*, c. 20, [*644 has the word "place," as well as "towns corporate and boroughs." There was a judgment for the crown, and costs were allowed to the prosecutor, and the question was, whether such allowance was right. The court held it was not, because the word "places" in the 9 *Anne*, c. 20, s. 1, applied only to such places as were *eiusdem generis* with those enumerated, viz., cities, towns corporate, and boroughs; for had all places been intended, the legislature would have used one compendious word to comprehend all places, and *Buller*, J., noticed the distinction between burthensome offices, such as that of a constable, and offices from which profit may be expected, such as corporate offices in corporations. He noticed also the expression by Lord *Mansfield*, in *Rex v. Williams*, that it is not within the reason or meaning of the act that it should extend generally to all offices within a corporation, and drew the inference that Lord *Mansfield*, must have thought that there was no office, not in a corporation, within the act. In *Rex v. Hall*, 1 B. & C. 237, the same question occurred as in *Rex v. Williams*, whether the statute applied to a non-corporate office (the office of register and clerk of the court of requests,) in a corporate place (the city of *Bristol*), and *Abbott*, C. J., referred to *Rex v. Wallis*, as deciding that the word "places," meant places *eiusdem generis* with those mentioned in the act, and that *Birmingham*, not being a city or town corporate, was not a place within the act, and added as his own opinion, that

"other offices," must mean offices *eiusdem generis* with those mentioned, which are *all corporate offices*. In *Rex v. Richardson*, 9 East, 469, upon a quo warranto information against the portreeve of the borough of Penryn, which is not a corporate borough, the defendant obtained a rule nisi to plead several matters, and insisted that he had a right to do so, because the borough returned members to Parliament, and was therefore within the statute of Anne, which gives a right to plead double in cases within that act; but upon cause shown, the court considered *Rex v. Wallis*, as in point, that the statute only applied to corporate offices, and discharged the rule. The case of *Rex v. Highmore*, 5 B. & A. 771, is the only case I am aware of which has come before the court, wherein a doubt appears to have been entertained upon the point. The question was, whether on a quo warranto information against the bailiff or sub-bailiff, who is the returning officer of Milburn Port, which is a borough which sends members to Parliament, but is not a corporation, the defendant was entitled to plead double: Abbott, C. J., during the argument said, the words "burgesses or freemen" seemed to confine the statute to places having burgesses or freemen, but the rule to plead several matters was made absolute, because, if the court discharged the rule the defendant would have been precluded from setting the matter right by writ of error, whereas if they made it absolute and the defendant pleaded double, the error, if it were one, would appear upon the record, and the judgment of a higher tribunal might be taken upon the point. This case, therefore, appears to have proceeded not so much upon the ground that the court had doubt, as upon the principle that the question, if any, should be open to the investigation of a court of error. And upon this state of the authorities, where there is not one that expresses any doubt, where one, viz., *Rex v. Richardson*, is in point, and where every other except that of *Rex v. Highmore*, which is no authority either way, proceeds avowedly upon the principle that the statute applies only to corporate offices (and there can be no corporate office but in a corporation,) the error in those decisions must be palpable, and the words of the statute very plain and unequivocal, before we can act in opposition to the principle upon which those decisions proceed. But when we consider that the word "boroughs" in the title of the act may be satisfied by referring it to the last section, which prohibits the choice of a returning officer for two successive years, and that in that preamble which introduces the provisions for writs of *mandamus* and quo warranto informations, we find mention made of the peace, order, and government of the place, with which a bailiff as returning officer has nothing to do, and of burgesses or freemen, which occur only in corporations, we think it impossible to say that it is clear the provisions as to writs of *mandamus* and quo warranto informations apply to unincorporated boroughs, and on the contrary it appears to us that they apply wholly to *corporate offices in corporate places*. The consequence is that the rule must be made absolute.

Rule absolute.

Replevin. Avowry, that the defendant demised the close, in which, &c., (amongst others,) to A. B., and because the cattle were there he distrained them for rent-arrear. Plea in bar, that the cattle were not levant and couchant upon the close, in which, &c.: Held, on demurrer, that the plea was bad; first, for not showing how the cattle came upon the land; secondly, for not stating that they were not levant and couchant upon any part of the lands demised.

Replevin. Avowry, that defendant was seized of the close in question, and demised it, amongst others, to A. B., and for rent in arrear distrained the cattle

in question, being in the close in which, &c. Plea in bar, that the cattle were not levant and couchant on the close in which, &c. Demurrer, assigning for causes, that the plea in bar did not state that the cattle escaped into the place in which, &c., by the default of the owner or tenant thereof; and that it was not averred in the plea, owing to what cause, or under what circumstances the cattle came upon the close in which, &c. Joinder in demurrer.

Richards, in support of the demurrer. 'The plea in bar is bad, for it tenders an immaterial issue. That the cattle were not levant and couchant is no protection against a distress for rent, unless they came upon the land through the default of the tenant or the owner. The only instance of such a plea is in *Kempe v. Crews*, 1 Ld. Raym. 167; and there, *Treby*, C. J., said that it would be bad on demurrer. Here, the defendant has adopted that course.'

Mauls, contra. It is contended, that levancy and couchancy is material only when the cattle come upon *the land by the default of the tenant or owner; but that is not so. In 3 Bl. Com. 8, it is said: "With regard [*648 to a stranger's beasts which are found on the tenant's land, the following distinctions are taken. If they are put in by consent of the owner of the beasts; they are distrainable immediately afterwards for rent-arrear, by the landlord. So, also, if the stranger's cattle break the fences and commit a trespass, by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts, for the wrong committed through his negligence. But if the land were not sufficiently fenced so as to keep out cattle, the landlord cannot distrain them till they have been levant and couchant on the land." In this latter case, levancy and couchancy is material, although the tenant or owner be not in default. *Blackstone* then goes on to say, that where the lessor or his tenant is in default, cattle coming upon the land cannot be distrained, until after notice has been given to the owner, and he neglects to remove them. The passage in *Kempe v. Crews*, which is relied upon, was merely an *obiter dictum*, and the actual determination of the court was in favor of the plaintiff.

Richards, in reply. In the passage immediately preceding that which has been read from 3 Bl. Com., it is said, that all things upon the land are *prima facie* distrainable for rent. The owner of the cattle should, therefore, show in his plea in bar the special matter upon which he relies as a protection from that liability.

**Bavley*, J.† I am of opinion that this plea in bar is bad. It is a general rule that all things upon the premises are distrainable for rent- [*649 arrear. There are exceptions to that rule; but he that wishes to avail himself of the exception must bring himself within it. The mere want of levancy and couchancy is not sufficient to protect the cattle from a distress. If the cattle are upon the premises by the consent of the owner, or through his default, levancy and couchancy is immaterial. Now it is to be presumed, that the circumstances under which the cattle come upon the premises are within the knowledge of the owner; he, therefore, should state them. The case of *Kempe v. Crews* is a clear authority upon this point. There, trespass was brought for taking the plaintiff's cattle. The defendant justified taking them upon land demised by him to one *W.* for rent-arrear. Replication, that they were not levant and couchant. Defendant took issue upon that, and after it was found for the plaintiff, he moved for a repleader, which was refused, because the issue might be material; and a repleader is never granted, unless the issue must be immaterial. But it was admitted in argument that the replication would have been bad on demurrer; and *Treby*, C. J., expressly says, "that if the defendant had demurred upon the replication it would have been ill." There is another objection in this case: the defendant avows, stating that the tenant held the close in which, &c. amongst other lands; the plaintiff pleads in bar that the

† *Abbott*, C. J., was sitting at *Nisi Prius*, in London.

cattle were not levant and couchant on the close in which, &c.: that might be true, and yet they might have been so upon some part of the lands demised.

***HOLROYD, J.** I agree that the plea in bar is bad on both grounds.
***650]** It is a general rule, that all things on the land are distrainable for rent-arrear. An avowry is therefore good, merely stating that the cattle were upon the land. If the owner wishes to avail himself of an exception, he must bring himself within it.

Judgment for the defendant.†

† *Littledale, J., had gone to Chambers*

HURST, et al. v. JENNINGS.

A bond, upon the face of it, appearing to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breaches or executing a writ of inquiry: Held, first, that this was a bond substantially conditioned for the performance of an agreement, within the 8 & 9 W. 3, c. 11, s. 8, and that the obligees ought to have assigned breaches.

Secondly, that the indenture, by virtue of which the judgment was entered up, was, in legal effect, a *cognovit actionem* within the meaning of the third section of the 3 G. 4, c. 39, or if not, that it was a contrivance to defeat the provisions of that statute, and the indenture not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the court, upon an application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn.

THIS action was brought upon a bond dated the 13th of November, 1824, in the penal sum of 10,000*l.*, conditioned for payment to the plaintiffs of 8000*l.*, and interest, on the 13th of January, 1825. By an indenture of the same date, stamped with a 12*l. ad valorem* stamp, and made between the defendant of the one part and the plaintiffs of the other part, reciting that the defendant was then justly and truly indebted to the plaintiffs in the sum of 3500*l.* or thereabouts, ***651]** for goods sold and delivered, and money lent and advanced "by them to him, and for a considerable part whereof plaintiffs had received, as a security, various bills of exchange and notes of hands not then at maturity; and that defendant, the better to enable him to carry on his trade and business, had occasion to raise a considerable sum of money, and for the purpose of raising the same had applied to the plaintiffs, who had agreed to draw upon the defendant five several bills of exchange for 1000*l.* each, to bear even date with the indenture, and to be made payable respectively at twelve, fifteen, eighteen, twenty-one, and twenty-four months after date; and which bills of exchange being accepted by the defendant, they, the plaintiffs, had agreed to get discounted, and to hand over the proceeds thereof unto him the defendant. And then, after reciting the bond, it was by the indenture witnessed that for declaring the purposes for which the bond was executed, it was agreed between the parties, and the defendant did thereby declare that it should be lawful to and for the plaintiffs to commence an action upon the said bond or obligation, and proceed to judgment thereon whenever they should think fit; and that upon judgment being obtained, they should be at liberty, according to their will and

pleasure, at any time, and from time to time, to issue one or more execution or executions upon the judgment as they might be advised and deem expedient. And the parties declared and *agreed* that the bond was so made, and that any judgment obtained thereon should stand and be, as a security for payment to the plaintiffs, on demand and without any deduction or abatement whatsoever, of all such sums of money as then were or might *thereafter* become due from the defendant to the plaintiffs for goods sold and delivered, or to be sold and delivered, or "for moneys advanced or paid, or to be advanced or paid by them, or any or either of them, to, for, or on account of the said five bills of exchange, or to, for, or on any other account, or on behalf of the defendant, or which the plaintiffs had, or might become liable for, or engage to pay for the defendant, or for which he the defendant should at any time thereafter become indebted to the plaintiffs on any account whatsoever, with lawful interest; and also for the purpose of effecting a full and complete *indemnity* to them in respect thereof. On the 21st of January, 1825, the plaintiffs commenced an action upon the bond, and obtained judgment by *nil dicit*; which judgment was signed on the 3d of February, 1825. On the 14th of January, 1826, the plaintiffs caused an execution to be sued out upon the judgment, under which execution the sheriff levied upon the goods and chattels of the defendant for 847*3*. 12*s.* 10*d.*, besides sheriff's poundage. The goods and chattels seized under the execution remained upon the premises of the defendant on and after the 3d of February, 1826. On that day a commission of bankrupt was awarded against the defendant, under which he was declared a bankrupt, and a provisional assignment of his estate and effects executed by the major part of the commissioners. A rule *nisi* had been obtained calling upon the plaintiffs to show cause why this execution should not be withdrawn.

Rumball, now showed cause. The question intended to be raised is, whether under the statute 6 G. 4, c. 16, s. 108, the execution is void. In *Taylor v. Taylor*, Ante, 392, * the court decided that such an execution was not wholly void under this statute, and refused to set it aside. [The court here suggested that the question was of very general importance, and admitted of too much doubt to be decided upon motion, and intimated that it might be fit to state the facts in a special case for the opinion of the court.]

F. Pollock, in support of the rule, stated that there were two other grounds on which the execution should be withdrawn. The first was that the judgment and execution thereon were void by the statute 3 G. 4, c. 39, s. 1,† because the indenture was in the nature of a warrant of attorney to confess a judgment, or a *cognovit actionem*, and had not been registered pursuant to that act. Secondly, that there had been no suggestion of breaches or writ of inquiry, as required by the statute of the 8 & 9 W. 3, c. 11, s. 8.

**Rumball*. The indenture is not a warrant of attorney to confess judgment. A warrant of attorney is an authority or warrant given to

† The 3 G. 4, c. 39, s. 1, recites, that injustice was frequently done to creditors by secret warrants of attorney, to confess judgments for securing the payment of money whereby persons in a state of insolvency were enabled to keep up the appearance of being in good circumstances; and the persons holding such warrants of attorney had the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of their creditors, and for remedy thereof enacts, "That if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defences and interments thereon, in case such warrant of attorney shall be given to confess judgment in the court of K. B., or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of dockets and judgments in the court of K. B."

Sect. 2, enacts, "that if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within the said space of twenty-one days from the exe-

some attorney to confess a judgment in an action against the person giving it at the suit of a particular plaintiff. Nor is it a *cognovit actionem*; for that is an admission by a defendant, in a suit already commenced, of the right of the plaintiff to recover in that action. If so, it is not within the words of the act of parliament; and therefore even if it were in its effects an evasion of the provisions of the statute, it would not be void. A warrant of attorney is irrevocable, *Odes v. Dr. Woodward*, 2 Ld. Raym. 766; 1 Salk. 87. The party taking it has, therefore, an indefeasible right to enter up judgment, and take out execution *at any time*. It is in its effect equal to a judgment. A *cognovit actionem* has the same effect. This indenture amounts, at most, to a covenant not to defend an action on the bond, and would not exclude the jurisdiction of the court, *Kill *v. Hollister*, 1 Wils. 129. The defendant might, notwithstanding this covenant, have defended the action. The indenture therefore is very different in its effects from a warrant of attorney or *cognovit actionem*, and is not within either the words or the meaning of the statute. Secondly, the court will not set aside this execution on motion. The statute, section 2, enacts, "that such warrants of attorney, and the execution thereon, shall be deemed fraudulent and void against the assignees; and such assignees shall be entitled to recover back and receive for the use of the creditors of the bankrupt, all and every the moneys levied or effects seized under and by virtue of such judgment and execution." If the execution be void, there is no necessity for the court to order it to be withdrawn, for the assignees may bring an action for the goods seized under the execution, and it will be no defence to such an action. In an action the question would receive a more solemn decision, and the parties might carry the cause into a court of error; of which privilege a decision of the question on motion will deprive them.

ABBOTT, C. J. This is an application to the court, in terms, to compel the plaintiff to withdraw an execution, or in effect to set aside an execution. The only object of this application is to vacate the execution, not the judgment. If we see that the execution has issued on a judgment, which has been obtained by means of a contrivance, devised to evade the provisions of an act of parliament or any rule of the common law, we ought not to allow the execution to continue in force so as to have *that effect*. I am clearly of opinion *656] that the bond and indenture, by virtue of which the plaintiffs were authorized to enter up judgment and sue out execution, were devised with the intention to evade the provisions of the statute 3 G. 4, c. 39. That statute, in order to give publicity to warrants of attorney to confess judgment, enacts, that such instruments shall be registered in the manner therein mentioned, within twenty-one days after the execution thereof. It appears that in this case the defendant, on the 14th of November, 1824, executed a bond conditioned for the payment to the plaintiffs of 8000*l.* and interest on the 13th of January, 1825, and that by an indenture, of the same date with the bond, reciting that the defendant was indebted to the plaintiffs in the sum of 3500*l.*, and that he had occasion to raise more money, and had applied to the plaintiffs for that purpose, it was witnessed that for declaring the purposes for which the bond was executed, it was *agreed* between the parties that it should be lawful to the plaintiffs to commence an action on the bond, and proceed to judgment when they should think fit, and that upon judgment being obtained they should, at their

cution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back, and receive, for the use of the creditors of such bankrupt at large, all and every the moneys levied or effects seized under and by virtue of such judgment and execution."

Sect. 3, after reciting that the object of the said provision might be defeated by any person giving a *cognovit actionem* instead of a warrant of attorney to confess judgment, enacts the same provisions as to every *cognovit actionem* given by any defendant in any personal action as were before enacted with respect to warrants of attorney.

will and pleasure, at any time issue one or more execution or executions upon the said judgment; and it was further agreed that that judgment should be a security, not only for moneys already advanced, but for any moneys which might thereafter be advanced. The deed, therefore, authorizes the plaintiffs, without giving any notice to the defendant to commence the action, to proceed to judgment, and issue execution. If this is not a case within the very words of the act of parliament, the judgment, by virtue of which the execution has issued, has been obtained by means of a contrivance used for the purpose, "and calculated to have the effect, (if it be allowed to remain in force,) [*657] of defeating the provisions of that act of parliament; and on that ground I think the execution which has issued upon that judgment ought not to stand. If it were allowed to continue, the contrivance would have the effect of defeating another very wholesome act of parliament, the 8 & 9 W. 3, c. 11, s. 8, which requires that the plaintiffs shall suggest breaches in all actions upon bonds conditioned for the performance of covenants and agreements. This is a bond conditioned nominally for payment of a sum certain, but substantially conditioned for the performance of an agreement, that the plaintiffs shall be at liberty to enter up judgment, and issue execution for any moneys which may thereafter become due from the defendant to the plaintiffs. I think this is a case within the statute, and that the plaintiffs were not entitled to issue execution, without having first assigned breaches. The rule for withdrawing the execution must be made absolute.

HOLROYD, J. I think that this execution ought to be set aside. This is a case either directly within the act of parliament, or the deed and judgment were a contrivance to defeat the provisions of it. By the first section every warrant of attorney must be filed within twenty-one days after execution in the manner therein mentioned. By section two, "if it has not been filed within that time, it is to be deemed fraudulent against the assignees, under any commission of bankrupt afterwards issued against the party giving the warrant." It is clear, therefore, that if the instrument executed in this case had been a warrant of attorney instead of a bond "and indenture, the judgment and execution [*658] would have been void against the assignees, because the provisions of the statute had not been complied with. Section three, recites, that the former provision may be defeated by a person giving a *cognovit actionem* instead of a warrant of attorney to confess judgment, and enacts that every *cognovit actionem*, unless filed in like manner, shall be void against the assignees. It appears to me, that the deed set out in the affidavit has the legal effect of a *cognovit actionem*, for it enables the plaintiffs, without giving any previous notice to the defendant, to commence an action against him, and to proceed to judgment, and to issue execution when they shall think fit. There is nothing in this deed to prevent the plaintiff's saying that the defendant has confessed the action. I incline, therefore, to think, that this is a case within the words of the third section of the statute; but if it be not, the judgment has been obtained by means of a contrivance, devised to defeat the provisions of the act of parliament, and I think the execution sued out upon a judgment so obtained ought not to be permitted to stand.

LITTLEDALE, J. The bond in this case, upon the face of it, purports to be a bond for the payment of a sum certain; but by an indenture of the same date, it appears to be conditioned for the performance of an agreement. For it is there stated, that it was declared and *agreed*, that the plaintiffs should be at liberty to enter up judgment when they thought fit; and that such judgment should be a security, not only for moneys then advanced, but for all sums to be thereafter advanced. If that agreement had been incorporated in the condition of the bond, it is quite clear that the plaintiffs must have assigned [*659] breaches. And although parol evidence is not admissible to show that the condition of a bond is different from that which the words of it import, yet, as in this case, the purposes of the bond are declared, by an instrument of as

high a nature, executed on the same day, I think this a bond conditioned substantially for the performance of an agreement within the words of the act; and I think it clearly within the mischief intended to be remedied. One of the objects of the statute was, to take away the necessity of proceedings in equity, to obtain relief against an unreasonable demand of the whole penalty, where small damages only had accrued. If such a case as the present had occurred before the statute, the defendant would have been compelled to seek relief in equity. I think this a case within the words and the object of the statute 8 & 9 W. 3, c. 11, s. 8, and that this rule for withdrawing the execution must be made absolute.

Rule absolute.

Marryat, F. Pollock, and Justice, were to have argued in support of the rule.



In an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias*, the sheriff proved that he had seized all the goods of the debtor under a *fieri facias* in another suit, before the plaintiffs' writ was delivered to him. The plaintiffs, in answer, proved that the judgment upon which the first execution was sued out was entered up upon a warrant of attorney fraudulently executed by the debtor, in order to defeat the plaintiffs' execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff, on the first day of the next term, was served with a rule to return the writ of *fieri facias* under which he had first levied. He did not give any notice to the plaintiffs, by whom the second *fieri facias* had been sued out, that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff, at whose suit the first *fieri facias* had been sued out: Held, that this was misconduct in the sheriff, and rendered him liable to the plaintiff in the second execution.

Quare, Whether the sheriff, if not guilty of such negligence or misconduct, would have been liable to the action.

This was an action against the defendant, the late sheriff of Surrey, for a false return of *nulla bona* to a writ of *fieri facias* indorsed to levy 20*l.* upon the goods of *R. Gooch*. Plea, not guilty. At the trial before Abbott, C. J., at the London sittings after Michaelmas term, 1825, the following appeared to be the facts of the case: On the 17th of December, 1824, the defendant seized the goods of *Gooch*, by virtue of a *fieri facias* sued out upon a judgment obtained by one *Knight*. On the 20th of December, a *fieri facias* indorsed to levy 20*l.* upon the goods of *Gooch*, was sued out by the plaintiffs upon a judgment obtained by them in Michaelmas term, 1824, for 400*l.*, and the writ was delivered to the defendant to be executed on the 20th of December. The defendant having previously seized the goods of *Gooch*, under the execution at the suit of *Knight*, made a return of *nulla bona* to the plaintiffs' *fieri facias*. On the 29th of December, the plaintiffs gave notice to the defendant to retain the amount of the levy or proceeds of the goods and effects levied under the judgment and execution in the cause of **Knight v. Gooch*, as proceedings would be taken for setting aside the judgment and execution. The defendant having proved that he had levied all *Gooch's* goods under the execution at the suit of *Knight*, the plaintiffs then proposed to give evidence to show that the judgment obtained by *Knight*, was fraudulent and void, upon the ground of its having been entered up by virtue of a warrant of attorney executed by *Gooch*, for the express purpose of defeating the plaintiffs' execution. The Lord Chief Justice was of opinion, that in this action for a false return against the sheriff, (who was not indemnified,) it was not competent to the

plaintiffs to show that another judgment and execution, under which the sheriff had previously levied, was fraudulent and void; but upon its being suggested that Lord *Kenyon*, had permitted such evidence to be given,† the Lord Chief Justice received the proof, but reserved liberty to the defendant to move to enter a nonsuit in case a verdict should be found for the plaintiffs. Evidence of the fraud was then given. It further appeared, that, on the first day of *Hilary* term, 1825, the sheriff was served with a rule in the cause of *Knight v. Gooch*, to return the writ. He did not give any notice to the plaintiffs that he had been served with such rule; and on the 31st of *January*, the sheriff's officer paid over to *Knight*, the sum of 58*l. 9s. 6d.*, the net proceeds of the goods levied under the execution. The Lord Chief Justice told the jury, that the only question for their consideration was, whether the warrant of attorney was fraudulently given by *Gooch* to *Knight*, in order to defeat the plaintiff's execution. If they thought it was, they ought to find for the plaintiffs, otherwise for the defendant. The jury found a verdict for the plaintiffs [662 for 58*l. 9s. 6d.*. A rule *nisi* for entering a nonsuit was obtained in *Hilary* term, upon the objection taken at the trial.

Gurney and *Campbell*, showed cause. The question of fact raised in this action was, whether *Gooch*, had any goods and chattels in the defendant's bailiwick at the time when the *fieri facias* sued out by the plaintiffs was delivered to the defendant. If the judgment obtained by *Knight* was valid, then *Gooch* had no goods; but if it was fraudulent and void, then the goods in the possession of the sheriff still continued to be the property of *Gooch*, and the sheriff ought not to have returned *nulla bona*. The statute 27 *Eliz.* c. 5, declares judgments fraudulently contrived with intent to delay creditors, to be (as against them,) utterly void and of none effect. The jury have found that this judgment was fraudulent. It is therefore absolutely void. Now, a judgment creditor may, in this form of action, give evidence to show that a transfer of the property by the debtor is colorable, and made with a view to protect the goods from an execution; or, if an assignment has been regularly executed, so as to transfer the goods, (as between the debtor and assignee,) still a plaintiff may give evidence to show that, as against a creditor, it is void under the statute 13 *Eliz.* c. 5. *Dewey v. Bayntun*, 6 *East*, 257. But if it be competent to a plaintiff to show that a deed purporting to transfer the property is void on the ground of fraud, there is no reason why he should not also be permitted to show that a judgment is void upon the same ground. In *Crossley v. Arkwright*, 2 *T. R.* 603, a person against whom a writ of *fieri facias** was sued out was in possession of the goods under a deed given in consideration of an antecedent debt, and an *annuity* payable from thenceforth; and it was held that the sheriff was warranted in returning *nulla bona*, it appearing that the memorial of such annuity was not registered according to the directions of the annuity act, and the deed being, on that account, absolutely void. In *Kempland v. Macaulay*, Peake's N. P. C. 65, the action was for a false return, and the defence was, that the plaintiff's writ was fraudulently sued out to cover the goods. But, assuming that the plaintiff cannot in this form of action dispute the validity of a prior execution under which the sheriff has levied, the sheriff in this case has made himself liable by lending himself to one of the parties. He received notice from the plaintiffs to retain the money, and having been served with a rule to return the writ, it was his duty to inform them that he had been served with that rule; but on the 31st of *January*, he paid over the money to *Knight*, without giving any such information. He has, therefore, contrary to his duty, paid over the money to a party who had no title to receive it, and must stand or fall by that person's title.

Marryat and *Comyn*, contra. Where the sheriff is indemnified by either of the execution creditors, there, although the action may be nominally against

† *Kempland v. M'Casley*, Peake's, N. P. C. 65.

the sheriff for a false return, it is substantially a suit between the respective creditors, and it is competent to either to show that the other has no title to the goods of the debtor, by proving that the transfer made by the debtor, (whether by assignment or by judgment obtained against him,) is void; but where the ^{*684]} sheriff is not ^{*}indemnified, he is not only the nominal but the substantial defendant: in such case it is no answer to a former levy to say that the process was issued fraudulently. He is the ministerial officer of the court; and is not bound to inquire into the title of the party at whose suit the execution issues. Such an inquiry would occasion great delay in the execution of process, and would subject the sheriff to an expense which he is not bound to incur. In *Tyler v. The Duke of Leeds*, 2 Stark. 218, the action was against the defendant, lord of the manor of *Wakefield*, for a false return of *nulla bona* to a mandate from the sheriff of *York*, upon a writ of *scire facias* to levy upon the goods of *J. Shaw*, at the suit of the plaintiff. The bailiff seized the goods as the joint property of *Shaw* and one *Bateman*, the latter being in possession. *Bateman*, claimed the whole of the property, and the bailiff relinquished it on being *indemnified* by *Bateman*. It was proposed, on the part of the defendant, to show that the judgment against *Shaw*, arose out of a fraudulent contrivance between the plaintiff and *Shaw*, to defraud the creditors of the latter. But Lord *Ellenborough*, seems to have thought, that, in this form of action, it was not competent to the defendant to go into evidence of collateral fraud, although he might, by direct evidence, attack the judgment; and the evidence was not received. In *Kempland v. Macauley*, Peake's N. P. C. 65, the sheriff was merely a nominal defendant, the real defendant being another creditor, who had sued out an execution against the goods of the debtor. Secondly, after the notice given by the plaintiffs, it was incumbent upon them to apply promptly to the court to set aside the execution obtained by *Knight*: they had ample ^{*685]} time for so doing, ^{*}and not having done it, the defendant might fairly conclude that they did not mean to contest the judgment.

ABBOTT, C. J. I think we are not called upon in the present case to decide the general question, whether it is competent to a plaintiff in an action against the sheriff for a false return, to show that a judgment and execution by virtue of which the goods of the debtor were previously seized, were fraudulent; because if it appears by evidence that the sheriff by himself, or by his officer, whom he entrusts with the execution of his process, lends his aid to one party, and withholds it from another, then I think the sheriff must stand or fall by the rights of that party to whom he lends his aid. It appears that on the 29th of December, a notice was given to the sheriff by the present plaintiffs, requiring him to retain the amount of the levy, and that the plaintiffs would apply to the court to set aside *Knight's* judgment. On the 23d of January, the sheriff was served with a rule to return the writ—a six-days' rule. He could not be called upon, in any course of proceeding, to pay over the money to *Knight*, till after the expiration of the sixth day. At that time his officer, not the sheriff himself, for he has never interfered, paid over the money to the attorney for *Knight*. It appears to me, that it was the duty of the sheriff, when served with the rule to return *Knight's* writ, to inform the present plaintiffs of it, that they might consider whether they could take steps promptly to set aside the judgment. If he had informed them of it, and they had taken no steps, there would have been strong ground to maintain that the sheriff was justified in obeying the first process that came to his hand. Not having so informed the ^{*686]} plaintiffs, I think the sheriff appears to have lent himself to *Knight*, and, therefore he must stand or fall by the right that *Knight* had; and *Knight* had no right, for his judgment was evidently fraudulent.

BAILEY, J. I think that the evidence was properly received, not because it had the effect of showing that the judgment under which the first execution was sued out was void, but because it showed that the sheriff did not stand indifferent between the parties, and that he wrongfully paid over the money to

one of two claimants, to the prejudice of the other, such payment being made to that one who had no right to receive it; and I think that our decision in this case will be calculated to make sheriff's act *bona fide*. Here there was a fraudulent judgment and execution, and an honest judgment and execution. The sheriff was not bound to try the question of fraud, or to decide which of the two creditors should have the preference; but he ought to have stood indifferent between the parties, and not to have lent himself to either. Having received notice from the creditors who sued out the second *fi. fa.*, that the first judgment was questionable, he ought to have given notice to them, that he had been served with a rule to return the writ, and that unless they took some steps before that rule expired, he should be forced to pay over the money to the plaintiff in the first execution. The sheriff did not adopt that course. If he had, the plaintiffs might have taken upon themselves to resist *Knight's* execution. The question then would have been between *Knight* and the present plaintiffs; instead of which the sheriff's officer lent himself too readily to *Knight*, in order to give him the preference.

*HORROYD, J. The writ of *fi. fa.* does not command the sheriff to pay over to the plaintiff the money which he levies, but to bring it into court, that it may be rendered to the plaintiff in satisfaction of his damages. It is the duty of the sheriff to retain the money in his hands, in order to allow parties to apply to the court to set aside an execution, which may be sued out for fraudulent purposes; and if the sheriff were not bound to retain the money, it might, in many instances, be mischievous. Here the officer of the sheriff paid over the money to the plaintiff in the first execution. I have entertained some doubt, in the course of the argument, whether the present plaintiffs ought not, in pursuance of the notice they gave to the sheriff, to have applied to the court, within the first six days of term, to set aside *Knight's* execution, and to have the money paid over to them. But I incline to think that it was the duty of the sheriff to have informed the plaintiffs, before he paid over the money, that he had been served with the rule to return the writ. He was, therefore, guilty of negligence in paying over the money to *Knight*; and as the latter had no right to receive it, the defendant must be answerable for the consequences of his negligence. This rule must, therefore, be discharged.

Rule discharged.^t

^t See *Saunders v. Bridges*, 3 B. & A. 93.

We have been informed by Mr. Bowles, of Shaftesbury, the attorney for the trustees of Lady Arundell, in the cause of *Dewey v. Bayntun*, (6 East, 257,) that the sheriff was indemnified.



*In the Matter of BURT.

[666

Where an award under the 9 & 10 W. 3, c. 15, was made after the *essouye* day, but before the *quarte die post*: Held, that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term next following.

An award in this case had been made on the 1st of June, 1825, under a submission which had been made a rule of court. The *essouye* day of Trinity term, was the 30th of May. A rule nisi for setting aside the award was obtained in Michaelmas term, 1825, upon certain grounds therein specified, which it is unnecessary to mention. The statute 9 & 10 W. 3, c. 15, enacts, that an arbitration or umpirage obtained by undue means shall be esteemed void, and

be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to arbitration before the last day of the next term after such arbitration made or published to the parties.

Bolland and *Sheppard*, showed cause. The award was made before *Trinity* term, and the application to set it aside ought to have been made in that term. The first day of *Trinity* term, was the 3d of *June*. The *essaign* day is no part of the term within the meaning of the act of Parliament. The object of the legislature was that either of the parties should have an opportunity of applying to set aside the award during all the days of the next term when the court is sitting. Here the party had an opportunity of making his application during all those days. The statute 32 *H. 8.*, c. 21, s. 2, enacts, that ~~1669]~~ *Trinity* term, shall begin the *Monday* next, after *Trinity Sunday* for the keeping of the *essaigns*, proper returns, and other ceremonies heretofore used and kept, and that the *full term* of the said *Trinity* term, shall begin the *Friday* next, after *Corpus Christi Day*, &c. This statute distinguishes between the *essaign* day and the full term. The statute 9 & 10 *W. 3.*, c. 15, must have contemplated the full term; that being the only term during which the complaint there mentioned could be made to the court.

Alderson, contra. The *essaign* day is in law the first day of the term, within the meaning of the statute 9 & 10 *W. 3.*, c. 15; and after the passing of that statute, a single judge regularly came, and sat in the court and heard motions on the *essaign* day. All legal acts relate to that day, and not to the *quarto die post*; and a judgment entitled of a particular term, has relation to the *essaign* day of that term, *Stanford v. Cooper*, Cro. Car. 102. In *Bolton v. Eyles*, 2 *Bro. & Bing.* 51, the *essaign* day was considered to be part of the term, so that in the interval between that day and what is commonly called full term, a bill might be filed against the Warden of the *Fleet*, which at that time could not be done during the vacation; and in a still later case of *Laidler v. Elliott*, 3 *B. & C.* 738, it was held, that that interval was to be considered part of the term within the meaning of the rule of court, *Hilary*, 26 *G. 3.*, which requires, that, in case of a surrender in discharge of bail, the prisoner shall be supersedable, unless the plaintiff shall cause him to be charged in execution, within two terms next after such surrender, and due notice thereof. These authorities to show that ~~1670]~~ the *essaign* day is in law the first day of the term, and that being so, then *Michaelmas* term, was the term next after the making the award, and the rule was obtained in proper time.

Per Curiam. The *essaign* day for some, but not for all purposes, is considered the first day of the term. In order to enter up judgment upon an old warrant of attorney, the affidavit must state not merely, that the party was alive after the *essaign* day, but after the *quarto die post*. On the other hand, there are many instances, some of which have been mentioned, where the *essaign* day has been considered the first day of the term. And upon the whole we think, that the statute 9 & 10 *W. 3.* c. 15, s. 2, which enacts, that the application to set aside an award shall be made before the last day of the *next term*, after the arbitration made, had reference to that which in legal proceedings has been generally considered the term. *Stanford v. Cooper*, Cro. Car. 102, shows, that the *essaign* day, is in law the first day of the term, and that all legal acts relate thereto, and not to the *quarto die post*. We think that *Michaelmas* term, was the term next after the award made, within the meaning of this act of Parliament, and consequently that the application to set aside the award was not too late.

The case was then heard upon the matters disclosed in the affidavits, and ultimately the rule was discharged.

Rule discharged.

*DOE on the Demise of GARNONS v. KNIGHT.

Where a party to an instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential.

Delivery to a third person for the use of the party in whose favor the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.

THIS was an ejectment brought to recover possession of certain messuages and lands in the county of *Flint*. The lessor of the plaintiff claimed the property as mortgagee under a deed purporting to be executed by *W. Wynne*, deceased. At the trial before *Garrow*, B., at the *Summer assizes* for the county of *Stafford*, 1825, the principal question turned on the validity of that deed; and the following appeared to be the facts of the case: *Wynne* was an attorney residing at *Mold*, in *Flintshire*, and had acted in that character for *Garnons* the lessor of the plaintiff, who resided at a distance of about three miles from *Mold*. *Wynne's* sister and niece lived in a house adjoining to his own at *Mold*. On the 12th of *April*, 1820, about six o'clock in the evening, *Wynne* called at his sister's house, his niece then being the only person at home, and asked her to witness or sign some parchment. He produced the parchment, placed it on the table, signed his name, and then said, "I deliver this as my act and deed," putting his finger at the same time on the seal; the niece signed her name, and he took it away with him. The deed remained on the table until he took it away. He did not mention to his niece the contents of the deed, or the name of Mr. *Garnons*. The niece had no authority from Mr. *Garnons* to receive any thing for him. It was proved by Miss *Elizabeth Wynne*, "the sister of *Wynne*, that in *April*, 1820, (but whether before [*672] or after the execution of the deed as above mentioned did not distinctly appear,) he brought her a brown paper parcel, and said, "Here, *Bess*, keep this: it belongs to Mr. *Garnons*." Nothing further passed at this time; but a few days after he came again, and asked for the parcel, and she gave it to him: he returned it back to her again on the 14th, 15th, or 16th of *April*, saying, "Here, put this by." When she received it the second time, it was less in bulk than before. *Wynne* died in *August*, 1820. After his funeral, she delivered this parcel to one *Barker* in the same state in which she received it from her brother. *Barker*, who was an intimate friend of *Wynne*, stated, that the latter in *July*, 1814, sent for him, and told him that he had received upwards of 26,000*l.* upon Mr. *Garnons'* account; and after taking credit for sums he had paid, and placed out for Mr. *Garnons*, he was still indebted to him in more than 13,000*l.* He then asked the witness, if he, as his (*Wynne's*) friend, would see Mr. *Garnons* to explain the circumstances. The witness consented, and *Wynne* then made a statement of his property; by which it appeared that after payment of his debts, including the 13,000*l.*, he would have a surplus for himself and family of 8000*l.* at the least. He desired the witness to tell *Garnons* that, although he could not pay him at that time, he would *take care to make him perfectly secure* for all the moneys due from him. Upon this being communicated to *Garnons*, he desired *Barker* to assure *Wynne*, that he would not then distress him, or expose his circumstances, but he expected that he would provide him securities for the money he, *Wynne*, owed him. This was communicated to *Wynne*, who expressed great *gratitude to *Garnons*, [*673] and said, he would take care to make him perfectly secure. After the funeral of *Wynne*, his will was produced, and with it was a paper in his own hand-writing, containing a statement of his property, and a list of various debts

secured by mortgage or bond, and among others, under the title "*mortgage*," there was stated to be a debt to Mr. *Garnons* for 10,000*l.* Miss *Wynne* soon after delivered to the witness, *Barker*, a brown paper parcel sealed, but not directed. Upon this being opened, there was inclosed in it another white paper parcel directed, in the hand-writing of *Wynne*, "Richard *Garnons*, Esq." Within it was a mortgage deed, (the same that was witnessed by *Wynne's* niece, as before stated,) from *Wynne* to *Garnons* for 10,000*l.* There was also within the white parcel, a paper folded in the form of a letter directed in the hand-writing of *Wynne* to Mr. *Garnons*. That contained a statement of the account between *Wynne* and *Garnons*, and 10,000*l.*, part of the balance due from *Wynne* to *Garnons*, was stated to be secured upon *Wynne's* property. The mortgage deed found in the parcel was then delivered to *Garnons*. It was a mortgage of all *Wynne's* real estates. It was contended on the part of the defendant that nothing passed by the deed, inasmuch as there had been no sufficient delivery of it to the mortgagee, or to any person on his behalf, to make it valid; and, secondly, because it was fraudulent and void against the creditors of the grantor under the statute 13 *Eliz. c. 5.* The learned Judge overruled the objections, and the defendant then proved that Mr. *Wynne*, in May, 1820, had delivered to him a bond and mortgage of his real estates, to secure money due from *Wynne* to him; and that by his will he devised all his estates to the defendant, *Knight*, in trust to sell and pay "his debts.

*674] It was further proved, that about the 5th of April, a skin of parchment with a 12*l.* stamp was prepared by *Wynne's* order, and for a few days he remained in his private room, with the door shut. A clerk entered the room, and found him writing upon a parchment: he afterwards locked the door. There was no draft of the mortgage in the office, and he never mentioned it. The whole of the deed was in *Wynne's* own hand-writing. He had three clerks, and deeds were in the usual course of business executed in the office, and witnessed by himself and his clerks. The learned Judge told the jury, that the first question for their consideration was, whether the mortgage to the lessor of the plaintiff was duly executed by *Wynne* the deceased; but that if they thought it was originally well executed, the question for their consideration would be, whether the delivery to Mrs. Elizabeth *Wynne* was good delivery; and he told them he was of opinion, that if, after it was formally executed, Mr. *Wynne* had delivered it to a friend of Mr. *Garnons*, or to his banker for his use, such delivery would have been sufficient to vest in Mr. *Garnons* the interest intended to be conveyed to him under it; and the question for them to decide was, whether the delivery to Miss *Wynne* was, under all the circumstances of the case, a departing with the possession of the deed, and of the power and control over it, for the benefit of Mr. *Garnons*, and to be delivered to him either in Mr. *Wynne's* lifetime or after his death; or whether it was delivered to Miss *Wynne* merely for safe custody as the depository, and subject to his future control and disposition. If they were of opinion that it was delivered merely for the latter purpose, they should find for the defendant, otherwise for the plaintiff.

A verdict having been found for the plaintiff, *675] *Campbell*, *in last Michaelmas term, obtained a rule *nisi* for a new trial, upon two grounds: first, that there had not been a sufficient delivery of the deed; and, secondly, that it was fraudulent as against creditors or purchasers within the statute 13 *El. c. 5.*, or 27 *El. c. 4.* Upon the first point he contended, that delivery was necessary to the execution of a deed; that there could be no good delivery unless made to the party intended to be benefited by it, or to some person acting on his behalf, or to a stranger expressly for his use; and he relied upon Sheppard's Touchstone, 57, where it is laid down, "that a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him, or it may be delivered to any stranger for and on the behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger without any such declara-

tion, intention, or intimation, unless it be in a case where it is delivered as an escrow, it seems this is not a sufficient delivery :" and he contended, that in this case there was not any delivery to the mortgagee, or to any person on his behalf on the 12th of April; and that the subsequent delivery to Miss *Wynne* was not sufficient, because it did not put the deed out of the control of Mr. *Wynne*, and there was no evidence to warrant the finding of the jury that Mr. *Wynne* had parted with the control.

Taunton, and *G. R. Cross*, at the sittings in banc after *Hilary* term, showed cause. It is not essential to the perfecting of a deed that it should be delivered to the party intended to be benefited by it. The law requires the solemn act of delivery in order to demonstrate beyond doubt, that the party making the instrument meant it to be his act. That cannot be shown more clearly [676 and unequivocally than by a declaration to that effect, made in the presence of the attesting witness at the time when the deed is executed. Such a declaration amounts to an absolute and formal delivery of the deed by words. There has in this case been such an absolute and formal delivery of the deed by words; and in that respect this differs from all the reported cases, where the delivery of a deed has been held to be imperfect. There is no authority to show that it is essential to a deed that it should be delivered to the party intended to be benefited by it. Upon a review of the old authorities which are collected in *Comyns' Dig. tit. Fait, (A. 8.)* and *Viner's Abr. tit. Fait*, it will appear that wherever the question has arisen as to what constitutes a good delivery in *law*, the question considered has been whether, upon the *first* delivery, sufficient has taken place to amount either to a formal or a constructive delivery of the deed. A formal delivery is where the party at the time of executing the deed uses apt words to denote his intention, and from that time it shall operate as his deed. A constructive delivery is where the intention of the maker of the instrument to become bound by it is manifested, not by any express declaration of his intention, but by some act which is considered in law equivalent to such a declaration, as, (in the following instances put in *Comyns' Digest*,) by the tradition of the deed to the *party*, or by throwing it upon the table in *his* presence, with the *intent that he should take it*, or by the party saying, "*Take it; it is sufficient for you.*" In these instances, although there is not any formal delivery of the deed, the intention of the party to perfect the deed is made manifest by the act done by him; and it is therefore considered a constructive delivery of the deed. That it is the [677 intention of the party executing the instrument which makes the act operative as a delivery is illustrated by the case of *Stanton v. Chambers*, cited from *Hale's MSS.*, in the notes to *Co. Litt. 36 a.* "The obligor seals obligation, and throws it upon the table without other circumstances; this is *not* a delivery. But if he throws it *towards the obligee, or if the obligee immediately takes it*, and the obligor says nothing, it is a delivery." The mere throwing the deed upon the table is not a constructive delivery of it, because it does not manifestly show the intention of the obligor to become bound by it, or that the obligee should have the power of availing himself of the obligation; but the throwing it *towards* the obligee, or allowing him to take it up, is a constructive delivery, because either of those acts unequivocally *denotes* the intention of the obligor, that the instrument shall take effect as his deed. And this explains why the same act may operate as a constructive delivery, if it be done towards the party himself, but not if done towards a stranger; because in the one case it may, and in the other may not be sufficient to manifest the intention of the maker of the instrument that it should operate as his deed. In *Thoroughgood's case*, 9 Coke, 137, it is stated, "that in 19 H. 8, 8 a., a difference is taken when a writing is delivered to the party himself and when to a stranger, as it was there agreed, that a writing may take effect by actual delivery to the *party* himself without any words; and as a writing may take effect by actual delivery without words, so it may take effect by words without actual delivery:

*678] as if a writing is "sealed, and it lies in a window or upon a table, and the obligor saith to the obligee, See, there's the writing, take it as my deed, and he takes it accordingly, it is a good delivery *in law*." The first instance put is that of tradition to the party ; the second instance seems to include both formal delivery and tradition. The distinction between a delivery to the party and to a stranger is commented upon in Co. Litt. 36 a. "If a man deliver a writing sealed, to the party to whom it is made, as an escrow, to be his deed upon certain conditions, &c., this is an absolute delivery of the deed, being made to the *party* himself; for the delivery is sufficient without speaking of any words, (otherwise a man that is mute could not deliver a deed,) and tradition is only requisite; and then, when the words are contrary to the act which is the delivery, the words are of none effect." There the tradition of the writing sealed to the *party* intended to be benefited by it manifests the intention of the party executing to be bound by it instantly, as much as if he had formally declared that to be his intention at the time. Lord Coke then goes on : "But it may be delivered to a stranger as an escrow, because the bare act of delivery to him without words worketh nothing." The mere tradition of a deed to a stranger does not show it to be the unequivocal intention of the party to be bound by it, but "if he delivers it *as his deed* into the *hands* of a stranger, that is sufficient." Com. Dig. tit. Fait, (A. 3.) So in Clayton's Reports, 31, it was held, if A. deliver a deed made to J. S. to J. D., though he do not say to the use of J. S., yet this is a good delivery of the deed to J. S. if he accept of it." In this instance the deed is not perfected by the act done by the party ; for the delivery "of the deed does not become *679] effectual until it is accepted by the party to whom it is made. Another instance put in Com. Dig. is, "If it be delivered *as his deed* to a stranger, to be delivered to the party upon the performance of a condition, it shall be his deed presently ; and if the party obtain it, he may sue before the condition performed." This is an instance of an absolute delivery, by formal words, to a stranger, and is an authority to show that if Mr. Garnons, in this case, had obtained the possession of this deed at any time, he might have sued upon it instantly. These authorities establish, that a deed once formally delivered is effectual in law, although a condition be subsequently annexed to it. The result of the authorities is, that the law looks to the delivery of the deed, (whether that be done by formal words or by any other act,) as manifesting the intention of the party to be presently bound by it. If that intention be manifested by a declaration in the words commonly used on that occasion, the instrument takes effect as the deed of the party from the moment when the formal delivery takes place. *Barlow v. Heneage*, Prec. in Ch. 210, *Clevering v. Clevering*, Prec. in Ch. 235 ; 2 Vern. 478, and Lady Hudson's case, there cited, are express authorities to show, that a deed once formally executed, though kept by the executing party till his death and never published, is a valid deed, and takes effect from the time of execution. *Clevering v. Clevering* shows, that the estate conveyed by such a deed not only vests upon the execution of the deed, but that it cannot be divested by matter subsequent, and that it is not competent to the maker of it to destroy its legal effect even by cancellation. *In the present case there was an absolute and formal delivery *680] of the instrument as a deed on the 12th of April, in the presence of the attesting witness. But assuming that not to be so, there was a second delivery of it to Miss Wynne, with a clearly marked and unequivocal intention on the part of the maker of it, that it should be available as a security for Mr. Garnons. Then it is said that the control retained by the grantor over this deed, although never exercised, was sufficient to defeat its effect. First, the jury have negatived the fact, that Mr. Wynne had any control over the deed. And admitting that he had, *Barlow v. Heneage*, Prec. in Ch. 210, and *Clevering v. Clevering*, 2 Vern. 478, show that where an absolute and perfect delivery has taken place, the existence of a power and control over the instrument by the

grantor is immaterial, and that the very cancellation of it will not defeat its operation.

To the argument that the deed was void under the statute of the 13 *Eliz.* c. 5, s 2, as being made with the intent to defraud creditors, it is a sufficient answer, that there was no evidence to show that any creditor was delayed or defrauded, *Estwick v. Caillaud*, 5. T. R. 420. Nor does the statute 27 *Eliz.* c. 4, make any difference. If the defendant relies upon *Wynne's* will, the question is between a creditor and a devisee, who is a volunteer, and not favored in a court of equity: if he relies upon the mortgage to him, any objection made to the mortgage to *Garnons*, is equally applicable to the other. Besides, the lessor of the plaintiff being a mortgagee, is to be considered a purchaser for a valuable consideration, and then the mortgage deed under which he claims is not within the stat. 27 *El.* c. 4.

**Campbell* and *Odnall Russell*, contra. There was no delivery of this deed on the 12th of *April*. Secondly, the delivery to Miss *Wynne*, [⁶⁸¹] at a subsequent period was not sufficient to make the instrument operate as a deed. First, a deed takes effect not from the signing and sealing, but from the tradition or delivery of it, 2 *Black. Comm.* 307, *Grendit v. Baker*, Yelv. 7, *Chamberlain v. Stanton*, Cro. Eliz. 122, *Perkins*, 187. A delivery to the party himself, or to his authorized agent, is good by the usual formal words, or without formal words, by manual tradition; but if the delivery be made to a stranger, it is necessary to make some express declaration to the effect that it is delivered for, or on the behalf of, or to the use of the party to whom it is made, *Shep. Touchst.* 57. In *Co. Lit.* 36 a, it is said, "A deed cannot be delivered to a party as an escrow, because delivery to a *party* without words is sufficient; but it may be delivered to a stranger as an escrow, because the bare delivery to him without words worketh nothing;" and afterwards it is stated, "as a deed may be delivered to the *party* without words, so may a deed be delivered by *words* without any act of delivery, as if the writing sealed lieth upon the table, and the *feoffor* or obligor saith to the *feoffee* or *obligee*, 'Go and take up the said writing, it is sufficient for you,' or 'it will serve the turn,' or 'take it as my deed,' or the like words, it is a sufficient delivery." Lord *Coke*, in all these instances speaks of a delivery to the party. These authorities establish, that a delivery to the party with or without words is sufficient, but that a delivery to a stranger without words is not sufficient, because the bare delivery to him does not show the intention of the maker of [⁶⁸²] the instrument to become bound by it. Now there was no delivery on the 12th of *April*, to the mortgagee or to his authorized agent, nor to any person to the use of the mortgagee. Mr. *Wynne*, did not part with the possession of the deed for an instant. The name of Mr. *Garnons*, was not then mentioned, and the attesting witness was wholly ignorant of the contents of the deed. The words used by Mr. *Wynne*, would have been a sufficient tradition of the instrument, if there had been any *donee* present; but as that was not the case, it was necessary to the perfection of the deed that it should be delivered to Miss *Jones*, (*Wynne's* niece,) to the use of *Garnons*. In *Shelton's* case, Cro. Eliz. 7, lessee for years granted his term by deed, which he sealed in the presence of divers, and of the *grantee* himself, and it was read at the same time but not delivered, nor did the grantee take it, but it was left behind them in the same place. And it was held, that being left behind them, and not countermanded, it was a delivery in law. But in that case the grantee was present, it was sealed to him, and left by the parties. There was not a sufficient delivery on the 12th of *April*, in this case, within any of the instances put in *Com. Dig.* tit. *Fait*, (A 3.) because it was not made either to the party or into the hands of Miss *Jones*, as in the case there cited from 2 *Rolle's Abr.* tit. *Fait*, (K 1 42.) where it is said, "If *A.* make an obligation to *J.* and delivers it to *B.*, if *J.* gets the obligation he may have an action upon it, for it will be intended that *B.* took the deed for him as his servant" That is a case,

therefore, where it was delivered to an agent having authority to receive it for *the obligee. Nor was this a sufficient delivery within the case of *Par-*
 *683] *ker v. Tenant*, cited in *Com. Dig.* from *Dyer*, 192. "A. made a bond to B. for the use of C., and putting it into C.'s hands in the presence of B., says, 'This will serve,' and that was held to be a good delivery." There it was delivered to C. in the presence of the obligee, and C. must, therefore, have been considered the authorized agent of B. for the purpose of receiving it. There certainly have been some cases in equity where a deed has been held to be binding although it has not been delivered to the party or to any person for his use, as in *Sear v. Ashwell*, 3 *Swanst.* 411, *Barlow v. Heneage*, *Prec.* in *Chan.* 210, *Clavering v. Clavering*, 2 *Vern.* 473. But this observation applies to all those cases, that the party by coming into a court of equity for relief admitted the deed to be well executed, for otherwise he might have had a remedy at law. In *Boughton v. Boughton*, 1 *Atk.* 625, the only question was, whether the will revoked the deed, and it was expressly stated that the deed was formal as to the execution. It must, therefore, be taken to have been duly signed, sealed, and delivered. In *Worrall v. Jacob*, 3 *Meriv.* 256, it was admitted that the deed of appointment had been *duly executed* by the wife; the only question was as to the effect of its remaining with her after it had been executed. The fair inference is, that it had been duly delivered, and, therefore, that case affords no argument to show that delivery is unnecessary to the due execution of a deed. In *Naldred v. Gilham*, 1 *P. Wms.* 576, it is expressly said that *Catherine*, the aunt, by indenture of covenant to stand seized, settled *684] the premises on herself for life, "remainder to her nephew *Naldred* in fee, without any power of revocation, but though the aunt bespoke two parts thereof, yet she kept both in her own possession. It is clear, therefore, that the deed was duly executed, otherwise she could not have *settled* the premises. *Clavering v. Clavering*, 2 *Vern.* 473, is the only case where the deed is not found to have been duly executed. *Cotton v. King*, 2 *P. Wms.* 357, is an authority in favor of the defendant. There Lady *Cotton*, on the eve of a second marriage, executed deeds disposing of property among children of a former marriage, and delivered them into the hands of one *Brereton*, by whom they were prepared, declaring "that she had done that for the sake of her children." The Lord Chancellor there says, "As to the Lady *Cotton*, if she had executed these deeds, and kept them in her own hands or custody, and they had been got from thence, I do not think she should have been bound by them; so if they had been placed in the hands of her agent, for her agent's are her hands." But the Chancellor relies on the fact that there were duplicates of these deeds, and that she had declared it to be her intention and desire to put this out of her power. In *Tuw v. Bury*, *Dyer*, 167, the obligor had parted with the possession of the bond. In *Murray v. The Earl of Stair*, 2 *B. & C.* 82, the bond was delivered by the obligor as his deed; but the subscribing witness said, it was agreed it should remain in his hands till all securities should be delivered up; and it was held that the jury were justified in finding that it was delivered as an escrow. So in *Johnson v. Baker*, 4 *B. & A.* 440, it was agreed by parol, before execution of a "composition deed, that it should *685] be void unless executed by all the creditors. The surety executed in the usual way as his act and deed, and it was held to be only an escrow. In *Wilson v. Balfour*, 2 *Campb.* 579, bankers while solvent, and before contemplating bankruptcy, being indebted to a particular customer, wrapt up certain securities belonging to them in an envelope inscribed with his name, and inclosing a memorandum stating that they had deposited the securities with him as a collateral security, but gave no information to the customer till the eve of their bankruptcy, when they sent him the parcel saying they must stop the next day. It was held that the customer could not retain the securities against the assignees of the bankers. Lord *Ellenborough*, there says, that the bankers only intended to deliver the bonds to the customer; the whole rested in intention;

the possession was never put out of themselves. So here the act of delivery was incomplete; the whole rested in intention. Assuming, then, that there was no sufficient delivery on the 12th of April, the question is, whether what took place afterwards, when Mr. *Wynne*, gave the deed to his sister, and desired her to keep it, amounts to a delivery. The evidence raised a strong presumption that the mortgage deed was not contained in the first parcel delivered to Miss *Wynne*. But if it had been there, the circumstance of her delivering it up again to her brother, and his retaining it several days without any objection made by her, shows that he preserved a power and control over it. When the parcel was re-delivered it was without direction, and nothing was said about Mr. *Garnons*. If *Wynne*, had intended the deed to take effect ^[*685] in his lifetime, he had ample opportunity of delivering it himself to Mr. *Garnons*, for they lived within a short distance of, and frequently saw, one another. Having, therefore, preserved a control over the deed, it must be taken that he delivered it to his sister to keep for him, and not to be held by her as the agent of *Garnons*. The jury, indeed, have found that *Wynne*, parted with the possession and control over the deed, but there was no evidence to warrant that finding. The learned Judge told them that if it was *Mr. Wynne's* intention, that the parcel should be delivered after his death to Mr. *Garnons*, that would be sufficient. That, however, would not have been an absolute delivery, but would have shown that *Wynne*, did not mean to part with the control over the deed.

But admitting this deed to have been well delivered, still it is void by the operation of the 13 *Eliz.* c. 5., against creditors, or against a subsequent purchaser by the statute 27 *Eliz.* c. 4, being a fraudulent deed within the meaning of those statutes. If it was handed over to a person to hold for Mr. *Garnons*, it was not fraudulent; but if the deed remained in the possession or power of the grantor, then it was fraudulent. That ought to have been explained to the jury. There was evidence that Mr. *Wynne*, was insolvent when he executed the deed. *Hassells v. Simpson*, Doug. 89, shows that a voluntary preference to *bona fide* creditors by deed, is an act of bankruptcy; and *Cadogan v. Kennett*, Cowper, 492, shows that if the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute.

Car. adv. vult.

**BAYLEY*, J., now delivered the judgment of the court.

There were two points in this case. One, whether there was an ^[*687] effectual delivery of a mortgage deed, under which the lessor of the plaintiff claimed, so as to make the mortgage operate. The other, whether such mortgage was or was not void against creditors or a subsequent mortgagee. Upon the first point the facts were shortly these. In July, 1814, Mr. *Wynne*, an attorney, who was seised in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (*Wynne*) had misapplied above 10,000*l.* of his (*Garnons*) money. *Garnons* answered, he relied and expected that *Wynne*, would provide him securities for his money; and *Wynne* said he would make him perfectly secure, and he should be no loser. On the 12th of April, 1826, *Wynne* went to his sister's, who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece, and used the words: "I deliver this as my act and deed." The niece, by his desire, attested the execution, and then Mr. *Wynne* took it away. The niece knew not what the deed was, nor was Mr. *Garnons*' name mentioned. In the same month of April, he delivered a brown paper parcel to his sister, saying, "Here, *Bess*, keep this; it belongs to Mr. *Garnons*." He came for it again in a few days, and she gave it him; and he returned it on the 14th, 15th, or 16th of April, saying, "Here, put this by." It was then less in bulk than

before, and contained the mortgage in question. Mr. *Wynne*, died the 10th of August following, and after his death the parcel was opened, and the mortgage found. Mr. *Garnons*, knew nothing of the mortgage until after it was so found. My Brother *Garrett*, who tried the cause, left two *questions to the jury ; one, whether the mortgage was duly executed ; the other, whether the delivery to the sister was a good delivery ; and he explained to them, that if the delivery was a departing with the possession, and of the power and control over the deed for the benefit of Mr. *Garnons*, in order that it might be delivered to him either in Mr. *Wynne's* lifetime, or after his death, the delivery would be good ; but if it was delivered to the sister for safe custody only for Mr. *Wynne*, and to be subject to his future control and disposition, it was not a good delivery, and they ought to find for the defendant. The jury found for the plaintiff. Their opinion, therefore, was, that Mr. *Wynne*, parted with the possession and all power and control over the deed, and that the sister held it for Mr. *Garnons*, free from the control and disposition of the brother. It was urged upon the argument, that there was no evidence to warrant this finding, and that the conclusion which the jury drew had no premises upon which it can be supported. Is this objection, however, valid ? Why did Mr. *Wynne*, part with the possession to his sister, except to put it out of his own control ? Why did he say when he delivered the first parcel, "it belongs to Mr. *Garnons*," if he did not mean her to understand, that it was to be held for Mr. *Garnons*' use ? And though the sister did return it to her brother when he asked for it, would she not have been justified had she refused ? Might she not have said, " You told me it belonged to Mr. *Garnons*, and I will part with it to no one but with his concurrence." The finding, therefore, of the jury, if this be a material point, appears to me well warranted by the evidence, and then there will be two questions upon the first point : one, whether when a deed is duly signed and sealed, and formerly delivered with apt words of delivery, but *is retained by the party executing it, that retention will obstruct the operation of the deed ; the other, whether if delivery from such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the person who is to be benefited by it, until after the death of the party by whom it was executed. Upon the first question, whether a deed will operate as a deed though it is never parted with by the person who executed it, there are many authorities to show that it will. In *Barlow v. Heneage*, Prec. Cha. 211, *George Heneage*, executed a deed purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, and gave bond to the same trustees conditioned to pay to them 1000*l.* at a certain day, in trust for his daughters ; but he kept both deed and bond in his own power, and received the profits of the estate till he died. He noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly. It was urged, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only. Lord Keeper *Wright* said, *these were the father's deeds*, and he could not derogate from them ; and the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only ; but that decree was, that interest should be paid upon the bond from the time when the condition made the *money payable. In *Clavering v. Clavering*, Prec. Cha. 225. 2 Vern. 473. 1 Bro. Parl. Cas. 122. Sir *James Clavering*, settled an estate upon one son in 1684, and in 1690, made a settlement of the same estate upon another son : he never delivered out or published the settlement of 1684, but had it in his own power, and it was found after his death amongst his waste papers, 2 Vern. 474, 475. A bill was filed under the set

tlement of 1690, for relief against the settlement of 1684; but Lord Keeper *Wright* held, the relief could not be granted, and observed, that though the settlement of 1684, was always in the custody or power of Sir *James*, that did not give him a power to resume the estate, and he dismissed the bill. In Lady *Hudson's* case, cited by Lord Keeper *Wright*, a father, being displeased with his son, executed a deed giving his wife 100*l.* per annum in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, cancelled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord *Somers*, dismissed the bill. In *Naldred v. Gilham*, 1 Pr. Wms. 577, Mrs. *Naldred*, in 1707, executed the deed, by which she covenanted to stand seized to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement; a copy of this deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish this copy, and to have the second settlement delivered up; and Sir *Joseph Jekyll* determined, with great clearness, for the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. It is true, Lord Chancellor *Parker*, reversed his decree; but it was not on the ground that the deed was not well executed, or that it was not binding because Mrs. *Naldred*, had kept it in her possession, but because it was plain that she intended to keep the estate in her own power; that she designed that there should have been a power of revocation in the settlement; that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon, by the deed's being made an absolute conveyance, which was unreasonable, when it ought to have had a power of revocation, and because the plaintiff, if he had any title, had a title at law, and had, therefore, no business in court of equity. Lord *Parker's* decision, therefore, is consistent with the position that a deed, in general, may be valid, though it remains under the control of the party who executes it, not at variance with it; and so it is clearly considered in *Boughton v. Boughton*, 1 Atkyns, 625. In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. Lord *Hardwicke*, considered it as valid, and acted upon it; and he distinguished it from *Naldred v. Gilham*, which he said was not applicable to every case, but depended upon particular circumstances; and he described Lord *Macclesfield*, as having stated, as the ground of his decree, that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking, (or rather of reserving a "power to revoke.") Upon these authorities, [692 it seems to me, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on *Doe v. Roberts*, 2 Barn. & A. 367, because there the brother who executed the deed, though he retained the title deeds, parted with the deed which he executed.

But if this point were doubtful, can there be any question but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit, 11 East, 623, (per Lord *Ellenborough*); and there is the strongest ground here for presuming Mr. *Garnons'* assent, because of his declaration that he relied and expected Mr. *Wynne* would provide him security for his money, and *Wynne* had given an

answer importing that he would. *Shepherd*, who is particularly strict in requiring that the deed should pass from the possession of the grantor, (and more strict than the cases I have stated imply to be necessary,) lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger *for his use and on his behalf*, *Shep.* 57. And 2 Roll. Abr. (K.) 24, pl. 7, *Taw v. Bury*, Dyer, 167 b.; 1 Anders. 4, and *Alford v. Lea*, 2 Leon, 111; Cro. Eliz. 54, and 3

[*Co. 27*, are clear authorities, that, on a delivery to a stranger for the "use
*693] and on the behalf of the grantee, the deed will operate *instanter*, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this: "If a man make an obligation to *A.*, and deliver it to *B.*, if *A.* get the obligation, he shall have action upon it, for it shall be intended that *B.* took the deed for him as his servant,

3 H. 6, 27." The point is put *arguendo* by *Paston*, Serjt. in 3 H. 6, who adds, "for a servant may do what is for his master's advantage, what is to his disadvantage not." In *Taw v. Bury* an executor sued upon a bond: the defendant pleaded, that he caused the bond to be written and sealed, and delivered it to *Calmady* to deliver to the testator as defendant's deed; that *Calmady* offered to deliver it to testator as defendant's deed, and the testator refused to accept it as such; wherefore *Calmady* left it with testator as a schedule, and not as defendant's deed, and so *non est factum*.

On demurrer on this and another ground, Sir *Henry Brown* and *Dyer*, Justices, held, that first by the delivery of it to *Calmady*, without speaking of it as the defendant's deed, the deed was good, and was in law the deed of defendant before any delivery over to the testator, and then testator's refusal could not undo it as defendant's deed from the beginning, and they gave judgment for the plaintiff, very much against the opinion of the Chief Justice Sir *Anthony Brown*, but others of the King's Bench, says *Dyer*, agreed to that judgment. It was afterwards reversed, however, for a discontinuance in the pleadings. Sir *A. Brown's* doubt might possibly be grounded on this, that the delivery to *Calmady* was conditional, if the testator would accept it; and if so, it would not invalidate the position, which alone is material here, that an unconditional delivery to a

[*stranger* *for the benefit of the grantee will ensue immediately to the
*694] benefit of the grantee, and will make the deed a perfect deed, without any concurrence by the grantee. And this is further proved by *Alford v. Lea*, 2 Leon, 110; Cro. Eliz. 54. That was debt upon an arbitration bond; the award directed, that before the feast of *Saint Peter* both parties should release to each other all actions. Defendant executed a release on the eve of the feast, and delivered it to *Prim* to the use of the plaintiff, but the plaintiff did not know of it until after the feast, and then he disagreed to it, and whether this was a performance of the condition was the question. It was urged that it was not, for the release took no effect till agreement of the releases. It was answered, it was immediately a release, and defendant could not plead *non est factum*, or countermand it, and plaintiff might agree to it when he pleased. And it was adjudged to be a good performance of the condition, no place being appointed for delivering it, and the defendant might not be able to find the plaintiff, and they relied on *Taw's* case. This, therefore, was a confirmation,

at a distance of twenty-eight years, of Taw v. Bury; and at a still later period (*33 Eliz.*) it was again confirmed in the great case of *Butler v. Baker*, 3 Co. 26 b. Lord *Coke* explains this point very satisfactorily. "If *A.* make an obligation to *B.* and deliver it to *C.* to the use of *B.*, this is the deed of *A.* presently. But if *C.* offer it to *B.*, there *B.* may refuse it in *posse*, and thereby the obligation will lose its force; (but, perhaps, in such case, *A.* in an action brought on this obligation cannot plead *non est factum*, because it was once his deed.) and therewith agrees *Hil. 1 Eliz.* *Taw's* case, S. P. Bro. Ab.

[*Donee*, pl. 29; 8 Vin. 488. The *same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels,

tels are in the donee presently, before notice or agreement; but the donee may make refusal in *ipsis*, and by that the property and interest will be divested, and such disagreement need not be in a court of record. Note, reader, by this resolution you will not be led into error by certain opinions delivered by the way and without premeditation, in 7 Ed. 4, 7, &c., and other books *obiter*.[†] Upon these authorities we are of opinion that the delivery of this deed by *Wynne*, and putting it into the possession of his sister, made it a good and valid deed at least from the time it was put into the sister's possession.

The remaining question then is this, whether this deed is void as against creditors under the 13 Eliz. c. 5, or as against defendant as a purchaser under 27 Eliz. c. 4? As to creditors, there was no proof of outstanding debts at the time of the trial, nor any proof of there being any creditor except the defendant, and he may be considered in the double character of creditor and purchaser. The facts in evidence as to him are merely these: that in May or June, 1820, Mr. *Wynne* delivered to his son a bond and mortgage for defendant and title deeds, and the mortgage and title deeds related to the same premises as Mr. *Garnons'* mortgage. What was the nature of the defendant's debt did not appear, or what was the consideration for the bond and mortgage. Whether any money was advanced when such bond and mortgage was given, or whether it was for a pre-existing debt, whether it was obtained by pressure from the defendant, or given voluntarily and of his own motion by Mr. *Wynne*, and whether the defendant knew of it or not, are points upon which there was no proof, and under these circumstances we cannot say the defendant [696 made out a case to entitle him to treat Mr. *Garnons'* deed as void under either of the statutes of *Elizabeth*. Should he be able hereafter to show that this mortgage is entitled to a preference, the present verdict will be no bar to his claim. For these reasons we are of opinion, that the rule for a new trial must be discharged.

Rule discharged.

[†] *Gould*, J., cites this doctrine, Salk. 301, in *Wankford v. Wankford*.



RUNCORN v. DOE, on the Demise of J. COOPER.

(In Error.)

Where in ejectment the plaintiff gave evidence of some acts of ownership exercised upon the land in dispute, by the lessor's ancestor, and of a fine levied by him about the same time; and the defendant proved some acts of ownership by the vicar, and gave evidence which tended to show that the land was formerly part of the church-yard; the Judge refused to leave it as a question to the jury, whether the parties to the fine had any estate of freehold, but told them that the fine was conclusive bar to the vicar. On error, held, that this was wrong, and the judgment was reversed.

An adverse possession for twenty years, is not a bar to a rector or vicar, except as against the same incumbent who submitted to such possession.

EJECTMENT for messuages and land in the parish of *Runcorn*, in the county of *Chester*. Plea, not guilty. At the trial before *Warren*, C. J., of *Chester*, at the Great Sessions for that county, in the Summer, 1823, it appeared that the premises in question consisted of a piece of land lying on the south side of the river *Mersey*, at a place where the tide flows and reflows, extending from the north side of *Runcorn* church-yard down to low water mark, and upon which some baths had been built. The lessor of the plaintiff proved, that, in

1792, his ancestor, (one *J. Cooper*,) had the land lying both to the east and the west of *Runcorn* church-yard ; that his cattle used to go down to the sea-shore, and depasture on the banks and upon the place in question, as well as other parts. There was no fence to divide it from the adjoining parts of the shore.

*697] Some other acts of ownership on his part were also proved. The plaintiff then gave in evidence the chirograph of a fine levied by *J. Cooper* in 1797, and a deed to lead the uses of the fine, which declared that it should enure to such uses as *J. Cooper* should appoint ; and, in default of appointment, to him and his heirs for ever. For the defendant, evidence was given to show that the river had made encroachments upon the shore opposite *Runcorn* church, and that the *locus in quo* had formerly been part of the church-yard, and that acts of ownership were exercised by the vicar for several years about 1780. About that time two bathing sheds were built there by permission of the town of *Runcorn* ; they remained fifteen years, and were then washed away by a high tide. The new baths were built in 1822, by subscription of several of the inhabitants of *Runcorn*. The Chief Justice having summed up the evidence so given to the jury, the foreman asked, " If the jury should be of opinion that the freehold of the place sought to be recovered in the action was in the vicar of *Runcorn*, what effect the fine would have in point of law ? " And thereupon the counsel for the defendant insisted, that it ought to be left as a question for the jury whether the parties levying the fine had, at the time of the levying thereof, any estate of freehold by right or wrong in the said place ; but the justices, (*Warren*, C. J., and *Marshall*, J.,) refused to leave such question to the jury, and delivered their opinion to the jury that, in point of law, the fine was a conclusive bar to the vicar. And the said justices, at the request of the counsel for the plaintiff, asked the jury whether *J. Cooper*, (the lessor of the plaintiff,) had since been twenty years in possession of the said place. And the jurors thereupon said they were of opinion that he had been, and that

*698] they were of opinion that the right to the said place was in the vicar *at the time of the levying the said fine. And thereupon, by the direction of the said justices, the jury found a verdict for the plaintiff. A bill of exceptions was then tendered and sealed ; and the record having been removed into this court by writ of error, the following errors were assigned, viz. that the justices delivered their opinion that the fine was a conclusive bar to the vicar, whereas it was not so ; and that they refused to leave to the jury the question whether the parties levying the fine had at the time of levying it, any estate of freehold by right or by wrong in the said place. Joinder in error.

Parke, for the plaintiff in error. There can be no doubt that the direction of the justices below was wrong. There was contradictory evidence as to the possession of the place in dispute. Then the lessor of the plaintiff sought to bind the right by giving in evidence a fine levied without proclamations, at least none were proved. That fine would be void if the parties to it had not an estate of freehold. Now, where a fine is pleaded, it may be answered by saying, that the parties had no estate of freehold ; and here the whole being at large upon the evidence, it was a question for the jury whether they had any such estate or no. It appears that the counsel for the plaintiff endeavored to get rid of the mistake, by requesting the justices to ask the jury, whether the lessor had since been twenty years in possession ; and they answered that he had. Now, in the first place, the court cannot take notice of a question so put to the jury. They have not found a special verdict, but generally for the plaintiff, and the justices never desired the jury to dismiss the question of the fine in giving their verdict. Secondly, supposing the court would *take notice of this answer, it does not show that the plaintiff is entitled to recover. The jury do not say it was an adverse possession, nor that it was continuous ; they do not say when it began, or when it ended. The demise was laid in 1822 ; the trial was in 1823. Possibly the jury might not mean to say that the twenty years had expired at the time of the demise, but at the

time of the trial. They finding nothing as to the state of the church, whether there had been a change of the incumbent during that period; and as against the church, twenty years' possession gives no title.

Cross, Serjt., contra. The question is, whether, taking the whole case into consideration, there was any misdirection. It appeared upon the evidence, that the ancestor of the lessor of the plaintiff was in possession of the place in question in the year 1792, five years before the fine was levied. *Prima facie*, possession proves a seisin of an estate of freehold, at least. In this case there was nothing to destroy the effect of that possession; the justices were therefore warranted in assuming that the parties to the fine had an estate of freehold, and then it would be a conclusive bar. [Abbott, C. J. The old bathing sheds stood for fifteen years, and were washed away twenty-one years ago; they must, therefore, have been in existence at the time when the fine was levied.] There was no evidence that they were put up adversely to the ancestor of the lessor. But supposing the direction as to the fine to be incorrect, still the plaintiff was entitled to recover, the jury having found a possession in him for twenty years. In Bull, N. P. 103, it is laid down, "If the plaintiff prove that *A.* was in the possession of the premises in question, and *that his lessor is heir to *A.*, it is sufficient *prima facie*; for it shall be intended that ^[*700] *A.* had seisin in fee till the contrary appear. And if he prove that his lessor or his ancestors had possession for twenty years without interruption, till the defendant obtain possession it is a sufficient title; for by the 21 Jac. 1, c. 16, twenty years' possession tolls the entry of the person having right; and, consequently, though the very right be in the defendant, yet he cannot justify ejecting the plaintiff."

ABBOTT, C. J. I am of opinion, that the judgment given in the court below must be reversed, and a *venire de novo* awarded. The question before us is not upon what the jury might have found, but whether the direction of the learned Judge, that the fine was a conclusive bar to the vicar, was right. It could not be so unless the possession of *J. Cooper*, who levied it, existed at that time. Upon the whole of the evidence, it is very doubtful whether it was in him or not. Then a question was put to the jury, to which they answered, that the lessor of the plaintiff had been in possession twenty years since the fine, but that they were of opinion, that at the time when the fine was levied, the right was in the vicar; and thereupon, by the direction of the justices, a verdict was found for the plaintiff. Even supposing the fact of the twenty years' possession, to have been found with all that precision, the want of which has been pointed out by the counsel for the plaintiff in error, it would be difficult to say that it remedied the direction of the learned Judge as to the other matter. But that finding was very loose, and accompanied by the observation as to the right of the vicar. Now, possession is not, in general, evidence against a rector or *vicar, unless against the same person who ^[*701] has submitted to that possession; and it does not appear in this case, whether, during the period in question, the incumbent of *Runcorn* has or has not been changed. It is said, that there was no evidence to show that the land in question was ever the property of any person but the lessor of the plaintiff, and his ancestors. But the church-yard intervened between the different parts of their property lying above the shore, and there was considerable evidence to show, that the place in question was formerly part of the church-yard. For these reasons, I am of opinion that, upon the whole finding, enough does not appear to sustain the judgment for the plaintiff below.

BAYLEY, J. I am of the same opinion. A fine is by the common law conclusive upon parties and privies, but not upon strangers, unless it be with proclamations. In the present case, no proclamations were proved to have been

^t See *Croft v. Howel*, Floud, 538, and the note by Floud. in *Stew v. Zeuch*, ibid. 375. *Barker v. Richardson*, 4 B. & A. 579.

made. But even if they had, the fine would not be binding, unless the party levying it had at the time an estate of freehold by right or by wrong. Upon the evidence, I think that the justices below were not warranted in assuming that the ancestor of the lessor of the plaintiff had any estate of freehold. (The learned judge then commented upon the evidence to show, that some time before the fine the freehold was not in *J. Cooper*, but in the vicar.) If it was in the vicar, *J. Cooper*, could not afterwards obtain the freehold by right, for the vicar had no power to alien. Then, with respect to the finding of the twenty [702] years' possession, in order to make that "availing," the finding should have been in precise and definite language. But the jury do not say whether it was adverse or not, nor do they say when the twenty years expired. That finding cannot, therefore, be made use of to support the judgment in favor of the plaintiff below.

HOLROYD and LITTLEDALE, Js., concurred.

Judgment reversed, and *caecire de novo* awarded.

The KING v. LACY, Clerk.

Where an inclosure act directed that all great tithes payable to the rector of the parish, should be extinguished, and that the commissioners should ascertain the net value of such tithes, and affix a fair clear annual rent or sum of money per acre in lieu of such tithes, and as an adequate compensation for the same to the rector: Held, that the rector was in respect of such rents, rateable to the repair of the highways.

UPON an appeal by the Rev. *Richard Lacy*, rector of the parish of *Whiston*, against an order made by a magistrate for the payment of the sum of 12*l.* 5*s.*, being the amount of an highway assessment upon him for the township of *Whiston*; the sessions confirmed the order, subject to opinion of this court upon the following case. In the 56 G. 3, an act was passed, intitled an act for inclosing lands in the parish of *Whiston*, in the county of *York*, in which act is the following clause: "And whereas it is convenient and desirable that all and singular the great tithes rendered or payable in kind or otherwise, and all ecclesiastical dues, moduses, compositions, or other payments in money or prescriptive rights whatsoever in lieu thereof which can or may henceforth arise or grow due or payable, to the said *Richard Lacy*, and his successors, rectors of the parish of *Whiston* aforesaid, for the time being, out of or from or for and in respect as well of the said several commons and parcels of waste ground by this act directed to be divided, allotted, and enclosed, as of the several and respective messuages, cottages, tofts, garths, gardens, orchards, and ancient inclosed lands and grounds, and other hereditaments situate, lying, and being within the said parish, shall be abolished and extinguished, and that in lieu thereof within so much of the said parish as lies within the said manor of *Whiston*, an adequate compensation should be made to the said *Richard Lacy*, and his successors, rectors of the parish of *Whiston* aforesaid, for the time being, by a corn rent or rents, as herein-after is mentioned, and that in lieu thereof, within so much of the said parish as lies within the said manor of *Morthen*, an adequate compensation should be made to the said *Richard Lacy*, and his successors, by an allotment or allotments of land as hereinafter also mentioned; Be it therefore enacted, that the said commissioners shall, and they are hereby required to ascertain the net value of all great tithes and moduses issuing or that may arise and renew from out of, in, or upon so much of the said commons and ancient

inclosures of the said parish as lie within the said manor of *Whiston*, with respect to each owner's or proprietor's share thereof, and to affix a fair clear annual rent or sum of money per acre in lieu of such great tithes and moduses, and as an adequate compensation and satisfaction for the same, to the said *Richard Lacy*, and his successors, rectors of *Whiston* aforesaid; and shall in and by their award hereinafter directed to be made, ascertain and distinctly set forth against the name of each owner of common allotment and ancient inclosures, at the time of making such their award, the exact measurement of each field or inclosure constituting his, her, or their property within the manor of *Whiston* aforesaid, and the *annual rents or sums of money per acre to be [*704 hereafter issuing from each field or inclosure respectively, in lieu of all great tithes and moduses as aforesaid; which said rents and sums of money shall be payable and paid forever by the several owners or occupiers thereof by four equal quarterly payments in every year; that is to say, the 12th of February, the 12th of May, the 12th of August, and the 12th of November, the first payment thereof to begin and be made on the 12th of February, in such year as the said commissioners in their award shall order or direct." The rector was to have an allotment in lieu of small tithes. In the year 1825, the Rev. *R. Lacy*, was rated for the repairs of the highways in the township of *Whiston*, at the sum of 12*l.* 5*s.* in respect of the corn rents given to him in lieu of tithes. This he refused to pay, and upon such refusal the order appealed against was made.

Tindal in support of the order of sessions. The corn rent in this case was rateable to the repair of the highways. By the 13 G. 3, c. 78, s. 45, the assessments are to be made "upon every occupier of lands, tenements, woods, *tithes*, and hereditaments within the parish, township, or place," and the only substantial question is, whether the corn rent be by substitution tithe? It is given in lieu of the great tithes, payable in kind or otherwise, and all ecclesiastical dues, moduses, compositions, or other payments. Unless there are some words expressly exempting it, this rent will be liable to all burthens to which the tithes were liable, *Loundes v. Horne*, 2 W. Bl. 1252, *Rex v. Boldero*, 4 B. & C. 467, In *Rex v. Toms*, Doug. 401, and **Chatfield v. Ruston*, 3 B. & C. 863, an express exemption from all rates and taxes was given. Perhaps the expression *net value* in the inclosure act may be relied upon; but that only means the value of the tithe, minus the expense of collecting it. It would be impossible to make an estimate of the poor and highway rates, which are fluctuating charges, so as to ascertain the net value after allowing for those rates.

Blackburne, contra. A corn rent, such as that now in question, is not rateable to the repair of the highways under the 13 G. 3, c. 78. Secondly, this rent is expressly exempted from any such charge by the act for enclosing lands in the parish of *Whiston*. No analogy exists between poor rates and highway rates, and, therefore, no legitimate inference can be drawn in favor of the present rate from the cases which have been decided upon the 43 Eliz. c. 2. That statute makes rectors and vicars liable to be rated *eo nomine*, and there was good reason for such a provision. In early times, when there was no legal provision for the poor, parsons were under a spiritual obligation to relieve them out of the profits of their livings, and, therefore, it was to be expected that the statute would make them liable to be rated for the profits of their benefices, in whatever way those profits were derived. The object of the highway act appears to have been to cast the burthen of repairing roads upon those who used them, and accordingly we find that statute-work is to be done or compounded for in proportion to the value of the lands in the occupation of the party charged, or the number of teams kept by him. This *difference between the two statutes was pointed out by this court in *Rex v. Justices* [*706 of *Buckinghamshire*, 1 B. & C. 485, where they refused to compel the justices to enforce by a distress warrant the payment of a highway rate made

upon a parson in respect of tithes which he had let. And in *Underhill v. Ellacombe*, 1 M'Lellon and Younge, 450, the Court of Exchequer seem to have thought a parson not liable to be rated under such circumstances. Secondly the inclosure act expressly exempts this rent from highway and all other rates. This exemption does not depend merely upon the provision that the commissioners shall calculate the rent upon the *net value* of the great tithes, &c., although that expression would very fairly admit of the construction now contended for ; but the statute goes on to say, that they shall affix a fair *clear annual rent* or sum of money in lieu of such tithes, &c. Now a rent cannot be *clear* which is subject to rates, and, therefore, full effect will not be given to the words of the statute, unless the order of sessions is quashed.

Cur. adv. vult.

BAYLEY, J., delivered the judgment of the court.

The question in this case was, whether certain corn rents payable under an inclosure act, in lieu of tithes and moduses, in the township of *Whiston*, were liable to be assessed to the highway rate. Two points were insisted upon in opposition to the rate ; one that the inclosure act virtually exempted them, because it fixed the rents according to the net value of tithes and moduses, and it was insisted that by net value was to be understood the value *free from rates* ; the other, that *ordinary tithes, i. e., tithes not being impropriate or appropriations of tithes, were not in any case liable to the highway rate, and that the corn rents which were payable in lieu of such tithes, were therefore, also free. Since the case of *Rex v. Boldero*, 4 B. & C. 467, it must be considered as settled that, upon the second point, the corn rents would stand upon the footing of tithes and moduses for which they were substituted, and that if the tithes and moduses would have been liable, the corn rents, unless specially exempt by the inclosure act, are liable. Are the corn rents, then, specially exempt by the inclosure act ? The parish of *Whiston*, contains two manors, the manor of *Whiston*, and the manor of *Morthen*, and the act applies to both. I collect from the case that part of the parish constitutes a distinct township, the township of *Whiston*, and it is to that township only the rate applies. The act directs that the rector, who is rector of the parish, shall have, out of the wastes in both manors, an allotment equivalent in value to all the small tithes and payments in lieu of small tithes within the said manors, regard being had to the amount of the small tithes payable out of the old inclosures and commons within each of the manors respectively. No provision is made for exempting that allotment from parochial rates, and it would, therefore, of course be liable to contribute to them. The statute then makes a provision in lieu of great tithes, and directs that compensation shall be made for what arises in *Whiston* manor, by corn rents, and for what arises in *Morthen* manor, by an allotment ; but there is no clause to exempt the allotment from its proportion of parochial burthens, and of course *it would be liable. The commissioners are directed to ascertain the net value of all great tithes and moduses in *Whiston*, with respect to each owner's share thereof, and to affix a fair clear annual rent per acre in lieu of such great tithes and moduses ; and the question is, what is here meant by the net value of the great tithes and moduses. If by *net* is meant, not only allowing for the expenses of collecting and getting in, but deducting also all parochial burthens thereon, the rents are exempt ; but if the word "net" refers only to the expenses of collecting and getting in, the act leaves them liable to the parochial burthens they would otherwise have to bear ; and it seems to us it refers to the expenses of collecting and getting in only. Those expenses may easily be computed : they will seldom vary except as the price of labor and the accidents of each season vary ; but the parochial burthens may vary in a much greater degree ; and had it been intended to exempt the rector from contributing to them in respect of the corn rent, it can hardly be supposed he would have been left liable in

respect of his allotments. The probability is, he would have been wholly exempted, or wholly liable.

Then is the highway act confined to tithes inappropriate, and proprieties of tithes? By the highway act 13 *G. 3 c. 78. s. 46*, the assessment is to be made upon every occupier of *lands, tenements, woods, tithes, and hereditaments*, within the parish; language very different from what is used in 43 *Eliz. c. 2*, for the poor rate. The assessment there is to be made upon every inhabitant, parson, and vicar, and every other occupier of lands, houses, *tithes inappropriate, proprieties of tithes*, coal-mines, or saleable underwoods. The reason of specifying tithes inappropriate and proprieties of tithes *there* might be, because every other description of tithe, all in the hands of the [709] incumbent, would come into charge under the words *parson and vicar*, and the particular descriptions of tithes might be added to take in what might be in *lay* hands, and would not be reached by the words "parson or vicar;" and the legislature might studiously have it in view to include every description of tithes, in whatever hands it might be. And in the highway act, where the legislature has used the general word *tithes*, it must extend to every description of tithes, unless a clear intention to confine it can be collected from the act. We can find no such intention, and are therefore of opinion that these corn rents, which are in substance tithe, are liable to the rate.

Order of sessions confirmed.

GOODTITLE on the Demise of DODWELL v. GIBBS.

By lease and release *M. H.* conveyed to *J. W.*, and to his heirs and assigns, certain freehold and copyhold premises, to hold the same unto the said *J. W.*, his heirs and assigns, from and immediately after the death of *M. H.*, to, for, and upon the several uses, ends, intents, and purposes therinafter mentioned: Held, that, by the premises, an immediate estate of freehold was given to *J. W.*, and that the *habendum* had not the effect of rendering the deed void as giving a freehold in *futuro*.

EJECTMENT for lands in the parish of *White Waltham*, in the county of *Berks*. Plea, the general issue. At the trial before *Burrough J.*, at the *Berkshires* Summer assizes, 1825, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case: *Martha Hatton* in her lifetime, and at the time of the making of the surrender to the use of her "will, and making such will and executing the deeds hereafter mentioned, was [710] seised of estates of inheritance in fee simple in the premises in question, consisting of a messuage and buildings, and about five acres and a half of freehold land, and three closes of land which are copyhold, situate as aforesaid, and being so seised, she on the 9th of *February*, 1768, surrendered the said copyhold premises to and for such uses, intents, and purposes, and to and for the benefit of such person and persons, and his, her, and their heirs, as the said *Martha Hatton* by her last will and testament in writing already had or at any time thereafter should limit, direct, appoint, or give the same. *Martha Hatton* duly executed a lease and release of the said freehold premises as follows: The lease without date, and the release bearing date the 29th of *July*, 1768, and made between *Martha Hatton* of the one part, and *John Westbrook* the elder of the other part, and by the latter indenture it was witnessed, that for the settling and assuring the messuages or tenements, lands, hereditaments, and premises therinafter mentioned, to and for the several uses, intents, and purposes therinafter particularly mentioned, the said *Martha Hatton* for and in consideration of the sum of ten shillings, &c. paid by the said *John Westbrook*

the elder, the receipt whereof was thereby acknowledged, and for other causes, and considerations thereunto moving, did grant, bargain, sell, alien, release, and confirm unto the said *John Westbrook* the elder, (in his actual possession then being by virtue of a bargain and sale to him thereof made for one whole year, by indenture bearing date the day next before the day of the date of the indenture of release, and by force of the statute made for transferring uses into possession,) and to his heirs and assigns, divers hereditaments, including by description the freehold and copyhold premises in question, to hold the same unto the said *John Westbrook* the elder, his heirs and assigns, from and immediately after the decease of the said *Martha Hatton*, to, for, and upon the several uses, ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same; that is to say, to the use of the said *John Westbrook* the elder (from and immediately after the decease of the said *Martha Hatton*) and *Anna* his wife, and their assigns for and during the term of their natural lives, and the life of the longer liver of them; and from and after the decease of the survivor of them the said *John Westbrook* the elder and *Anna* his wife, to the use and behoof of *John Westbrook* the younger, son of the said *John Westbrook* the elder, and his assigns, for and during the term of his natural life, without impeachment of waste, and from and after the decease of the said *John Westbrook* the younger, to the use and behoof of the first and other sons of the body of the said *John Westbrook* the younger, lawfully to be begotten severally and successively, and the heirs male of the body of such first and other sons lawfully issuing; and for want of such issue, to the use and behoof of *Hatton*, the daughter of the said *John Westbrook* the elder, and *Anna* his wife, her heirs and assigns for ever. And the said *Martha Hatton* covenanted for further assurance of the said freehold and copyhold premises to the uses aforesaid, but no surrender was made of the copyhold lands to the uses aforesaid. The lessor of the plaintiff was the daughter of *Hatton* (the daughter of *John Westbrook* and *Anna* his wife,) by *Henry Dodwell*, her husband.

*712] **John Westbrook* the elder and *John Westbrook* the younger suffered a recovery in 1774; but it was admitted that it did not bar the remainder given to *Hatton Westbrook* by the release of 1768, the only question raised being as to the validity of that deed. The case was argued on a former day in this term by

Cooe for the lessor of the plaintiff. The question turns upon the *habendum* in the deed bearing date the 29th of *July*, 1768. It is contended, that the *habendum* gave an estate of freehold in *futuro*, and is therefore void. In the granting part, the estate given to *J. W.* the elder is express and certain; it is to him, his heirs, and assigns; then follows the *habendum*, "to hold the same unto the said *J. W.* the elder, his heirs and assigns, from and immediately after the decease of the said *Martha Hatton*, to, for, and upon the several uses, ends, intents, and purposes hereinafter mentioned," &c. Now the *habendum* may very fairly be read with a stop after the words "heirs and assigns." If so, the grant would be immediate, although certain uses might arise in *futuro*. But an *habendum* is not an essential part of a deed, *Shep. Touch.* 76, and if it is repugnant to the granting part, it must be rejected. There are, indeed, cases apparently warranting a different conclusion; but upon examination it will be found that they are distinguishable from the present case. The rule is this; if an estate be granted in any premises, and that grant is express and certain, the *habendum* shall not vitiate it, for *utile per inutile non vitiatur*. But if the estate granted in the "premises be not express, but arising by implication of law, there a void *habendum*, or one differing materially from the grant, may defeat it, *Shep. Touch.* 112. *Baldwin's case*, 2 Co. 23, *Stukely v. Butler*, Hob. 168, and *Carter v. Magdwick*, 3 Lev. 339, which last case is expressly in point for the present lessor of the plaintiff. It is true that in *Buckler's case*, 2 Co. 55, where tenant for life having made a lease for years, granted *tenementa praedicta* to *C. habendum*, from the feast of the *Nativity of*

Saint John the Baptist next following, for life, the grant was held void, for that an estate of freehold cannot commence in *futuro*. But there it was observed, that the *habendum* was not contrary to the premises, for no certain estate was contained in the premises, but generally the land given and granted, which might be qualified by the *habendum* to an estate for years or at will. And in *Hogg v. Cross*, Cro. Eliz. 254, where an *habendum* for an estate of freehold in *futuro* was held to make the grant void, the court proceeded upon the ground that it was the purport of the deed that nothing should pass till after the death of the grantor, and that nothing should pass but according to the intent; which rule has been adopted in many modern cases, *Roe v. Tranmer*, 2 Wills. 75, *Osmond v. Sheafe*, 3 Lev. 370. In *Underhay v. Underhay*, [Cited in Hob. 171; Cro. Eliz. 269. S. C.,] one having leased his land to three for their lives, granted the reversion *habendum* to the grantee for his life, and then added, "which said estate for life is to begin after the death of the three first lessees," and that was adjudged a good estate in reversion for life. Thus then it appears that there is no objection to the granting part of this deed by the common law; secondly, there is no objection to the limitation of uses. The greatest effect produced by the statute of uses is, that by its operation the legal estate of freehold passes in *futuro*; for there is no doubt that a limitation by way of springing use is good provided the event whereupon the use is to arise is to happen within what the law considers a reasonable time; that is, a life or lives in being and twenty-one years after, which appears to have been the case in *Davis v. Speed*, 2 Salk. 676, *Roe v. Tranmer*, *Osman v. Sheafe*, and *Pybus v. Mitford*, 1 Ventr. 372.

Preston contra. If the objection that the conveyance is of a freehold in *futuro*, and therefore void, be well founded, the uses cannot arise, *debile fundamentum nullit opus*. In all the cases which have been cited, it was held, that the conveyance operated as a covenant to stand seized. The only case in point cited for the plaintiff was *Carter v. Madgwick*; but that is not found in any other reporter but *Levinz*, although nearly all the other cases in that book are: it does not appear to have been ever quoted or relied upon by any Judge, and is contrary to every principle of law, and every rule applied to the exposition of deeds.† The case was thus: "Parker seised in fee, by indenture between him and J. B. his grandson, the lessor, in consideration of affection and 5s. granted, bargained, and sold to the lessor and his heirs the tenements in question, *habendum*, immediately after his death, to the lessor and the heirs male of his body," with divers remainders over; and the court, by their judgment, that the estate passed "immediately by the premises, made that a fee which was intended to be an estate tail, and made that a grant of the estate immediately which was intended to be a grant in *futuro*, reserving a life estate to the grantor. It might have been good as a covenant to stand seized; but the court did not avail themselves of that doctrine, as in *Osman v. Sheafe*. The *habendum* certainly is not essential to a deed; but when inserted, it is most essential, unless it be absolutely repugnant to the granting part. *Stukely v. Butler*, and the other cases in which it has been held, that if there be a grant of an express estate, followed by an *habendum* repugnant to that grant, the *habendum* is void, may be admitted; but the question has always turned upon the repugnancy. Thus where a grant is to A. and his heirs, *habendum* for the life of A., that is clearly repugnant, Plowd. 153. [*Bayley J.* If the deed be read with a stop after "habendum unto J. W., his heirs and assigns," then nothing is postponed but the use; the seisin is given immediately.] The deed must be read as if it had been made before the statute of uses. Putting the uses out of view, the conveyance is to A. and his heirs, *habendum in futuro*. The declaration of uses does not commence until after the *habendum* is closed; *Braine v. Deakon*, Preston on Estates, 229. It is admitted, that the *habendum*

† It is found in Com. Dig. tit. Fait, (E 10.)

may control the grant where the estate is not express ; it may be a grant in fee or in tail, in *presenti* or in *futuro*, and that is to be explained by the *habendum*, 2 Roll. Abr. Grant, p. 68.^t Here the estate granted is not express ; it is to "A. and his heirs ; but they were *intended to take in the particular mode pointed out by the *habendum*.

*716] *Cur. adv. vult.*

ABBOTT, C. J., now delivered the judgment of the court.

This came before the court upon a special case, which was argued during the present term. The only question raised was upon the validity of a deed executed by *Martha Hatton*, as to the freehold tenements therein mentioned. After stating the facts of the case, the Lord Chief Justice proceeded as follows :

The objection made to the validity of the deed was, that it is a grant of a freehold to commence in *futuro* ; and if this be its true effect, it is undoubtedly void. The question whether this be its true effect, depends upon the operation of the *habendum*. If the *habendum* is to be considered as the operating part of the deed, the deed will be an attempt to convey a freehold in *futuro*. If the part called the premises be the operating part, and the *habendum* can be rejected, or considered only as qualifying the premises, a present freehold will pass, and the deed will be good. Many cases were quoted in the argument, to which it is not necessary to advert again. The distinction as to the effect of the *habendum* between deeds in which the premises expressly mention an estate or interest, and those in which the premises merely describe the tenements, but do not mention any estate or interest, was noted and relied upon, and it was contended that in the deed in question the premises do mention an estate and interest, (as we think they do), and the case of *Carter v. Madgwick*, 3 Lev. 339, was quoted as being directly in point to the present case.

*717] *The distinction to which I allude is this : If no estate be mentioned in the premises, the grantees will take nothing under that part of the deed, except by implication and presumption of law, but if an *habendum* follow, the intention of the parties as to the estate to be conveyed will be found in the *habendum*, and, consequently, no implication or presumption of law can be made, and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected, and the deed stand good upon the premises.

This was done in *Carter v. Madgwick* ; and the very learned gentleman who argued for the defendant, and against the validity of the deed, observed that that case was a solitary decision, never quoted or relied upon, and contrary to law, as it gave an immediate estate to the grantees, whereas the grantor manifestly intended to reserve a life estate to himself. Perhaps so much of the opinion of the court as regards the exclusion of a life-estate in the grantor may be found to have been expressed, without sufficiently adverting to the operation of the statute of uses, and to a construction that might have been given to the deed so as to allow a life-estate. The grantor had in fact enjoyed during life in that case as in the present. But the case of *Carter v. Madgwick* is not a solitary decision. The case of **Jarman v. Orchard*, Skin. 528 ; Salk. 4718] 346 ; Show. P. C. 199, is to the same effect. In that case *Thomas Nicholas* being possessed of a barn, cottage, and land, as assignee of a lease for one thousand years, did, by indenture reciting the lease, and expressed to be in consideration of natural love to his grand-daughter, and for other good

^t Thus, a grant to "A. and his heirs" may be restrained by the *habendum* to the heirs of the body. *Thurman's case*, 2 Roll Abr. Grant, K. pl. 24.

causes and considerations, grant, assign, and set over to his grand-daughter *Mary*, her executors, administrators, and assigns, all the said cottage, barn, and lands, and all other the premises thereinbefore recited, together with the recited lease, and all writings and evidences touching the premises, *habendum* the said cottage, &c., to the said *Mary*, her executors, administrators, and assigns, from and after the decease of the said *Thomas Nicholas* and his wife, for the residue of the term, subject to the rent and covenants. Now if this deed was considered as an assignment to commence and take effect after the death of *T. Nicholas*, the deed would be void, as in law assigning nothing, the life-interest of *T. Nicholas* being deemed in law to be of greater value and longer duration than any term of years. And it was contended that the deed could only be construed as such an assignment, because it appeared that *T. N.* did not mean to part with his interest in the term during his own life. The question arose after the death of *T. N.* In the King's Bench judgment was given against the validity of the deed; but that judgment was reversed in the Exchequer Chamber, and the reversal affirmed in parliament. And the ground of the reversal was, that the entire residue of the term passed by the premises of the deed, and the *habendum* was void.

*In the present case, we think an immediate freehold passed by the premises in the deed, and consequently the objection that the deed passed only a freehold to commence in *futuro*, cannot prevail. *Mary Hatton*, the testator, is now dead, and therefore perhaps it may not be necessary to decide whether any use vested in her for her life. We think, however, that the use did vest in her for her life, and so the deed will stand good in all its parts, and effect be given to the intention of the parties, which ought to be done, if by law it may. The release is expressed to be made in consideration of ten shillings paid by *John Westbrook* the elder, and other causes and considerations. This *John Westbrook* had married a cousin of *Martha Hatton*, and the deed was evidently intended as a family settlement. Now if the consideration of ten shillings had not been expressed, and the deed had contained no *habendum*, we think the use of the entire fee would have resulted to *M. H.* by implication and presumption of law. And upon supposition of the absence of this consideration, and the insertion of the *habendum*, we think the effect of the *habendum* would be partially to rebut the implication, and to narrow the use to an estate for life in *M. H.* And if the mention of this consideration of ten shillings should have the effect of preventing a resulting use to *M. H.*, and, in the absence of an *habendum*, should vest the use of the entire fee in *J. W.*, (a point upon which we think it unnecessary to give an opinion,) still this use would only arise by implication and presumption of law, grounded on the pecuniary consideration, and would not be a use expressed in the deed. And this being so, we think the *habendum* might have, in this view of the case also, the effect of partially rebutting the implication, by *showing the intention of the parties to be, that the use should not vest in *J. W.* until after the death of *M. H.*, and this would be good in law, because a use may be limited in *futuro*; and then the use of so much of the estate as was not limited or declared by the deed, might in our opinion result to and vest in *M. H.* And upon either of these constructions, effect will be given to the whole deed, and to the intention of the parties.

Postea to the plaintiff.

DENN on the Demise of NOWELL v. ROAKE.

(In Error.)

Where *A. B.*, seized in fee of one moiety of certain premises in the county of *S.*, and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows : "I give and devise all my freehold estates in *L.* and county of *S.*, or elsewhere, to my nephew *J. K.* for life, on condition that out of the rents thereof he do from time to time keep such estates in repair;" Held, that this did not operate as an execution of the power, and passed that moiety only of which testator was seized in fee.

EJECTMENT for a mill, dwelling-house, and land, in the county of *Surrey*. Plea, not guilty. At the trial before *Richards*, C. B., at the *Surrey* Spring assizes, 1823, a special verdict was found in substance as follows. *Miles Poole* was seized in fee of the premises in question, and died so seized on the 17th of November, 1749. Upon his death the premises descended to *Sarah*, the wife of *T. Scott*, and *Elizabeth*, the wife of *Henry Roake*, which said *Sarah* and *Elizabeth* were the daughters and co-heirs of *Miles Poole*. The said *T. Scott* and *Sarah* his wife, and *Henry Roake* and *Elizabeth* his wife, by lease and release, bearing date respectively 26th and 26th of April, 1750, conveyed the premises to one *Hill*, to the intent that he might become a good and perfect tenant of the freehold for suffering a recovery. And it was thereby declared, that the recovery should enure as to one undivided moiety of the premises to the use of *T. Scott* for life, without impeachment of waste ; remainder to the use of *Sarah Scott* for life ; remainder to the use of such person and persons, and for such estate and estates as the said *Sarah Scott*, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time direct, limit, or appoint ; and for want of such appointment, to the use of all the children of *T. Scott* and *Sarah* his wife, as tenants in common in tail. And for default of such issue to the use of *Elizabeth Roake* for life, without impeachment of waste ; remainder to her children as tenants in common in tail ; and for default of such issue to the use of *T. Scott* in fee. And there were corresponding limitations as to the moiety of which *Henry Roake* and *Elizabeth* his wife were seized. A recovery was accordingly suffered in *Easter* term, 1750. In 1758, *T. Scott* died without issue, leaving *Sarah* his wife him surviving. In 1763, *Sarah Scott* intermarried with *John Trymmer*, who died in 1766, leaving *Sarah Trymmer* him surviving. *Elizabeth Roake* died in the month of *May*, 1775, leaving *Henry Roake*, her husband, and *John Roake*, her son and only child by the said *Henry Roake*, her surviving, and without having made any deed, writing, will or appointment for or in respect of the tenements in the declaration mentioned. By lease and release, bearing date respectively the 6th and 7th of September, 1775, (the release reciting a contract between *Sarah Trymmer* and *John Roake* for the absolute purchase of his moiety of the premises, subject to the life-estate of his father *H. Roake*,) *H. Roake* and *J. Roake* conveyed the premises to one *Parnell*, to make him tenant to the preceipe, in order to suffer a recovery to the use of *H. Roake* for life ; remainder to *S. Trymmer* in fee. *H. Roake* died on or about the 15th of December, 1775. On the 6th of June, 1783, *Sarah Trymmer* made and published her last will and testament in writing, in the presence of and attested by three credible witnesses, and thereby gave and devised all her freehold estates in the city of *London* and county of *Surrey*, or elsewhere, in the words following ; that is to say, "I hereby give and devise all my freehold estates in the city of *London* and

county of *Surrey*, or elsewhere, to my nephew *John Roake*, for his life, on condition that out of the rents thereof he do from time to time keep such estates in proper and tenable repair; and on the decease of my said nephew *J. Roake*, I devise all my said estates, subject to and chargeable with the payment of 30*l.* a year to *Ann*, the wife of the said *J. Roake*, for her life, by even quarterly payments, to and among his children, lawfully begotten, equally at the age of twenty-one, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs at his or her age of twenty-one." And for default of issue of *J. Roake*, to certain other persons in the will mentioned. *S. Trymmer* died on the 4th of December, 1786, without revoking her said will, the said *J. Roake* being then living and her heir at law. *S. Trymmer* had not at the time of making her will, or at the time of her death, any other freehold lands, *tenements, or hereditaments in the county of *Surrey*, than those mentioned in the declaration. [723] The special verdict then contained the finding of other facts, showing the title of the lessor of the plaintiff, which it is not necessary to state, as the judgment of the court below and of this court, was founded upon the will of *S. Trymmer*; it being admitted, that if the will did not operate as an execution of the power reserved to *S. Scott*, afterwards *Trymmer*, by the deed of 1750, the plaintiff was entitled to recover. Judgment was given in the court below for the defendant, and thereupon a writ of error was brought, and the common errors assigned. The case was, on a former day in this term, argued by

Preston for the plaintiff in error. If the will of *Sarah Trymmer* operated as an appointment of that moiety of the estate in *Surrey* of which she was tenant for life, with a power of appointment, then it is conceded that the lessor of the plaintiff is not entitled to recover. But whoever exercises a power of appointment must show a clear intention to exercise it. All the cases from Sir *Edward Clere's* case, 6 Co. 18, down to the present time proceed on that principle; and the same principle is equally involved in the doctrine of elections as applied by courts of equity. There must be something specific, some reference to the power or to the subject matter of the power, so as to show that the attention of the party supposed to exercise it was directed to his power. A residuary or general devise is not sufficient for this purpose. These propositions cannot be disputed; the only question^a is on the application of them to each particular case. Now the words of this devise are, "I [724] give all my freehold estates in the city of *London* and county of *Surrey* or elsewhere to my nephew *J. Roake* for life." Those words certainly are not sufficient to raise an inference of an intention in the testatrix to deprive her nephew of the estate-tail in one moiety, to which he was entitled under the settlement, and to give him merely an estate for life in that moiety of the lands in question. Had the testatrix used the words "all my estate called *A.*, in the county of *Surrey*," that expression might have passed both moieties. By describing the estate by name she would have shown that she acted under the power as to that portion or moiety over which she had only a power of appointment. For the defendant reliance will be placed on the condition annexed to the devise, "on condition that out of the rents thereof he do from time to time keep such estates in proper and tenable repair." But there is in that direction to repair nothing to show that she had her power of appointment in view; the direction is applicable to those estates only which she had before given, and, therefore, cannot enlarge the effect of the words of devise. Suppose portions had been raisable by the settlement, and legacies had been given to the same persons by this will, could it be contended that the portionists must be put to their election to forego their legacies or their portions, and yet that consequence must follow, if it be held that the testatrix manifested an intent to exercise the power. All the principal cases were cited in the judgment delivered by *Best*, C. J., in the court below, but they do not warrant the

*725] conclusion to which that court came. Sir Edward *Clere's case was the earliest of the authorities cited on this point. It was in that case resolved, that if a man make a feoffment to the use of his will, and afterwards by his will devises the land itself, without any reference to his authority, there the land shall pass by the will, under the seisin or ownership, and not under his power; but in the principal case as the land could pass only by virtue of an authority in the testator, it was held that the will should operate as an execution of that authority, since otherwise the devise would be utterly void. In *Maddison v. Andrew*, 1 Ves. sen. 57., it was held that the will operated as an execution of the power, because the testator having used in the bequest the word *charge*, which was the very term used in the power, must be taken to have intended to execute that power. On the contrary, in *Andrews v. Emmott*, 2 Br. Ch. Ca. 297, the testator had a power to charge a sum of 3000l., but he did not in express terms execute the power: there was not any expression to show an intention to execute the power, and there was other property on which the will might operate, and it was held that the power was not executed; and *Ex parte Caswell*, 1 Atk. 559, was to the same effect. So also in *Langham v. Nenny*, 3 Ves. 467; *Nannock v. Horton*, 7 Ves. 391; *Bennet v. Aburrow*, 8 Ves. 609, and *Bradley v. Westcott*, 13 Ves. 445, it was held that express words or clear intentions were necessary to execute a power. For the defendant it must be said, that the general direction to repair shows an intention to pass the entire estate, and as embracing both moieties, that the intention to pass the whole estate shows an "intention to execute the power. *Standen v. Standen*, 2 Ves. jun. 589, before Lord Loughborough, is the strongest case that can be cited for the defendant; but *Best*, C. J., in giving the judgment of the Court of Common Pleas in the case now before the court, says that the reasoning of Lord Loughborough is supported by no previous authority, and has been objected to in many subsequent cases. *Jones v. Tucker*, 2 Mer. 533, and *Jones v. Currie*, 1 Swanst. 66, are also strong cases in favor of the lessor of the plaintiff; and in *Coates v. King*, decided in 1821, before the privy council, where Alexander Coates had divided by will his real property in *Antigua* among his three sons, with power to one of them to dispose by will of his share, the son being possessed of considerable real and personal estates in *Antigua*, independent of that given by his father's will, devised in these terms, "all my real estates in *Antigua*, and all other my real estate whatsoever and wheresoever;" and it was held that the will did not pass that property over which he had the power.

Jemmett, contra. It may be admitted, that neither a general devise or a residuary devise will carry an estate, over which the testator has merely a power without any interest. It is necessary that an intention to execute the power should appear. But with respect to the *media* through which such intention may be ascertained, it makes a great difference whether the will relates to real or personal property. Where the devise is of the latter the intention to pass it must be apparent on the face of the will: the court cannot inquire into the circumstances or situation of the testator; but a different rule *727] has been laid down and acted upon, where the will is of real *estates, *Standen v. Standen*, *Nannock v. Horton*, *Jones v. Currie*. Now, looking at the circumstances under which this will was made, it is found that property descended to the testatrix and her sister Mrs. *Roake*, as co-heiresses, and they and their husbands made a settlement, whereby, in the event of either dying childless, her moiety would go to the sister for life, with remainder to her children, if any, in tail; but each reserved a power of appointment over her own moiety. This shows an intention, that if one only of the sisters had issue, the whole estate should go to her family, and should not be divided. Mrs. *Roake* died, leaving one son, who, under the settlement was tenant in tail. He suffered a recovery, and then sold and conveyed his moiety to the testatrix in fee. Testatrix had no children, and being aware that she had pur-

shased her sister's share, and thereby gained the entirety of the estate, she devised all her freehold estates in *London, Surrey, or elsewhere*, to her nephew. Nothing can be more clear than her intention to give to him the whole estate, which was hers during her life. It is true, she calls it *her estate*, but she does not mean to give her interest in the land, but to vest in her nephew all the land, which, at the time of making the will, she was entitled to call hers. The case of *Standen v. Standen* is a strong authority in favor of this construction; and although observations may have been made upon some of the words attributed to Lord *Loughborough*, yet the decision was affirmed on appeal to the House of Lords, and has never since been questioned. There, the testator directed his real estate to be sold, and gave the money arising from the sale, and the residue of his personal estate, in trust for his wife for life; and after her decease, as to one moiety, "for such person or persons as she should by [728] any deed or writing, or by will, with two or more witnesses, appoint. The real estate was not sold. Testator's widow received the rents and profits, and the produce of the personal estate for her life; and by her will, after disposing of some specific articles, she devised in the following words: "I give all the rest, residue, and remainder of my estate and effects, of what nature or kind soever, and whether real or personal, and all my plate, &c. which I shall be possessed of, interested in, or entitled to at the time of my decease, subject to, and after payment of all my just debts, funeral expenses, and charges of proving my will, and specific legacies, I give to *S. H.*;" and it was held, that the moiety of the real estate, devised by the first will, passed by this will. The Lord Chancellor says, "It is a little hard to attempt to explain that it was not her estate. How could she have it more than by enjoyment during life, and the power of disposing to whatever person, and in whatever manner she pleased, with the small addition of two witnesses?" And this was cited and relied upon by *Manfield*, C. J., in *Morgan d. Surman v. Surman*, 1 *Taunt.* 289; and in that case, and in *Roach v. Wadham*, 6 *East*, 289, and *Dillon v. Dillon*, 1 *Ball & Beatty*, 77, a liberal construction as to the intention of executing the power prevailed. The cases respecting personal property ought not to be considered as authorities against the present defendant, on account of the rule which in those cases prevents the court from ascertaining, by extrinsic evidence, the intention of the testator. *Hales v. Margerum*, 3 *Ves.* 299, a case as to personal property is, however, in favor of the defendant, and is stronger in consequence of that rule. *S. Rutter* by his will gave [729] "to his executors 1000*l.* consols, for the sole use and benefit of his daughter *E. T.*, independent of her husband, and whenever she shall happen to die, the said 1000*l.* annuity stock shall be absolutely in her own power to dispose of by her last will and testament." *E. T.* made her will as follows: "All my freehold messuages, lands, &c., and also all my stocks, funds, moneys, and securities, and all other my real and personal estate and effects whatsoever, I give to *S. M.*;" and it was held that the 1000*l.* consols passed by these general words. Besides the intention to be presumed from the circumstances under which the present will was made, there is the direction to repair, which is by no means unimportant, although not of itself decisive. If the whole estate passed, the condition as to repair is sensible and intelligible, if only a moiety passed, it is difficult to understand or to carry into effect that condition.

Preston, in reply. In *Standen v. Standen*, the testatrix had not any real estate except that over which she had a power, and therefore, unless that property subject to her power had passed, the will would have been inoperative. The decision that the estate passed was right, but the reasoning of the Lord Chancellor was at variance with all the other cases. In *Hales v. Margerum*, it was held that the testatrix had an interest in the 1000*l.* consols; and the will operated on her interest, and not as an execution of a power. In *Morgan d. Surman v. Surman*, the particular measure subject to the power was mentioned in the will, and that circumstance has always been deemed sufficient

*730] proof of an intention to execute the power. So also in *Dillon v. Dillon*, there was a reference to the estate. None of these cases in any degree break in on the rule that the intention of the testator to execute a power must be clear and indisputable ; and no attempt has been made to answer the case from *Antigua*. The argument from the direction to repair is founded on a fallacy : it assumes that the direction extends to the whole or entire estate, whereas it applies only to that which was before devised. Had one moiety belonged to a stranger, it would never have been supposed that the testatrix devised her moiety with a condition or obligation that the devisee should repair the whole.

Cur. adv. vult.

The judgment of the court was now delivered by

ABBOTT, C. J. The principal authorities bearing on this question were all referred to and commented upon in the elaborate judgment delivered by the Lord Chief Justice of the Court of Common Pleas ; and it is unnecessary for me to refer again to them. The rule or principle of decision applicable to this case has its origin in the case of *Sir E. Clere*, 6 Co. 17, b. The best exposition of it seems to be that given by Lord Chief Justice *Hobart*, in the *Com mendam* case, Hob. 159, 160, " If an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority ; and so you must take it, for *fictio credit veritati*. And, therefore, so it was ruled in *Sir E. Clere's* case, that if a man be seized of three acres of land *holden in chief,

*731] and make a *seoffment* of all to the use of such person, and of such estate as he shall give or dispose by his will, and after by his will gives and devises all his lands to *J. S.* and his heirs, that this shall carry but two parts of the land in point of devise. And, lastly, where an interest and authority meet, if the party declare clearly that his will is that this act shall take effect by his authority or power, there it shall prevail against the interest ; for *modus ei conventio vincunt legem*. And, therefore, in the same case of *Clere*, it is agreed, that if the devisor had recited his power, and had relied upon that, all would have passed by express declaration of the party himself. Nay more, though the party do not make an express declaration, yet if his act do import a *necessity* to work by his power, or else to be *wholly* void, the benignity of the law will give way to effect the meaning of the party ; and, therefore, in that case it was resolved, that whereas *Clere* was seized, for example, of three acres of land, every one of equal value, and conveyed two of them to his wife for her jointure, and afterwards made a *seoffment* of the third to the use of such person, &c., as before, and then devised that third *acre ut supra*, that devise was good by force of the authority ; for else the whole devise had been utterly void, having before given the other two parts to his wife. In more modern times, the rule has been expressed by Lord *Thurlow*, in the following words : " To execute the power, it must be impossible to impute to the testator any other intention than that of executing it :" the doctrine, he says, is not by any case carried further than this. The distinction most frequently occurring, and which serves for illustration, as well as application of the rule, is this :

*732] if a will contain "a devisee of all the testator's lands generally, and he has some lands upon which the will may work by his interest, the law will attribute the will to his interest ; and land of which he has only a power to devise will not pass. So if the will be of all his lands in a county or place named, and he has lands of his own therein. On the other hand, if the testator has no lands, or none in the county or place named, upon which the will may work by his interest, there the law will attribute the will to his power, and will infer that he intended to execute his power ; because if that be not done, the will will be void either wholly or so far as respects the county or place named.

In the case now before the court the testatrix has not referred to her power

and she had lands in the county of *Surrey*, upon which the will may work by her interest; viz., the other moiety of the tenements in question; and, therefore, if there were nothing more in the case, it seems very clear that the law could not attribute the will to the power, nor infer that she intended to execute the power.

It remains then to be considered, whether there be any thing more, either apparent upon the will, or existing as fact *dehors* the will, from which it can be satisfactorily and safely inferred that she intended to execute her power.

The will contains in itself an injunction on the devisee to keep the devised estates in repair.

The facts existing *dehors* the will are these: the estates had originally belonged to the father of the testatrix. One moiety had descended upon her, and another upon her sister *Roake*. The two sisters and their husbands had settled their moieties in such a "manner as to give the moiety of either, who [733] might die without issue, to the issue of the other, subject to a power to each to make a different disposition of her moiety by deed or will." The sister of the testatrix left issue, from whom the testatrix purchased the sister's moiety and thus became seised of one moiety in fee and of another for her life, with a power to dispose of the fee of the latter moiety.

The question then is, whether from these matters it can be safely and clearly inferred that the testatrix intended to execute her power. Now it appears by the will that the testatrix had estates in *London*, or at least supposed she had, and made her will upon that supposition. *And we see nothing repugnant to reason or to the ordinary sentiments and intentions of mankind, in supporting that a person having estates in London, and an undivided moiety only of estates in Surrey, might make a will containing such an injunction as the present, leaving that injunction to take effect as far as by law it could.* And even if it should be inferred from this part of the will that the testatrix meant thereby to give the entirety of the lands in *Surrey*, still it will not necessarily follow that she intended to execute her power, and this for the reason hereafter mentioned.

So if the extrinsic facts should lead to an inference that the testatrix cannot have intended to make a strict settlement of the purchased moiety upon the family of her sister, and leave that which was originally her own unsettled and undisposed of, still in our opinion it will not necessarily follow that she intended to execute her power. It may be that she intended her will to work by her interest in the tenements. It may have happened that she had entirely [734] forgotten the settlement, and supposed at the making of her will that she was then seised of the entirety of the estates in fee, as but for that settlement she would have been. The settlement was made in the life of her first husband, thirty-three years before the date of her will. The only fact upon the special verdict, showing that this settlement was ever thought of in the interval, is the release under which she purchased her sister's moiety in 1775, by which that moiety was conveyed for the purpose of suffering a recovery. This took place eight years before the date of her will, and no recovery was suffered till after her death, though she lived eleven years, and must have been in possession of this moiety for nine years, the tenant for life, her sister's husband, having died in 1775. It appears to us to be at least as probable that she had forgotten the settlement, and intended the will to work by an interest, as that she intended to execute the power contained in the settlement, and even more probable, because the language of the will is exactly such as would be used by a person who at the time supposed herself to have an estate in fee in the entirety of the tenements, and not such as would be used by a person who was conscious that she had a power only over one moiety, and a *seisin* in fee of the other.

Although, therefore, we may think the testatrix intended that the entirety should go in strict settlement on the family of her sister, yet we think it is pos-

sible to suppose that the testatrix had no intention to execute the power. And if the intention to execute the power be doubtful, the will cannot in our opinion be deemed to be an execution of it.

*735] *For these reasons we think that the judgment must be reversed.† Judgment reversed.

† The opinion of the Court of Common Pleas was pronounced by the Lord Chief Justice of that court on the 7th of February, 1825. The plaintiff, on the 20th, sued out his writ of error in K. B., returnable in fifteen days from the day of Easter. On the 20th of April, 1825, the defendants served the plaintiff with a rule to transcribe, and the transcript was completed in due course. On the 10th of June, the defendants taxed their costs, and on the 14th of the same month (Trinity term) signed judgment. In Michaelmas term, 1825, the defendants served the plaintiff with a rule to assign errors, and the plaintiff having delivered his assignment of errors, the defendants, in the same term, delivered the joinder in error. The case was afterwards argued, and the judgment of the Court of Common Pleas was reversed, and the plaintiff afterwards taxed his costs.

Gurney, in Michaelmas term, moved to quash the writ of error, on the ground that it was returnable before costs in the court below were taxed, and consequently before any judgment was given in that court; and he cited *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179, where it was held, that a writ of error will not reverse a judgment given after the term in which it was returnable: and though the record be transcribed after judgment given and carried into the court in which the writ of error is returnable, the judgment is not to be considered as removed. He also cited *Canning v. Wright*, 2 Ld. Raym. 1531; *Gould v. Coulthurst*, 1 Str. 139; *Rejindos v. Randolph*, 2 Str. 834; *Vice v. Burton*, 2 Str. 891; *Cook v. Horreck, Barnes*, 197; and *Stevens v. Ingram*, 3 Taunt. 384.

ABBOTT, C. J. The defendants ought, in an earlier stage of the proceedings, to have applied to the court to quash the writ of error. But they have joined in error, and by their counsel have appeared upon argument, and the judgment of the Court of Common Pleas has been actually reversed. They are much too late, therefore, to quash the writ of error.

Rule refused.

*The KING v. FLOWER.

An indictment under the 39 G. 3. c. 85., against a servant for embezzlement, must set out specifically some article of the property embezzled; and an indictment charging that the prisoner "took and received, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10*l.*, and afterwards embezzled the same," was held bad.

THE prisoner was indicted under the 39 G. 3. c. 85, for that he, being the servant of A. B., on, &c., did, by virtue of his employment as such servant, receive and take into his possession, for and on account of the said A. B., divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10*l.*, and afterwards embezzled it. The prisoner pleaded guilty, at the Spring assizes for Wilts, 1825, and was adjudged to be transported for the term of seven years. A writ of error having been brought upon that judgment,

R. Bayly, in support of the judgment, contended, that the indictment was sufficient; and he relied upon *Rex v. Johnson*, 3 M. & S. 539. There the indictment charged the prisoner with embezzling divers, to wit, nine bank notes, for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.*, and it was held to be sufficient. [Bayley, J. There the words *bank notes* were held to be a sufficient description of the thing embezzled, because they are specifically mentioned in the act of parliament.] Money is also specifically mentioned. In *Rex v. Carson, Russell & Ryan's Cr. Cas. Res. 303*, it was held, than an indictment for embezzling need not set out the exact sum embezzled.

**Per Curiam.* This case must be governed by that of *Rex v. Ferneaux*, Russell & Ryan's Cr. Cas. Res. 336. The indictment in that case charged that the prisoner being a servant, &c., received the sum of 1*l.* 11*s.*, on account of his master, and feloniously embezzled the same, &c. It appeared in evidence, that 1*l.* 11*s.* had been paid to the prisoner on account of his master, but it did not appear whether the same was paid by a 1*l.* note and 11*s.* in silver, or by two notes of 1*l.* each, or by a 2*l.* note, and the change given by the prisoner. The prisoner being found guilty in *Trinity* term, 1817, eleven Judges (*Burrough, J., dissentiente*) were of opinion that the indictment ought to set out specifically some one article at least, of the property embezzled, and the conviction was held to be wrong; and in *Rex v. Tyers*, Ib. 402, *Michaelmas* term, 1817, it was held, upon a question reserved by Lord Chief Justice *Abbott*, for the opinion of the Judges, that an indictment must describe, according to the fact, some of the property embezzled. The indictment, in this case, is insufficient, because it does not describe any part of the property embezzled; and the judgment must, therefore, be reversed.

Judgment reversed.



***TOMLINSON v. BENTAL, et al.**

[*738]

A pauper being casually in the parish of *A.*, met with an accident which disabled her, and which required immediate medical assistance. The constable of that parish improperly removed her to her own (which was the adjoining) parish, and sent for the surgeon of that parish to attend her: Held, that it was the duty of the parish officers of *A.* to have taken the pauper to the nearest convenient house in *A.*, and to have provided medical attendance there, and that they could not, by improperly removing her to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them, and that they were, therefore, liable to pay the surgeon's bill.

THIS was an action of *assumpsit* brought to recover the amount of a surgeon's bill. At the trial before *Graham, B.*, at the Spring assizes for the county of *Essex*, 1826, the following appeared to be the facts of the case: The plaintiff was a surgeon and apothecary residing at *Malden*. The defendants, in 1824, were overseers of the poor of the parish of *Heybridge*. In *October*, in that year, one *P. Bannister*, a poor woman belonging to the parish of *Malden*, returning from *Witham* to *Malden* in a cart, about ten o'clock at night, was thrown out of the cart in the parish of *Heybridge*, near to a public house there called the *Hoy*. Her thigh was broken, and she was otherwise much hurt. The constable of the parish of *Heybridge* being sent for, desired her to be sent out of that parish. She was placed again in the cart, and taken over a bridge (which divides the parishes of *Heybridge* and *Malden*;) the driver of the cart then remonstrated with the constable, and told him that he was wrong in removing her from *Heybridge*. Upon this the constable ordered her to be taken back to *Heybridge*, and said he would go and consult a neighboring magistrate. The magistrate, who was also churchwarden of the parish of *Heybridge*, advised him to take the woman to the nearest public-house, and to lay her thigh straight, and send for a doctor. The landlord of the *Hoy*, which was the nearest public-house, refused to take her in. The driver of the cart then suggested to the constable to take her to the poor-house. The constable said he did not know where they "would put her." The pauper, who [739] had been exposed to the cold air for some hours, said, "If you do not know where to put me, for God's sake take me home." The constable desired a bystander to pay attention to the request made by the pauper to be

sent home, as it was likely they might be called to speak to the fact upon some future occasion. She requested not to be put under the care of the plaintiff (who was apothecary of the parish of *Malden*), but of one *Thorpe*, who was apothecary of *Heybridge*. The constable then desired her to be taken to *Malden*. The driver of the cart refused to take her back to *Malden*, unless the constable would give him a note that she should be taken care of by the parish of *Heybridge*. The constable said he would, but he did not. He accompanied her to her house at *Malden*, where she arrived about two o'clock in the morning, and asked *Thorpe*, the apothecary to the parish of *Heybridge*, to attend her, and told him the pauper was at her own house. *Thorpe* said that in that case he, as the apothecary of *Heybridge*, had nothing to do with her. The constable then sent for *Tomlinson*, and the latter attended her for several weeks. Upon this evidence it was insisted at the trial, first, that as there was not any express promise by the parish officers of *Heybridge* to pay for the medical attendance given in the parish of *Malden*, the defendants were not liable; and *Atkins v. Banwell*, 2 East, 505, and *Wing v. Mill*, 1 B. & A. 104, were cited. The learned judge was of opinion, that there was some evidence to go to the jury, that the magistrate, who was churchwarden, and the constable, felt the obligation to afford the pauper relief, and that the constable actually undertook to pay the plaintiff for his attendance; and secondly, he. *740] "was of opinion, that as the accident, which happened in the parish of *Heybridge*, was one which required immediate care and attention, it was the duty of the officers of that parish to have taken the pauper to the house nearest to the place where the accident happened, and where they could procure accommodation for her, and to have provided medical assistance immediately, and if, as humanity required them to have done, they had sent for a surgeon to attend her in that parish, they would clearly have been liable; and that they could not, by neglecting their duty and removing her to another parish, relieve themselves from that liability which the law had cast upon them. The jury having found a verdict for the plaintiff for the amount of his bill, a rule nisi for a new trial was obtained in last *Easter* term, upon the ground that there was not an express promise by the defendants to pay the plaintiff, and that under the circumstances of the case, the law would not imply a promise on their part.

Gurney and *Chitty* showed cause. The accident having occurred in the parish of *Heybridge*, it became the duty of the officers of that parish to provide immediate medical assistance for the pauper. They ought to have taken her to the nearest house in the parish of *Heybridge*; but in order to relieve the parishioners from a burden which the law had cast upon them, one of the officers of that parish fraudulently and improperly removed the pauper. In *Lamb v. Bunce*, 4 M. & S. 275, Lord *Ellenborough* laid it down "that the pauper was to be considered as casual poor wherever his infirm and indigent body was found, and he had a claim on the parish "where he was so found *741] to have his necessities provided for." It is, therefore, clear, that if the pauper had been taken to the nearest house in the parish of *Heybridge*, and the plaintiff had attended her there, the defendants as the parish officers of *Heybridge* would have been liable, and they ought not to be released from that liability by their own improper conduct.

Nolan contra. The obligation to relieve casual poor arises from the party being in the parish where he is casual poor. It was decided in *Lamb v. Bunce*, 4 M. & S. 275, that the parish where the pauper necessarily resides during the time the medical assistance is given, and not where the accident happens, is liable for the expense of his cure. Now here the pauper during the time of her illness was in the parish of *Malden*, and not in that of *Heybridge*. In *Atkins v. Banwell*, 2 East, 505, it was held that the law will not raise an implied promise, in the parish where a pauper is settled, to reimburse the money laid out (by another parish in which he happened to be) in providing necessary medical assistance for him. In this case, a *fortiori*, no promise can be implied

by law on the part of the parish officers of *Heybridge* to pay for the surgical assistance given to the pauper, who was settled and actually residing in *Malden*. In *Wing v. Mill*, 1 B. & A. 104, a pauper residing in one parish received, during illness, a weekly allowance from another parish where he was settled, and it was held that an apothecary who had attended the pauper might maintain an action for the amount of his bill against the overseer of the latter parish who had *expressly* promised to pay. Here there ^{*}was no express promise by the defendants. The constable might be criminally responsible for [742] fraudulently removing the pauper, but his conduct cannot make the parishioners of *Heybridge* liable to the burden of maintaining the pauper during her illness.

ABBOTT C. J. I am of opinion that this rule must be discharged. The pauper met with the accident in the parish of *Heybridge*, an accident that entirely incapacitated her from going to her own place of abode ; and, therefore, if she had been taken to any house in *Heybridge*, as she ought to have been, and relief had been administered to her there, it is clear that the parish officers would have been liable for the expenses of her cure. *Rex v. The Inhabitants of St. James, in Bury St. Edmunds*, 10 East, 25, is an authority to show that it would not have been competent to the parish officers to have removed her, as a person coming to settle in *Heybridge*. If she had been taken to a house in *Heybridge*, therefore, the parish officers would have been under a moral and legal obligation to provide assistance for her. One of the parish officers did very properly recommend her to be taken to the nearest public house, which was in *Heybridge*. The occupier of that house did not think proper to open his doors and receive her. A proposition was then made to take her to the poor-house ; and upon the way thither some conversation took place, which excited in the mind of the poor woman (who at that time had been lying in the cold some hours) an alarm, whether, when she arrived there, she should be properly treated, and she said, "For God's sake, take ^{*}me to my own house ;" and she was then taken home. The first proposal was, to take [743] her to her own parish ; but, upon a remonstrance by the driver of the cart, the constable desisted. She was, however, ultimately taken to her own house. The constable of *Heybridge* sent to the plaintiff, and desired him to take care of her. As the parish officers of *Heybridge* must have paid for the medical attendance if she had remained there, it seems to me, that the removal from that parish to another (although it was her own) coupled with the fact that the surgeon was called in from the parish of *Malden*, does not relieve the inhabitants of *Heybridge* from the obligation to which they would have been clearly liable, if this woman had been taken to some house in that parish, and taken care of there ; and for these reasons I think that the verdict was right.

BAYLEY J. I am of opinion that the verdict was right. It is of very great importance, with a view to the protection to which the poor are entitled, that it should be fully understood upon whom, under such circumstances as those which have occurred in the present case, the legal obligation to provide medical attendance attaches. I do not put the case upon the ground of moral obligation, or upon the ground of the constable's having sent for and employed the plaintiff ; but I put it upon the ground that the law imposed a legal obligation upon the parish officers of *Heybridge*, to employ a surgeon for the cure of the pauper. I think it is highly prejudicial to the rights of the poor, that when an accident has happened, the question should be agitated or even pass in the minds of those persons in whose power ^{*}the sufferer is of necessity placed, whether a burden which must fall somewhere, must be borne [744] by them, or can by any contrivance be shifted to others. It is of importance, therefore, that it should be certain upon whom the obligation to provide medical attendance rests. For otherwise the consequence will be, that poor persons, who ought not to be removed from the place where they have met with an accident, will perhaps at the risk of their life, but certainly with great aggravation of their sufferings, be removed to a distance. In this case the pauper met

with the accident in *Heybridge*, which incapacitated her from moving herself from the spot where it happened. The best and most obvious course would have been, to have done that (which the magistrate of the place suggested should be done) viz. to have removed her into the public-house, but if she was not placed there, she ought to have been placed in the poor-house, or at all events she ought to have been sent to some house in the parish. I am of opinion that, when the parish officers refused her an asylum in that parish where she was entitled to have it, and forced her to go to her own house, all the attendance given by the plaintiff in the parish of *Malden*, in consequence of the wrongful conduct of some of the parishioners of *Heybridge*, is to be considered as if it had been given in the parish where the accident happened, and as if the house which she occupied, had been in the parish of *Heybridge*. In *Lamb v. Bunce*, 4 M. & S. 277, Lord *Ellenborough* speaks not of a moral, but of a legal obligation attaching on the parish, where the pauper lies sick or disabled, to provide assistance: he says, "It cannot be matter of *dispute in point of law, and I could wish it were so understood, that where time is not afforded for procuring an order of justices, the law raises an obligation against the parish where the pauper lies sick as casual poor, to look to the supply of his necessities :" and, therefore, upon that authority I consider, that as in this case the party met with the accident in *Heybridge*, that was the proper place for her to be in, and that the law raised a legal obligation in the parish officers of *Heybridge* to give her relief. Lord *Ellenborough* afterwards says, "If the parish officer stands by and sees that obligation performed by those who are fit and competent to perform it, and does not object, the law will raise a promise on his part to pay for the performance." Now, although the attendance was not given in the parish of *Heybridge*, but in the parish of *Malden*, yet as one of the parish officers of *Heybridge* knew that the attendance was indispensably necessary, and that the removal from *Heybridge* to *Malden* had been wrongful; it seems to me exactly the same, as if the parish officers had stood by and seen the attendance of the surgeon upon the pauper in the parish of *Heybridge*. There was a subsequent case of *Gent v. Tompkins* (*Trinity term, 1822.*) in this court, which seems to support the principle, that the law casts the obligation, of providing medical attendance for a pauper, disabled by an accident, upon that parish where the accident has happened. In that case the action was brought, not against the overseers of the parish in which the accident happened, but against the overseer of the parish to which the pauper belonged, and the court intimated a very strong opinion that it was not properly brought against the overseer of *the latter parish.† It may sometimes happen that the parish in which the accident happens may

† GENT v. TOMPKINS.

This was an action of *assumpsit* for work and labor bestowed by the plaintiff as a surgeon and apothecary, in and about the cure of one *Tyrrell*. Plea, general issue. At the trial before *Richards C. B.*, at the Spring assizes for the county of *Bucks*, 1822, the following appeared to be the facts of the case. The plaintiff was a surgeon and apothecary, residing in the parish of *Winslow* in the county of *Bucks*. The defendant in 1820 was overseer of the poor of the parish of *Newton Longville*. On the 22d of September, in that year, *Tyrrell*, a pauper, (whose settlement was in *Newton Longville*) met with a severe accident in the parish of *Winslow*, that rendered it unfit that he should be removed. He was taken to a public-house in that parish, and the plaintiff attended him there until the 25th of November, following. About a fortnight after the accident happened, the defendant (who resided in *Newton Longville*) called upon the plaintiff at his house, and expressed his approbation of the care bestowed by the plaintiff upon the pauper, and desired that he might continue to receive every attention, and he, the defendant, would see the plaintiff paid. The defendant asked if the pauper required any wine, and upon the plaintiff's saying that he did, the defendant desired that the pauper might have it. The plaintiff, in the first instance, had claimed the amount of his bill from the parish officers of *Winslow*, but that was by the advice of his attorney, who did not at that time know that the defendant had employed the plaintiff. It was contended that the defendant was not liable. For although the pauper was settled in *Newton Longville*, the obligation to provide medical assistance lay on that parish where the pauper was compelled to continue in consequence of the acci-

not be the proper place to give relief. It may happen that the ^{parish} officers, without entering into the question what are the limits of particular parishes, will do that which ought to be done immediately, namely, carry the pauper ^{to} the house nearest the place where the accident happens, instead of carrying her to a considerable distance. In *Lamb v. Bunce*, [747] the impression of the court was, that the parish in which the house was situate was the proper parish to have given the relief; but, without deciding that point, I am of opinion that in this case, inasmuch as the accident happened in the parish of *Heybridge*, and that was the place where, under all the circumstances, the pauper was entitled to receive surgical assistance, the plaintiff is entitled to look to the parish of *Heybridge* for payment of his bill.

dent, and consequently that the parish officers of *Winslow*, where the accident occurred, and the medical assistance was given, were liable to pay the plaintiff. The Lord Chief Baron reserved the point for the opinion of the court, and directed the jury to find a verdict for the plaintiff for 19l. 10s., the amount of his bill. A verdict having been found accordingly, a rule nisi for entering a nonsuit was afterwards obtained in *Easter* term.

Storks, and *C. F. Williams*, in *Trinity* term, 1822, showed cause. It must be admitted that the parish officers of *Winslow*, where the pauper necessarily lay sick in consequence of the accident, were, in the first instance, under a legal obligation to provide medical assistance for him. *Rex v. St. James*, in *Bury St. Edmunds*, 10 East, 25, *Rex v. St. Lawrence, Ludlow*, 4 B. & A. 660. It must be admitted, also, that the law will not raise an implied promise from a moral obligation. *Atkins v. Banwell*, 2 East, 505. But in this case there was an express promise by the defendant. He first adopts all that has been done, and then promises to pay the plaintiff. And the pauper being settled in *Newton Longville*, the defendant was under a moral obligation to provide for him; and a moral obligation is a sufficient consideration for an express promise, *Watson v. Turner*, Bull. N. P. 147.

Dover and Monroe, contra. The defendant, as overseer of *Newton Longville*, was not under any legal obligation to provide medical assistance for the pauper. The legal obligation was on the parish of *Winslow*, where the accident happened, and where the pauper of necessity lay sick during the time the plaintiff attended him. At the time when the defendant made the promise, a part of the sum now claimed constituted a debt due to the plaintiff from the parish officers of *Winslow*. As to that sum, the promise was to pay the debt of another, and not being in writing, was void. But the overseer was not under any moral obligation to support the pauper. There was no moral obligation, independent of the legal liability, created by statute, and the legal liability to maintain casual poor during sickness lies on that parish where the pauper continues by reason of his accident. [Beyley, J. Although the promise may be void as to the by-gone time, may it not be binding as to the future time? It was uncertain by whom the plaintiff was originally employed, and he might have ceased to attend the pauper when he pleased. Suppose he was induced by the promise of the defendant to continue his services, would not that be a sufficient consideration for the defendant's promise, so as to make him responsible for the attendance subsequently given?] It ought, at all events, to have been submitted as a question of fact to the jury, whether, after the making of the promise by the defendant, the plaintiff continued to attend the pauper on the part of the parish of *Winslow*.

It was suggested by the court, that the purposes of justice might be answered by the defendant paying the plaintiff 9l. 16s., and the latter entering a *set processus*. The defendant's counsel assented to this proposition, and the case stood over for some days, to give the plaintiff's counsel an opportunity of consulting their client. It was then intimated that they had received no instruction on the subject.

Abbott, C. J. We are clearly of opinion that the defendant, as overseer of the parish of *Newton Longville*, was not bound by law, in the first instance, to provide medical assistance for the pauper. The obligation to do that lay on the parish of *Winslow*, where the accident happened, and the pauper was compelled to remain in consequence of it. The officers of that parish are clearly bound to pay the plaintiff for his care and attendance bestowed upon the pauper before the defendant made his promise; but if the plaintiff subsequently to that period was induced to continue to attend the pauper in consequence of the promise, the latter may perhaps be liable for such attendance, but he certainly is not liable to the extent of the present verdict. The question ought to have been submitted to the jury, whether the plaintiff, after the promise made by the defendant, was thereby induced to continue his attendance on the pauper. The rule for a new trial must therefore, be made absolute.

Rule absolute.

The cause was afterwards settled, the defendant having paid 50l. to the plaintiff in satisfaction of debt and costs.

HOLROYD, J. The accident having happened to the pauper in the parish of *Heybridge*, it was the duty of *the officers of that parish to provide medical assistance for her there. They might have done that although the occupier of one public house refused to receive her. But I think they could not, by removing her elsewhere, shift upon other people that burden which the law cast upon themselves ; and that, whether they procured the medical assistance to be given in the parish or *out* of the parish, they are liable.

LITTLEDALE, J. I am of the same opinion. Whenever any accident happens to a poor person of such a serious nature as to render removal out of the parish dangerous or improper, I think the law casts an undoubted obligation on that parish to administer all necessary relief. If the pauper in this case had actually been taken to a house in *Heybridge*, and resided there while the surgeon was attending her, that parish would have been liable for her cure ; but it appears to me that, under the circumstances of this case, she was improperly taken out of the parish ; and that any officer or inhabitant taking her to another parish, where it was improper to take her, cannot by so doing release the inhabitants of the former parish from the obligation. I think, therefore, that this rule should be discharged.

Rule discharged.

Where a check, drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum : Held, that he could not charge the customer for any thing beyond the sum for which the check was originally drawn.

ASSUMPSIT to recover 197*l.* as money had and received by the defendants to the use of the plaintiffs. At the trial before Abbott, C. J., at the London sittings after Hilary term, 1824, the jury found a verdict for the plaintiffs, subject to the opinion of this court on the following case :

The plaintiffs are merchants in the city of *London*, having at the time of the transaction in question an account with the defendants, as bankers. On the 25th or 26th of *August*, 1823, Mr. *S. Hill*, applied to *J. Hall*, one of the plaintiffs, for the loan of a check for 3*l.* stating at the time it was for a friend to send into the country, upon which Mr. *Hall*, drew and delivered to *S. Hill*, the check upon the defendants, using for that purpose one of the printed forms with which the defendants supply their customers. The sum for which this check was drawn, was written by *Hall*, in words at length, in the body of the check, and also in figures, the latter being in the same line with his signature. Mr. *Hill*, had been induced to apply for the loan of the check by one *Wagstaff*, who had applied to him for such a check, and *Hill*, having obtained it, handed it over to *Wagstaff*; *Wagstaff*, expunged the dates, the figures, and the words three pounds, and also the figures 3*l.* 0*s.* 0*d.* and substituted the words two hundred pounds and 200*l.* in figures, but in such a manner that no one in the ordinary course of business could have observed it. The check so altered was presented by or on *account of *Wagstaff*, to the defendants [751] for payment, on the 29th of *August*, on which day the balance in their hands on the account of the plaintiffs, was only 183*l.* 15*s.* 5*d.* The defendants paid the amount of the check as altered, and having a day or two afterwards received funds to cover the amount over paid on the 29th of *August*,

they claimed to retain the whole sum of 200*l.* on account of the check drawn and paid under the foregoing circumstances.

F. Pollock, for the plaintiffs. The plaintiffs are entitled to recover the whole amount of the check. First, assuming that the defendants have not been guilty of any negligence, the loss must still fall upon them, for the altered check was not the check of the plaintiffs, and, therefore, the defendants paid the money without any authority. There is no difference in principle between this case and any other forgery. Suppose the body of a draft had been in the handwriting of the plaintiffs, but their signature had been forged, there can be no doubt that if the bankers had paid such a draft they would be liable. Or suppose that it was made payable to a special payee, and his name had been forged, and the bankers paid it to the wrong person, they would have been liable. There is no direct authority in our law upon the subject, but the very point is discussed in *Pothier's treatise du contrat du change*, part 1, c. 4, s. 99, p. 59. It assimilates a case like the present to that of a person employed to execute an order for another (*le contrat de mandat.*) There the employer is bound to reimburse the employee all his expenses to which the employment or order gives rise, (provided the employee does not, by his own negligence, "disimburse more than he ought." But he distinguishes between expenses occasioned in the execution of the order or employment, (*ex causa mandati,*) and those which are incurred accidentally in the course of the employment or order, and, ultimately, he comes to the conclusion that when a banker pays the full amount of a bill fraudulently altered by the holder, the sum paid beyond that for which it was originally drawn is not a payment made "*excusa mandati sed occasione tantum,*" the subsequent fraudulent alteration of the bill which led the banker into error, and which caused him the loss of the sum he had unduly paid, being an accidental circumstance which neither had been, nor could be foreseen, and against which the drawer cannot be supposed to have intended to indemnify the banker.†

† The passage from *Pothier* referred to is the following :

99. Scacchia, *Tract. de Com.* sect. 2, pl. 5, quæst. 1, propose cette question : Le porteur de la lettre de change l'a falsifiée, et a écrit une plus grande somme que celle portée par la lettre : la falsification est faite de manière qu'elle peut tromper une personne attentive et intelligente. Le banquier qui, trompé par la falsification de la lettre qui lui a été présentée, a payé au porteur la somme entière qui paroissait portée par la lettre, aura-t-il la répétition contre le tireur, son mandant, de ce qu'il a payé de plus que la somme qui était effectivement et véritablement portée par la lettre ? Scacchia décide pour l'affirmative. On peut dire pour son opinion, que selon les règles du contrat de mandat, le mandant s'oblige à rembourser le mandataire de tous les déboursés auxquels le mandat aura donné lieu, pourvu que le mandataire n'ait pas par sa faute déboursé plus qu'il ne falloit : *Mandator debet refundere mandatario quicquid ei inculpabiliter absit ex causâ mandati*, comme nous l'avons établi in *Pand. Justin.* tit. *Mand.* n. 55, et seq. Or, le paiement qu'a fait le banquier de la somme entière qui, par la falsification de la lettre, paroissait être portée dans la lettre qu'on lui a présenté, est un déboursé auquel le mandant du tireur a donné lieu ; et l'on ne peut en cela reprocher aucune faute à ce banquier, puisqu'on suppose que la falsification étoit telle, qu'elle pouvoit surprendre un homme intelligent : le tireur ne peut donc pas se dispenser de rembourser le banquier sur qui il a tiré la lettre, de la somme entière qu'il a payée ; sauf au tireur à exercer l'action du banquier, *conditionem indebiti*, contre le porteur de la lettre, pour la répétition de ce qu'il a reçu de plus que la somme qui étoit véritablement portée par la lettre. Si ce porteur de la lettre est un homme insolvable, c'est le tireur qui doit souffrir de cette insolvabilité, puisque son mandataire n'est pas en faute.

On peut dire au contraire en faveur du tireur, qu'il ne faut pas confondre ce qu'il en a couté au mandataire pour l'exécution du mandat, *ex causâ mandati*, avec ce qu'il lui en a couté à l'occasion du mandat, *non ex causâ mandati, sed tantum occasione mandati*. Ce qu'il en coûte *ex causâ mandati*, est tout ce qui tend à l'exécution du mandat. Par exemple, si je vous ai chargé d'aller visiter une terre que je vous ai volé, je suis obligé de vous donner les frais de voyage, les salaires que vous avez payés aux ouvriers dont vous vous êtes fait assister, et autres choses semblables, sont des déboursés qui tendoient à l'exécution du mandat dont je vous ai chargé, et qui sont faits *ex causâ mandati* : ce n'est que de ces choses que je suis censé, par le contrat de mandat intervenu entre nous, m'être obligé de vous rembourser. Mais, si vous avez été attaqué en chemin par des voleurs qui vous ont volé, je ne suis pas obligé de vous indemniser de cette perte ; car, quoique ce soit à l'occasion de mon mandat dont vous vous êtes chargé, que vous l'avez soufferte, et que vous ne l'eussiez pas soufferte sans cela, néanmoins ce n'est pas pour l'exécution de mon mandat, mais seulement à l'occa-

*In *Scholey v. Ramsbottom*, 2 Camp. 485, a check drawn by a customer upon his bankers, and which he afterwards cancelled by tearing it into several pieces, was paid by them *under circumstances which ought to have excited their suspicion, and induced them to make inquiries before paying it; and it was held that they could not take credit for the amount. Here the bankers have been guilty of negligence. The drawer of a bill of exchange has not *any means of discovering whether the instrument which he issues to the world be subsequently fraudulently altered; the banker has some means, and if he is deceived, must be responsible.

Goulburn, contra. This case is one of novelty and great importance to bankers, who, if the defendants are held liable, will be exposed to constant hazard without any means of prevention. For if the signature to a check be genuine, a banker is bound at his peril to pay it, although, (as frequently occurs,) every other part of it be written in a strange hand. And now it is contended that after he has ascertained the signature to be valid, he is further bound to notice any alteration in the body of the check itself, however minute, or however skilfully effected. It is said that any material alteration in instruments of this nature after they are drawn will render them void, but that is too broad a position. In *Kershaw v. Cox*, 3 Esp. N. P. C. 246, a most material alteration in a bill of exchange, viz. the insertion of the words "or order," was held by Lord Kenyon not to vitiate the bill. And as to an alteration in the sum for which the bill is drawn, Scacchia's authority, as cited by Pothier in the passage referred to, is express that in a case like the present the drawer,

sion de ce mandat, qu'il vous en coûte ce qu'on vous a volé; c'est par un cas fortuit, dont on ne peut pas dire que j'ai voulu m'obliger de vous indemniser, puisqu'il n'a pas même été prévu: *Non omnia quae impensurus non fuit, mandatori imputabat; veluti quod spoliatus sit à latronibus.* . . . nam haec magis casibus quam mandato impulari operet; L. 26. sect. 6. *Mandat.* Ces principes s'appliquent naturellement à l'espèce proposée. Lorsque le banquier sur qui j'ai tiré une lettre de change de cent livres, trompé par la falsification de la lettre, paie trois cent livres au porteur de la lettre, le paiement qu'il a fait de la somme de deux cents livres de plus qu'il n'est porté par le lettre, n'est pas un paiement qu'il fasse ex causa mandati, en exécution du mandat dont je l'ai chargé; on peut seulement dire qu'il l'a fait à l'occasion du mandat: la falsification de la lettre, qui l'a induit en erreur, et qui lui a causé la perte de la somme qu'il a indûment payée, est un cas fortuit qui n'a ni été, ni pu être prévu, et dont on peut dire par conséquent que j'ai voulu me charger de le dédommager.

Cependant si c'étoit par la faute du tireur que le banquier eut été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications; peut-être, s'il avoit écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté zero; le tireur seroit en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu; et c'est à ce cas qu'on doit restreindre la décision de Scacchia.

Pothier then shows, that the distinction between losses sustained by the employee in the course of his employment or order, without any default of the employer, and those losses to which the employer has given occasion by his default, is warranted by the civil law. The following case is put: If I employ you to buy a certain slave, and the slave, after you have bought him, but before you have sent him to me, robs you, there, according to one opinion, I am bound to indemnify you only if I knew the slave to have been a thief, because, in that case, I was in fault for not informing you; according to another opinion, whether I knew it or not, because I was guilty of negligence in not inquiring into the previous habits of the slave. He then proceeds thus:

Lorsque c'est la faute du mandataire qui a donné lieu au dommage qu'il a souffert à l'occasion du mandat, il n'est pas douteux qu'il ne peut pas demander à en être indemnisé; d. L. 6. sect. 7.

Il résulte de tout ceci qu'on ne doit pas décider indistinctement que le tireur doive indemniser le banquier de la perte que lui a causée l'erreur en laquelle l'a induit la falsification de la lettre, et qu'on doit décider au contraire que le tireur n'est tenu de cette indemnité que dans le cas auquel, par quelque faute de sa part, ou par celle de son facteur, il auroit donné lieu à cette falsification, faute d'avoir, en écrivant la lettre, pris les précautions qu'il pouvoit prendre pour la prévenir.

Dans le cas même où le mandant n'auroit pas eu le soin de prendre ces précautions, le mandataire ne pourra pas répéter du tireur ce qu'il a payé de plus que la somme qui étoit véritablement portée par la lettre, si la falsification pouvoit s'apercevoir avec quelque attention; car en ce cas, c'est la faute du banquier de n'avoir pas bien examiné la lettre qui lui a été présentée; et il n'est pas recevable suivant les principes ci-dessus, à demander l'indemnité d'une perte à laquelle il a donné lieu par sa faute.

and not the drawee, must bear the loss: although *Pothier*, after stating the arguments on both sides, inclines himself to the contrary opinion. As to a supposed analogy between deeds and bills, Mr. Justice *Buller* in *Master v. Miller*, 4 T. R. 320, denies that there is any such, and states conclusive reasons for his opinion; and it is clear that such an alteration in a deed as that which took place in the bill in the case of *Kershaw v. Cox*, 3 Esp. N. [756] P. C. 248, would have made the deed void. No argument, therefore, can be derived from such analogy. In *Scholey v. Ramsbottom*, there was every thing to cause inquiry and suspicion on the part of the bankers. The check had been torn in four pieces, and pasted together again, and when presented was obviously defaced and dirty, which was the express ground of Lord *Ellenborough's* decision: whereas here it is found that the check "was altered in such a manner that no one in the ordinary course of business would have observed it," which makes the whole difference, and converts that case into a strong authority for the defendants. Then as to negligence, it is here altogether on the side of the customer. Giving, or rather lending, as he did this check for so trifling an amount to another person for the purpose of being sent again to a third in the country, was in direct violation of the compact which must be implied between banker and customer; viz., that the latter shall not send abroad his name and signature in this unguarded mode, but shall use them only with due caution, and for the *bona fide* purpose of drawing out his funds for his own occasions. In *Russell v. Langstaff*, 2 Doug. 514, it was holden that a person signing his name to a blank stamp was liable for any sum afterwards inserted thereon. In this case it was argued, (as in this,) that a note so filled up was *not the note* of the party who had signed the blank stamp; but it was held by the court, that a man thus sending abroad his name and signature, must be responsible for all the consequences. So here the plaintiffs have thought fit to lend their name, owing nothing to the party to whom the check was given, and being told by him at the time that it was not [757] for his own use, and that he should not present it for payment. Under these circumstances it follows, that the plaintiffs must bear the loss, and not the bankers, who were not guilty of any negligence, and could not by any care or caution on their part detect the imposition.

ABBOTT, C. J. I am of opinion that the plaintiffs are entitled to recover. Bankers can only charge their customers with sums of money paid pursuant to order. Here, unfortunately, the bankers have *paid* more than the order authorised them to do; for by that they were directed to *pay* no more than 3*l*. I have no doubt the bankers cannot charge their customer beyond that sum. The plaintiffs are therefore entitled to the judgment of the court for the excess.

BAVLEY, J. The banker, as the depository of the customer's money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer, and to justify the payment, he must show that the order is genuine, not in signature only, but in every respect. This was not a genuine order, for the customer never ordered the payment of the money mentioned in the check.

Judgment for the plaintiffs.†

† See *Forster v. Clements*, 2 Camp. 17.

*SISSONS v. DIXON et al.

Where, in case against a carrier for the loss of goods delivered to him at *Dublin* to be conveyed to *Liverpool*, it was objected for the defendant, that unless the goods were proved to be duly entered at the custom-house, the importation was illegal, and the contract with the carrier void: Held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered.

CASE against the defendants, as common carriers from *Dublin* to *Liverpool*, charging them with the loss of a parcel delivered to them by the plaintiff at *Dublin*, to be carried to *Liverpool*. There was a count charging them as warehousemen, and a count in trover. Plea, the general issue. At the trial before *Hullock*, B., at the *Lancaster* Spring assizes, 1826, it appeared that the plaintiff was a lace manufacturer at *Liverpool*, and being at *Dublin*, delivered a parcel, containing a quantity of lace, to the defendants at their warehouse, to be forwarded to *Liverpool* by the *St. George* steam packet, of which the defendants were owners. The parcel was never delivered, although often demanded. For the defendants it was contended, that the plaintiff should have proved that the goods were duly entered according to the requisites of the 46 G. 3, c. 87, s. 1. The learned Judge reserved the point, and the plaintiff had a verdict for the value of the parcel, subject to a motion to enter a nonsuit. A rule for that purpose was granted in *Easter* term, against which

Henderson showed cause, and contended, first, that the provision of the 46 G. 3, c. 87, s. 1, as to entering goods imported from *Ireland*, was superseded by the 4 G. 4, c. 72, ss. 6, and 7, the Lords of the Treasury having exercised the power thereby given, and made the *Irish* trade a coasting trade, as appeared by *The Gazette* of 25th *September*, 1824, and consequently that those things [759] "only were required to be entered which were liable to duties. That the lace in question was not liable to duty, for that it must be taken to have been manufactured by the plaintiff and imported into *Ireland*, and, therefore, was entitled to a drawback on re-importation by the 56 G. 3, c. 83, s. 3. Secondly, that if the goods did require entry, there was no proof of any fraudulent intention, and without that the contract with the defendants was not void, *Caitlin v. Bell*, 4 Camp. 183. Thirdly, that the defendants ought to have proved that the goods were not entered; for the court would not without evidence presume that the plaintiff had acted illegally, *Williams v. East India Company*, 3 East, 192; *Pearce v. Whale*, 5 B. & C. 38.

J. Williams, contra. The agreement in this case had a tendency to violate the provision of an act of parliament, and, therefore, cannot be enforced, *Law v. Hodson*, 11 East, 300; *Ribbons v. Crickett*, 1 B. & P. 264.† [*Holroyd*, J. The argument upon that point is irrelevant, if it was incumbent upon you to prove the illegality of the transaction.]

BAYLEY, J. I am of opinion that this rule must be discharged. The presumption always is, that a party complies with the law. The means of proving the contrary were in this case within the power of the defendants, if the fact were as suggested; and as no proof was given that the goods were not duly entered, that ground of defence fails. The case of *Bennett v. Clough*, 1 B. & A. 461, is very similar to the present. It was an action against a [760] carrier for losing a parcel containing some bank notes, stamps, and a letter. For the defendant it was said, that the 42 G. 3, c. 81, s. 5, made it illegal to send a letter in a parcel, and that the plaintiff, therefore, could not recover. But there is a proviso in that section, that it shall not extend to any letter concerning goods, sent by a common carrier of goods, to be delivered

† Upon this point see *Jackson v. Hudson*, 11 East, 180.

with the goods to which it relates; and the court held, that inasmuch as illegality is never presumed, the defendant should have given *prima facie* evidence that the letter did not concern the stamps with which it was sent.

Rule discharged.

HIGGINS v. WOOLCOTT.

Where an attorney's bill is reduced on taxation by a sixth-part, the client is entitled to the costs of taxation. They are not in the discretion of the court.

An attorney's bill having been referred to the Master to be taxed, he struck off more than one-sixth, and allowed the client the costs of the taxation. A rule for reviewing that allowance was afterwards obtained upon affidavits of special circumstances, justifying the charges made in the bill.

Archbold showed cause, and contended that by the statute 2 G. 2, c. 23, s. 23, the client was entitled to the costs of the taxation. The words are, "and the said respective courts are hereby authorized to award the costs of such taxations to be paid by the parties, according to the event of the taxation of the bill; that is to say, if the bill taxed be less by a sixth-part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less," the "court in their discretion shall charge the attorney [761] or client in regard to the reasonableness or unreasonableness of such bill."

Abraham, contra, relied upon the case of *White v. Milner*, 2 H. Bl. 357, as showing that the court may exercise a discretion as to the allowance of costs in such cases. There the bill was reduced more than one-sixth, not by deductions from particular items, but by the disallowance of the costs of two actions, said to have been defended upon the credit of the client, and the court held that he was not entitled to the costs of the taxation.

Abbott, C. J. I think that the words of the statute are imperative in this case. They provide, "that where the bill taxed is less by a sixth-part than the bill delivered, the attorney is to pay the costs of the taxation." Here the bill was reduced on taxation more than one-sixth.

Rule discharged.

* The words "by a sixth-part" appear to have been omitted.

The KING v. TREMEARNE.

Where a true bill for perjury was found, and the Judge at the assizes having refused to try it on account of manifest imperfections in the record, a new bill was preferred, whereupon the defendant was found guilty, but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred a new indictment, (for the same offence,) and removed it into this court by *certiorari*, the court refused to stay the proceedings upon that indictment until the prosecutor paid the costs of the former proceedings.

An indictment for perjury having been preferred against the defendant, and afterwards removed into this court by *certiorari*, at the instance of the *prosecutor, *R. Bayly* obtained a rule nisi to stay the proceedings, until [762]

the costs of two former indictments for the same offence were paid by the prosecutor. The affidavit on which the motion was founded stated, that at the Cornwall Summer assizes, 1823, an indictment for the same alleged perjury was preferred, and found a true bill, and afterwards removed into this court by *certiorari*. The record was taken down for trial at the Summer assizes, 1824, when *Garrow*, B., refused to try it, on account of some manifest imperfections in the record. A new indictment was thereupon preferred, and in like manner removed into this court, and tried at the Summer assizes, 1825, when the defendant was found guilty; but a new trial was granted by this court, on the ground that a minor, not named in the panel or summoned on the jury, appeared and served instead of his father, who was in the panel, ante, 254. The prosecutor did not carry down that record again, but at the Spring assizes, 1826, preferred a new indictment, and removed it into this court, whereupon the present motion was made.

Langslow showed cause, and contended, that even if the court had jurisdiction to interfere, the defendant had not made out any case entitling himself to the costs of the former prosecution. He was convicted on the only trial that has taken place, and as a second trial is to be had at his instance, it can be no hardship upon him to be tried on a new indictment, founded upon the old charge.

Bayly, contra, contended, that the new indictment must be considered as in *763] the nature of an amendment; *and that, therefore, the prosecutor, whose default made the amendment necessary, ought to pay the expenses occasioned by his blunder. *Jones v. Davies*, 1 B. & C. 148, establishes that where proceedings are removed by *certiorari* into this court it has jurisdiction over the costs.

Per Curiam. No case of oppression has been made out by the defendant. His application for a new trial has made further expenses necessary, and it can make no difference to him, as to such expenses, whether he is again tried upon the old or upon a new indictment.

Rule discharged.

FREE v. MASON.

Where an appearance is entered for a defendant, and a declaration filed pursuant to the 12 G. 1, c. 29, no demand of plea is necessary.

A *LATITAT* was sued out against the defendant, returnable the first return of Easter term, and duly served. Some negotiation then took place, the defendant undertaking to give security for the debt, and at his request proceedings were stayed. No security having been given, the plaintiff after the *essouye* day of Trinity term entered an appearance, and filed common bail for the defendant, filed a declaration, and gave notice to plead in four days. No plea having been pleaded, the plaintiff signed judgment.

Abraham obtained a rule to set aside the judgment for irregularity, on the ground that a plea had never been demanded.

*764] *F. Pollock* showed cause, and contended that, according to *Palk v. Rendle*, 8 T. R. 465, no demand of plea was necessary.

ABBOTT, C. J. It is a settled rule of practice, that where a declaration is filed in pursuance of the statute 12 G. 1, c. 29, a demand of plea is unnecessary.

Rule discharged.

DOE v. ROE.

Where a declaration in ejectment was left at the house of the tenant in possession on Saturday, and the tenant afterwards acknowledged that he received it on the following Sunday, (which was before the *essouign* day :) Held, that this was not good service.

WHITEHEAD moved for judgment against the casual ejector upon an affidavit stating that the declaration was left at the house of the tenant in possession on the 20th of *May*, and that the tenant after the *essouign* day of this term acknowledged that he received the declaration on Sunday the 21st of *May*, the day preceding the *essouign* day.

Per Curiam. Service of the declaration on a *Sunday* by the lessor of the plaintiff upon the tenant in possession would not be good service ; and there does not appear to be any reason why he should be in a better situation if the declaration comes to the hands of the tenant on that day by the act of a third person.

Rule for judgment refused.

*FREE, D. D. v. BURGOYNE.

[*765]

In prohibition, a writ of error does not lie from K. B. to the Exchequer Chamber.

A CONSULTATION having been awarded in this case in *Easter* term, (See p. 400,) the plaintiff sued out a writ of error to the Exchequer Chamber, and obtained an allowance thereof, which was served upon the defendant's attorney on the 9th of *May*. The writ of consultation was issued and presented to the court below on the 10th of *June*, whereupon the plaintiff obtained a rule *nisi* to quash that writ, on the ground that the writ of error was a *supersedeas*. After hearing *Campbell* against the rule, and *Denman* in support of it,

The court held, that the statute 27 *Eliz.* c. 28. did not extend to this case, and that no writ of error lay to the Exchequer Chamber.

Rule discharged.†

† Suits in prohibition are not mentioned amongst those in which the 27 *Eliz.* c. 28, gives a writ of error to the Exchequer Chamber ; and the writ of prohibition is an original writ out of Chancery. See *Jefferson v. Bishop of Durham*, 1 B. & P. 121. *Crowcher v. Collins*, 1 *Saund.* 136. (1.) *Jaques v. Cesar*, 2 *Saund.* 101. (1.)

*HERBERT v. TAYLOR.

[*766]

Upon a general demurrer to a plea of *nil debet* to an action upon a bond, the Demurrer Book is to be made up by the plaintiff's attorney, and not to be filed with the clerk of the papers.

THIS was an action on a bond. The defendant pleaded the general issue *nil debet*, and delivered it to the plaintiff's attorney. The plaintiff demurred generally to that plea, and his attorney delivered the issue on the demurrer to the defendant's attorney, without filing the demurrer with the clerk of the papers,

and obtained a rule for a *conciuim*, and for judgment on the demurrer. A rule nisi had been obtained for setting aside the *conciuim* and the delivery of the issue, on the ground that the demurrer ought to have been filed with the clerk of the papers.

Marryat, and *Archbold*, now showed cause. The rule is, that all special pleas and special demurrs shall be filed with the clerk of the papers, but that general pleas and general demurrs shall be delivered by the attorneys. In the edition of the rules of court published in 1747, by Sir *George Cook*, the prothonotary of the Court of Common Pleas, there is the following note to the rule of court of *Trinity* 12 W. 3.: "The attorneys of this court make up the Issue and Demurrer Books in the following cases, viz. every issue that may be given on the book side; not guilty to a new assignment; the bar of son frank tenement; *comperuit ad diem* to a sheriff's bond; *not tied* record to an action of debt on a judgment; a general demurrer to a declaration; in covenant, where the defendant in his bar concludeth to the country; every special *non est factum*, *every son assault demesne, and likewise all issues and demurrs upon writs of error, *scire facias*, and *audita querela*, and all repleaders or other things formerly entered of record. In all other cases, both by bill and original, the *special* pleadings are to be left with the clerks of the papers, who make copies thereof, and when issue is joined, the paper books are made up by them." Although a general demurrer to the general issue is not expressly mentioned as an instance where the Demurrer Book may be made up by the attorney, yet it is evident that the distinction is between general and special pleas and demurrs, and a general demurrer to a declaration not only may, but must be delivered. Filing it is irregular if the plaintiff does not know of it. Ruled *Hilary*, 1817. *Archbold's Practice*, p. 6.

Chitty, contra. In the note to the rule of Court of *Hilary* term, 1 W. & M., edit. 1795., the cases already mentioned are enumerated as those where the attorneys are to make up the issue or demurrer book. The note then proceeds, "in all other cases, both by bill or original, the pleading must be filed with the clerk of the papers," and this rule is adopted in *Crompton's Practice*.

Abbott C. J. We are of opinion that the attorney was at liberty to make up and deliver the Demurrer Book in this case. This rule must therefore be discharged.

Rule discharged.

Archbold, then moved for judgment for the plaintiff, which was granted.

One of several joint defendants may obtain a rule for judgment, as in case of nonsuit.

This was an application by the defendant *Smith* for judgment as in case of a nonsuit. The defendants pleaded the general issue by separate attorneys, and issue was joined in *Michaelmas* term last, and notice of trial given for the sittings after *Hilary* term. The objection to the rule was, that one of two joint defendants cannot move for judgment as in case of a nonsuit.

The matters of the rule having been referred to the Master, he, after stating the facts, made the following report:

By statute 14 G. 2, c. 17, which authorises the application to the court for judgment as in case of a nonsuit, it is provided that all judgments given by virtue of that act shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect.

In the absence of any authority upon this point, I apprehend if this case had gone down to trial, and either of the defendants had appeared by his counsel, the plaintiff might have been called and nonsuited. I am, therefore, of opinion that the defendant *Smith* is entitled to have the rule made absolute for judgment as in case of a nonsuit, and which will authorize a general judgment of nonsuit to be entered against the plaintiff.

The court concurred in that opinion, and made the

Rule absolute.



*GROVER v. WATMORE.

[*769]

A summons for better particulars of the plaintiff's demand was obtained by the defendant four days before the time for pleading expired. The plaintiff's attorney did not attend till the third summons, and the order being then refused, and the time originally allowed for pleading having expired, signed judgment for want of a plea. Held, that as the delay was occasioned by the plaintiff's attorney, the judgment was signed too soon, and was therefore irregular.

In this case the process was returnable on the 20th of *April*. On the 21st the defendant's attorney obtained an order for the particulars of the plaintiff's demand. On the 22d of *April*, a declaration in debt was filed *de bene esse*, and notice of the same was left at the defendant's place of abode. A particular of the plaintiff's demand was delivered to the defendant's attorney on the 2d of *May*. On the 3d of *May*, common bail was filed for the defendant according to the statute. The defendant's attorney, on the 2d of *May*, took out a summons for better particulars of the plaintiff's demand, and on the same day served a copy of the summons on the plaintiff's attorney, which the latter did not attend. On the 3d of *May*, a second summons was taken out and served, and as the plaintiff's attorney did not attend, a third summons was taken out, which he did attend on the 5th of *May*, when the order was refused. Immediately after this summons was discharged, judgment was signed for want of a plea, and the plaintiff sued out a *ca. sa.*, of which the defendant's attorney had notice on the 8th of *May*. *Gurney* had obtained a rule *nisi* for setting aside the judgment, and the execution issued thereon, for irregularity, on the ground that the defendant had four days to plead from the return of the last summons, and that the plaintiff was not entitled to sign judgment till the 9th of *May*.

Archbold, now showed cause against this rule. Where the proceedings are stayed by the defendant beyond the time at which he would otherwise be obliged to take the next step, he must take that next step immediately on the rule or summons being disposed of, *St. Hanlaire v. Byam*, 4 B. & C. 970. [*770]

ABBOTT C. J. The rule laid down in that case is correct; but in this case the principal delay was created by the plaintiff, first, in not delivering the bill of particulars until the 2d of *May*, although the order for it was obtained on the 21st of *April*; and, secondly, in not attending the first or second summons for better particulars. We are of opinion, that the judgment was signed too soon, and consequently was irregular. This rule must, therefore, be made absolute.

Rule absolute.†

† HUGHES v. WALDEN, Hilary Term, 1827.

The defendant was arrested on the 8th of November, 1826, on a *latitude* returnable the 13th. The time for putting in bail expired on the 17th. On the 17th the defendant obtained and served a rule to show cause why the bail bond should not be delivered up to be can-

celled on the ground of *misdemeanor*; which rule was discharged with costs on the 25th. At a quarter before seven o'clock in the evening of the 25th, the plaintiff's attorney served a copy of the rule by which the rule nisi was discharged on the defendant's attorney, and then took an assignment of the bail bond, and sued out process against the bail. In a short time afterwards, in the same evening, the defendant's attorney put in bail, and served the plaintiff's attorney with notice. A rule nisi had been obtained by Chitty, for setting aside the proceedings on the bail bond for irregularity, with costs, upon the ground that the rule nisi suspended the proceedings for all purposes until the rule was disposed of, *Swayne v. Crommond* (4 T. R. 176,) and therefore that the time for putting in bail, for pleading, or the like, remained the same when the rule was discharged as when granted; and, consequently, that the defendant in this case having had the whole day on which he obtained the rule nisi to put in bail, had the whole of the day on which the rule was discharged for the like purpose.

Archbold, contra. Although the rule nisi suspended the plaintiff's proceeding while it was pending, the defendant was bound to put in and give notice of bail instanter after the rule was discharged. *St. Hilaire v. Byam* (4 B. & C. 790.)

*771] *Anson*, C. J. When a defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled (as contended for) to the same time for the purpose of taking the next step, as he had when he obtained the rule. But we think that a defendant in such a case should have a reasonable time allowed him for the purpose of taking his next proceeding; and we think that the whole of the day on which the rule is disposed of, such a reasonable time. As this, however, is a rule of practice now for the first time laid down by the court, we think, that although this rule should be made absolute, it should not be made absolute without costs.

Rule absolute, without costs.



Doe on the joint and several Demises of SAMUEL OVERING
AUCHMUTY, et al., v. JULIANA MULCASTER, Widow,
RICHARD TYLDEN, and JANE his Wife.

Children born in the United States of America, since the recognition of their independence, of parents who resided there before, but who were natural-born British subjects, and at the time of the separation of the two countries adhered to the British government, are not aliens, and are capable of inheriting lands in this country.

EJECTMENT for premises in the parish of *Ospringe*, in the county of *Kent*. Plea, Not guilty. At the trial before *Best*, C. J., at the Kent Summer assizes, 1825, a verdict was found for the plaintiff, subject to the opinion of this court upon the following case: The premises in question are of gavelkind tenure. The late Sir *Samuel Auchmuty*, deceased, in *August*, 1822, died, seised thereof, unmarried, and without issue, and intestate as to that property. He was the youngest son of *Samuel Auchmuty*, who was the son of a *British* born father and mother, and was born in *Massachusetts* in *North America*, then a colony of *Great Britain*, was rector of *Trinity Church*, in the city of *New York*, in the state of *New York*, in *North America*, at that time also a colony of *Great Britain*, and died there prior to the recognition of the independence of the United States of *America*, by *Great Britain*: and at the time of his death was a *British* subject. The said *Samuel*, the father, left issue him surviving, by his wife, (*an *English*-born subject,) three sons; *772] namely, *Robert Nicholls*, who was the eldest, *Richard*, and the said Sir *Samuel*, who so died seised of the premises in question; and three daughters; namely, the above named defendant *Juliana*, now the widow of *Frederick Mulcaster*, the above named defendant, *Jane*, now the wife of the said *Richard Tylden*, and *Isabella*; all which issue were born in the province of *New York*, before the declaration by the *American* states of their independence, and before the recognition thereof. *Richard* and *Isabella*, died before Sir *Samuel*, without leaving issue. *Robert Nicholls Auchmuty*, resided in the province of *New York*, during the revolutionary war, within the *British* lines, and

at that time served as an officer in, and afterwards for some time commanded a volunteer company of militia, called the governor's company, in aid of the royal cause in the said war, and bore arms against the United States, until the peace hereinafter mentioned. *Robert Nicholls Auchmuty*, being an American loyalist, still adhering to his then majesty as his subject, embarked with the British troops, when they evacuated New York, pursuant to the treaty of peace, between Great Britain, and the United States of America, concluded in September, 1783, and arrived with the said British troops in England, and he continued to reside in England, for about two years after his arrival therein as aforesaid. Whilst he so resided in England, he was duly appointed by the British government, secretary to a board of commissioners in pursuance of the said treaty of peace made in September, 1783, which board sat in the city of New York; and he went from England to New York, in the year 1785, under and by virtue of that appointment. After the determination of his employment under the British government, he settled in the United States of America, married a British born subject, and had children, and continued to [773] reside there until the time of his death, which took place in the year 1812. At the time of his death *Robert Nicholls Auchmuty*, left issue male four sons; viz., the three lessors of the plaintiff, and *Robert Mulcaster Auchmuty*, all of whom were born in the United States of America, subsequent to the recognition by Great Britain, of the independence of that country, and after *Robert Nicholls Auchmuty*, went to New York, under the said appointment as aforesaid. The four sons of the said *Robert Nicholls Auchmuty*, all survived Sir *Samuel Auchmuty*, who so died seised of the premises in question. *Robert Mulcaster Auchmuty*, died about the month of November, 1822, at Madras, without leaving any widow or issue, and without making any will to pass real estates. The lessors of the plaintiff in this action are the next heirs in gavel-kind of Sir *Samuel Auchmuty*, who died so seised, if they can by law inherit the said premises from the said Sir *Samuel Auchmuty*. The colony of New York, with other colonies in North America, separated themselves from the government and crown of Great Britain, and united themselves together, and on the 4th of July, 1776, declared themselves free and independent states by the name and style of "The United States of America." On the 3d of September, 1783, his late majesty acknowledged the United States of America, to be free, sovereign, and independent states, and on the said 3d of September, a definitive treaty of peace was signed between his said majesty and the United States of America, which said treaty is as follows; (the special case then set out the first, third, fourth, fifth, sixth, and seventh articles of the treaty, for which see *Doe d. Acklam*, 2 B. & C. 779.

**Chitty*, for the lessors of the plaintiff. The decision to which this court came in *Doe v. Acklam*, is decisive of the present question, for [774] this case is precisely the converse of the former. There the parent of the claimant did not join either party at the time of the war with America, but continued to reside there during the war, and at the time of the treaty made with this country, (whereby the independence of the United States was recognized,) and thenceforth until his death. That was considered as an election to become a citizen of America, and to put off his allegiance to this country. In the present case, it is clear that the father of the lessors of the plaintiff, at the time of the treaty, elected to continue a British subject, and he could not afterwards, even if he had wished so to do, get rid of that character. The present claimants are, therefore, clearly within the 4 G. 2, c. 21, being born of a father who at the time of their birth was a natural-born subject of this country. Should it be said that the case is altered by the circumstance of the father's being born in America, that is completely answered by the case of *Bacon v. Bacon*, Cro. Cas. 801.

Abraham, contra. The lessors of the plaintiff are not capable of inheriting lands in this country. They were born in the United States of America, after

the independence of those States had been recognized ; and being born of parents settled there, must be considered aliens. In *Calvin's* case, 7 Co. 31, an alien is defined to be a subject that is born out of the legiance of the king, and under the legiance of another ; and this definition is adopted in *Com. Dig. Alien*, (A.) If then the lessor of the plaintiff were aliens born, they cannot hold lands here, "although their parents were natural born," *Co. Lit.* 8 a.

*775] In the 20 Car. 2, c. 6, a statute was passed to naturalize the children of his majesty's English subjects born in foreign countries during the protectorate. The 7 Anne, c. 6, was made in *pari materia*, and each of them was intended to apply to cases where the children were born abroad, of parents who had gone there for temporary purposes, and not to make the foreign country their permanent abode, as was the case of the parents of the present claimants. The 4 G. 2, c. 21, was merely intended to restrain and not to enlarge the operation of the 7 Anne, c. 6.

ABBOTT, C. J. It is not found that *Robert Nicholls Auchmuty*, the father of the lessors, of the plaintiff, was at the time of the treaty in 1783, adhering to the United States. The facts prove the reverse, and the case directly within the stat. 4 G. 2, c. 21. The plaintiff is therefore entitled to recover.

BAYLEY, J. There is a very plain distinction between this case and that of *Doe v. Acklum*. In that case it appeared that the parent, through whom the claim was made, put off his allegiance at the time of the treaty which enabled him so to do. Here *Robert Nicholls Auchmuty*, took no such step at that time, and the law did not enable him to do so at any future time. He was, therefore, when residing in America, after the treaty, in the same situation as if he had gone to reside in any other foreign country, and his children are expressly within the stat. 4 G. 2, c. 21, and entitled to the privileges of natural-born subjects of the king of England.

*776] HOLROYD, J. The statutes 7. Anne, c. and 4 G. 2, c. 21, clearly give to the children of *R. N. Auchmuty*, inheritable blood, although they were not born within the legiance of the king.

Postea to the plaintiff.

SAMUEL BODDINGTON v. JOHN ABERNETHY.

Where copyholder in fee surrendered to the uses of a prior settlement, which contained a power to revoke the uses therein declared, and limit new ones : Held, that uses limited in execution of this power were good, although they had the effect of defeating prior vested estates

THE following case was sent by the Master of the Rolls for the opinion of this court :

At the time of the making of the indenture of lease and release next herein-after mentioned, *Ann Forbes*, spinster, party thereto, was seised for an estate of inheritance, in fee-simple, of certain freehold manors, messuages, lands, tenements, and hereditaments thereby conveyed. She was, also, at that time seised for an estate of inheritance in fee-tail, at the will of the lord, and according to the custom of the manor of *Enfield*, of certain copyhold messuages and hereditaments with the appurtenances in the said indenture mentioned, situate within, and parcel of the manor of *Enfield*, and demised and demisable by copy of court roll of the said manor to any person or persons willing to take the same,

in fee simple or otherwise, at the will of the lord, and according to the custom of the said manor. By lease and release bearing date respectively the 27th and 28th days of *June*, in the year 1785, (being the settlement made previously to the marriage of *Ann Forbes*, with *William Raymond*,) the release being duly made and executed between and by *Ann Forbes*, of the first part, *William Raymond*, of the second part, *James Raymond*, the elder *of [777 the third part, *Thomas Fuller*, and *James Raymond*, the younger of the fourth part, *John Raymond*, and *Thomas Hall Fiske*, of the fifth part, and *John Wolf*, and *Thomas Hall*, of the sixth part, in consideration of the said then intended marriage, and other the considerations therein mentioned, the said freehold hereditaments of which *Ann Forbes*, was seized in fee, were granted and released by her, with the privity and consent of *William Raymond*, unto *Thomas Fuller* and *James Raymond*, the younger, and their heirs and assigns, to hold the same unto *Thomas Fuller*, and *James Raymond*, the younger, their heirs and assigns, to the use of *W. Raymond* for life, and to certain other uses therein specified. And by the said indenture of release it was provided, agreed and declared by and between all the said parties thereto, that it should be lawful for *Thomas Fuller*, and *James Raymond*, the younger, or the survivor of them, or the heirs of such survivor, at any time or times thereafter, at the request, and with the consent and approbation of *William Raymond*, and *Ann Forbes*, his intended wife, or of the survivor of them, during their lives, and the life of the survivor of them, (such request, consent, and approbation to be testified in manner therein specified,) to dispose of and convey, either by way of sale for valuable consideration in money, or in exchange for or in lieu of other manors, &c., of equal value, all or any of the said manors, &c., unto any person or persons whomsoever, and that for the purpose of effecting such disposals and conveyances, but not for any other purpose, it should be lawful, if it should be thought necessary or requisite, for *Thomas Fuller*, and *James Raymond*, the younger, and the survivor of them, or for the heirs or assigns of such survivor, upon such request, and *with such consent and approbation as aforesaid, testified as aforesaid, by any deed or instrument in writing to be sealed and delivered by them the said *Thomas Fuller*, and *James Raymond*, the younger, or the survivor of them, or the heirs or assigns of such survivor, in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, powers, provisoies, limitations, and agreements in the said indenture of release limited, declared, and expressed, of and concerning the said hereditaments so to be sold or exchanged, and by the same or any other deed or instrument in writing, to be so sealed, and delivered, and attested, and with such consent and approbation, and so testified as aforesaid, to limit and appoint the said hereditaments and premises whereof the uses should be so revoked, either unto the purchaser or purchasers, or to the person or persons making such exchange or exchanges, and to his, her, and their respective heirs and assigns, or otherwise to limit, declare, direct, or appoint such new or other use or uses, estate or estates, trust or trusts of and concerning the same hereditaments and premises, as should be necessary or requisite for effecting such sale or exchange. And after further reciting in the said indenture of release, that *Ann Forbes*, was so seized in fee-tail as aforesaid, of and in the copyhold messuages and hereditaments, with the appurtenances, within and parcel of the manor of *Enfield*, as aforesaid, *Ann Forbes*, covenanted to make such surrender, and suffer such recovery in the copyhold court of the said manor, as were necessary to extinguish her estate tail, and bar all remainders expectant thereon, and for surrendering, limiting, and assuring the same, according to the custom of the manor, to the same uses, *and subject to the same powers as were before limited and declared as [778 to the freehold estates. Soon after the execution of the release the intended marriage was solemnised, and afterwards *Ann Raymond*, and her husband *W. Raymond*, surrendered to the use of *John Spelman Mannings*, to

make him tenant of the said copyhold premises, in order that a recovery might be suffered according to the covenant. On the 17th of *March*, 1789, *Manning* was admitted, and a recovery was suffered according to the covenant, wherein one *F. Ruddle*, was defendant, *Manning* tenant, and *W. Raymond*, and *Ann* his wife vouchees, who further vouched the common vouchee. *Ruddle* was admitted, and immediately surrendered to the uses, and subject to the powers in the indenture of release contained; and thereupon *W. Raymond*, was admitted tenant for life according to that indenture. By release and appointment of the 16th of *July*, 1805, made and executed by *T. Fuller*, and *J. Raymond*, the younger of the first part, *W. Raymond*, and *Ann* his wife, of the second part, *Samuel Boddington*, of the third part, *James Weston*, of the fourth part, the Rev. *John Raymond*, of the fifth part, and *Ambrose Weston*, of the sixth part, *T. Fuller*, and *J. Raymond*, the younger, in consideration of 1320*l.*, being a reasonable price in that behalf, to them paid by *Samuel Boddington*, with the consent and approbation, and at the request of *W. Raymond*, and *Ann* his wife, testified as required by the said first-mentioned indenture of release, and by virtue of the powers thereby given, sold the said copyhold premises to *Samuel Boddington* in fee. And in pursuance of the powers to them given by the first-mentioned indenture, and the surrender, revoked the uses, &c., to which the said copyhold premises had been surrendered, [780] and did thereby limit and appoint that all the said copyhold premises should, immediately from and after the sealing and delivery of the said indenture of release and appointment, be and remain to the use of *S. Boddington*, his heirs and assigns; and *W. Raymond*, for himself and *Ann* his wife, did covenant with *S. Boddington*, that he would surrender or cause to be surrendered into the hands of the lord, to the use of him *S. Boddington*, his heirs and assigns, the said copyhold hereditaments. The said indenture of release and appointment of the 16th of *July*, 1805, was a disposition, by way of sale, of the said copyhold hereditaments; and the same was duly signed, sealed, and delivered by all the parties thereto in the manner required by the first-mentioned indenture of release and settlement. On the 22d of *August*, 1805, *W. Raymond*, according to the custom of the manor, surrendered the said copyhold premises into the hands of the lord, to the use of *Thomas Fuller*, and *James Raymond*, the younger, their heirs and assigns, upon the several trusts, and for the ends, intents, and purposes mentioned, expressed, and declared of and concerning the same in the said indenture of settlement of the 28th of *June*, 1785; and at a court holden in and for the manor on the 28th of *August*, 1805, *T. Fuller*, and *J. Raymond*, the younger, were duly admitted tenants to the same; *habendum*, unto *T. Fuller*, and *J. Raymond*, the younger, their heirs and assigns, at the will of the lord, and according to the custom of the manor, upon the several trusts, and for the several ends, intents, and purposes mentioned, expressed, and declared of and concerning the same in the said indenture of settlement of the 28th of *June*, 1785. Afterwards, at [781] the same court, *T. Fuller*, and *J. Raymond*, the younger, surrendered the same copyhold premises into the hands of the lord, to the use and behoof of the plaintiff *S. Boddington*, his heirs and assigns forever; and thereupon the plaintiff *S. Boddington* was, at the same court, duly admitted tenant to the said copyhold premises, to hold the same, with the appurtenances, unto him, his heirs and assigns forever, at the will of the lord, and according to the custom of the manor. In the month of *July*, 1822, the defendant *John Abernethy*, entered into a contract with the plaintiff, to purchase of the plaintiff the said copyhold premises whereof the plaintiff had been so admitted tenant as aforesaid, and a bill in this cause was filed to compel a specific performance of such contract. The question for the opinion of the court is, whether the plaintiff has an estate in fee-simple at the will of the lord, according to the custom of the said manor, in the said copyhold messuages and hereditaments with the appurtenances.

Tinney, for the plaintiff. The question upon this case is, whether uses to arise in *futuro* upon contingencies, and so as to defeat prior vested estates, can be well limited in a surrender of copyhold lands. They may be so limited by deeds taking effect under the statute of uses in the case of freeholds, or by devises both of freeholds and copyholds, and in settlements of estates of either sort by way of trust. It must be admitted that the statute of uses does not affect copyholds, *Rouden v. Malster*, Cro. Car. 62, where this reason is assigned for the exemption, "because the transmutation of possession by the sole operation of the statute without allowance of the lord, would tend to the lord's prejudice,"^t it must be admitted also that this as a common law [782 conveyance would not be good, and the argument for the defendant must be, that the surrender of a copyhold is a common law conveyance, and subject to the rules of the common law. But the reasons for those rules being in many instances inapplicable to copyholds, the rules themselves ought not to be applied to such estates. A future freehold could not at common law be given, because the freehold could not be transferred without livery of seisin. So also, a fee could not have been limited to a stranger in destruction of a previous fee; for no estate of freehold could at the common law be defeated, except by entry of the feoffor or his heirs for a condition broken, and such entry would have defeated the limitation over. The case of copyhold land is very different, for there the freehold always remains in the lord. Neither do the objections made to feoffments to uses before the statute apply to copyholds. The owner of the freehold is known; there can be no difficulty in making a tenant to the *præcipe*, or in finding out the person who is bound to perform the services. There are many cases in which copyholds may be limited in a mode not allowed by the common law as to freeholds. A husband cannot give freehold lands to his wife, or a wife to her husband, but with respect to copyholds the law is otherwise, *Brooks v. Brooks*, Cro. Jac. 434. In *Co. Copy.* 81, many other instances are given, and that book shows that copyholds may be surrendered for estates of freehold to take effect in *futuro*. The older authorities support that position, and others which appear to warrant a different opinion are capable of explanation. In *Allin v. Nash*, Noy. 152, it was resolved, "that if a copyholder surrenders according to the custom, to the use of *N.* after the death of the surrenderer, that is good, notwithstanding [783 that one cannot preserve the same estate to himself, for the estate is in the lord. And the surrenderer during his life shall take the profits, and afterwards the lord ought to admit *B.* according to the direction of the surrender." In *Paulton v. Cornhill*, Cro. Eliz. 361, surrender was to the use of one in fee, upon condition to pay 100*l.* to a stranger, and if he failed, that it should be to the use of a stranger in fee. The report says, that "the court spake not much thereto, but willed to have it specially found, yet *Beaumont* conceived it to be well enough, for it shall be as an use limited upon a feoffment, and these uses shall rise out of the first surrender;" and in *Bentley v. Delamor*, Freem. 267, it is said, "It is good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds; a surrender in *futuro* is good, for the freehold remains in the lord." The only difficulty arises from the case of *Simpson v. Sotherne*, which is reported in various books, 2 Bulstr. 272; Cro. Jac. 376; 1 Roll. Rep. 109, 137, 153; Godb. 264; 2 Roll. Abr. 791. The accounts of the case given by these reporters vary, but that in 2 Bulstr. is the fullest, and appears to be the best. It is there stated, that *R. Simpson*, being a copyholder of inheritance in fee simple, did surrender his copyhold lands (*jacens in extremis*) unto the lord of the manor, *habendum* after his death *ad opus et usum* of the infant, then being in *ventre sa mère*, and that if such infant dies without heir, within age or before marriage, then he surrenders these lands to the use of one *John Simpson* and his heirs, accord-

*784] ing to the custom of the manor. **R. S.*, the copyholder, died, afterwards *Joan*, the infant with which his wife was with child, was born, the which *Joan* died within age, and the question was, whether *J. S.* should have the estate according to the second surrender, or *E. S.*, who was the heir of the surrenderer and of the infant; and it was resolved, that *J. S.* should not have the estate. But the ground of the decision was, that the grant to an infant in *ventre sa mere* was not good by an immediate surrender. That case as reported by Bulstr., does not support the opinion that a surrender cannot take effect in *futuro*. In Cro. Jac. 376, it is said to have been resolved that the surrender "to the use of *J. S.* and his heirs, if it happened that his (the surrenderer's) child in *ventre sa mere* died within age, was merely void, for he could not make such a conditional surrender to operate in future;" but this resolution is not found in Bulstr. It appears, indeed, by that reporter, and by Rolle, that *Coke*, C. J., during the discussion of the case, threw out something of that kind, saying it had been so determined in *Clampe*'s case, Cro. Eliz. 29. But that appears to have been a very different case. *Margaret Boreman*, copyholder in fee, married *J. Clampe*, and afterwards she and her husband surrendered the land, *per nomen* of the reversion after the death of the husband and wife, to the use of the plaintiff in fee; the wife died, and afterwards the husband died, and the plaintiff entered. The defendant was customary heir of *Margaret Clampe*, and judgment was given for the defendant. Now, it is clear that the surrender in that case was void, being of a reversion which the surrenderers had not. According to the report by *Godbolt*, one

*785] ground of the decision in *Simpson v. Sotherne* was, that the remainder to *J. S.* was to begin upon a condition precedent, which was never performed. In the supplement to Co. Copy. 144, the case of *Simpson v. Sotherne* is mentioned, as deciding that a surrender must be to such a person, or his use, who is in *esse*, and capable of such a surrender, or that may take presently by force of the surrender; and on that ground the surrender to the use of the infant in *ventre sa mere* was held bad. Probably that was the real ground of the decision; for in Bulestr., *Coke*, C. J., is made to liken the case to a devise to an infant in *ventre sa mere*, which he said could not be good. The law, as laid down in Co. Copy. 81, is, however, at variance with the decision in *Simpson v. Sotherne*. It is there said, that "in customary grants upon surrenders, the law is not so strict as in grants at the common law; for in grants at the common law, if the grantee be not in *rerum natura*, and able to take by virtue of the grant presently upon the grant made, it is merely void; but in customary grants upon surrenders the law is otherwise." And then Lord *Coke* goes on to state that a surrender to him that shall be heir of *J. S.*, or to *J. S.*'s next child is good. On the other side, *Gilb. Tenures*, 259, may be relied on, where he approves of the decision in *Simpson v. Sotherne*, as reported in Cro. Jac. This is controverted in *Fearne's Cont. Rem.* 276, 6th edit., citing *Paulton v. Cornhill*, and *Stocker v. Edwards*, 2 Show. 398, which latter case was as follows: "A surrender of a copyhold tenement was made to the use of himself for life, and after to the use of *J.*, his youngest son, and the heirs of his body, if he attain to the age of eighteen years; and 'if he die before he attain to that age without issue male, then to his right heirs.'" The question was, whether this was a contingent remainder, or whether it should attach immediately upon the death of tenant for life. And it was held that it attached immediately. This case is also reported in 3 Lev. 132, as if it arose upon a *will* of copyhold in *Watk. on Copy.* c. 5. p. 205, and it is assumed to have been so. That, however, is a mistake, as appears by a note to *Bromfield v. Crowder*, 1 N. R. 324. But in neither of those reports does it appear that the validity of such a conditional surrender, to take effect on the death of the son under eighteen years of age, was doubted. There are indeed cases in which it has been said that surrenders of copyholds are common law conveyances, and to be so construed: and these expressions

may be relied on for the defendant. Thus in *Lovell v. Lovell*, 3 Atk. 11, Lord Hardwicke says, "Surrenders of copyhold estates are to be construed as deeds and conveyances at common law, *and not as a will*." Now it may be perfectly true that surrenders ought to be construed as conveyances at common law and yet they may not take effect in the same way. The words "and not as a will," show that the observation merely applied to the interpretation to be put upon the words of the surrender; and this is confirmed by what follows immediately after the passage before cited. "And, as Mr. Ford said, a springing use in a copyhold estate would be construed as a springing use in a freehold." In *Fisher v. Wigg*, 1 P. W. 14; 1 Ld. Raym. 622, Holt, C. J., said that "copyhold lands do not differ in construction of law from freehold lands, and surrenders of copyholds must be governed by the same rules as conveyances at common law;" but that only applied to the meaning to "be given to certain words, and the majority of the court were of a different opinion; and *Watkins*, on Copy, vol. i. p. 112, admits that if that be the law, surrenders are not to be construed as common law conveyances. If estates to commence in *futuro* may be limited on a surrender of copyholds, it seems to follow that a power may be reserved to revoke the uses declared in the surrenders, and limit others in lieu of them. It appears from the case of *Lovell v. Lovell*, that in the opinion of Lord Hardwicke there may be springing uses limited upon a surrender of copyholds; and in *Roe v. Griffiths*, 4 Burr. 1953; *Doe v. Morgan*, 7 T. R. 103, and Lord Kensington v. Mansell, 13 Ves. 240, the point was not discussed; but it seems to have been taken for granted that a surrender of copyholds to certain uses, with power to the surrenderer to declare other uses by deed or will, was good. Where a surrender is made to the use of a will, it does not appear to have been ever doubted that the devisor might limit shifting or springing uses, so as to have the effect of devesting prior vested estates, *Wellcoke v. Hammond*, cited in *Boraston's* case, 3 Co. 20; *Brian and Cawen's* case, 3 Leon. 115; *Taylor v. Taylor*, 1 Atk. 386; *Driver v. Thompson*, 4 Taunt. 294; *Doe v. Barthrop*, 5 Taunt. 382; *Holder v. Preston*. 2 Wils. 400. Now a will does not operate as a devise of copyholds, but as a declaration of the uses of the surrender; and it would be difficult to assign any good reason why uses declared in that mode should be supported, if they ought not when declared in any other instrument. In the case of freeholds, shifting or springing uses might, before the statute, be declared upon a feoffment to uses, (although a freehold could not be given to commence in *futuro*), for in such case the freehold remained in the same person. This rule applies also to copyholds, for the freehold remains in the lord. There may be some reason why words in a will of copyholds should suffice to raise such uses, which would be insufficient in a deed, because the testator is supposed to be *inops consilii*, but there does not appear to be any reason why that should be allowed to be done by will, which cannot be done by any form of words in a deed, each being nothing more than a declaration of uses upon a surrender. In practice copyholds were for a long series of years made the subject of such settlements as that in question; and precedents may be found in the English Copyholder, p. 385, and Horseman's Precedents, vol. ii. 468; vol. iii. 425. Nor was the validity of them ever questioned in modern times, until the doubt suggested in *Gilb. Tenures*, 259, was revived, in *Watkins* on Copy, c. 5. It is important that such settlements should be held good, and that parties should not be compelled to make them by way of trust; for then it is necessary to resort to a court of equity, in order to compel a performance of the trusts. Besides, the rolls of the manor are properly evidence of the copyholder's title; but the stewards will not enter trusts upon the rolls. Again, trustees may defeat the trusts by committing a forfeiture; or by accident their estate may escheat, and in either case the lord would hold by title paramount the trusts, and not subject to them.

G. R. Cross, contra. The plaintiff, *S. Boddington*, has not an estate in fee-

simple in the copyhold premises in question. If the power reserved in the settlement, to revoke the old and appoint new uses, be good, it must *be admitted that it has been well executed. But it is clear that such a power would be bad with respect to common law conveyances of freeholds ; and it has been frequently held that surrenders of copyholds are to be treated as common law conveyances. It is also at variance with the principles of the law relating to copyholds ; for it has the effect of destroying prior vested estates ; and it is a general rule, that no vested estates of copyhold can be divested, except by surrender. It is said, that the freehold remaining in the lord is sufficient to support all uses and trusts declared of the lands ; and he is compared to the feoffee to uses of freeholds ; but there is this important distinction in the latter case. Before the statute of uses the legal estate was in the feoffee ; in the case of copyholds it is in the tenant, and not in the lord. The various incidents of copyholds of inheritance show that the legal estate is in the copyholder, and his estate is sufficient to support the trusts, so that there will be no practical inconvenience in holding the power in question to be void, for springing and executory uses may be limited by way of trust. The descent of copyholds follows the rules of the common law, *Supplement to Co. Copy.* 116, *Smith v. Triggs*, 1 Str. 487. So, if a devise be made to the customary heir, he is in by descent and not by the will : *Doe Dem. Shewen v. Wroot*, 5 East, 132 ; and in *Doe v. Barthrop*, 5 Taunt, 382, where copyholder in fee devised to *R. K.* and *C. J.*, and their heirs in trust, to permit and suffer *M. A. S.*, or her assigns, to receive the rents and profits during her life, and subject to such estate and interest of *M. A. S.*, unto such person or persons, for such estates, &c. as *M. A. S.* should by deed or will appoint, it was held that the legal estate in the trustees "should be carried only so far as was necessary to effectuate the intention of the devisor, that the trust would be executed by limiting to the trustees a base fee, determinable with the life of *M. A. S.*, and that therefore the legal estate went over from them when the life estate of *M. A. S.* determined. The result of all these cases is, that the legal estate of copyholds never was fiduciary, but always remained in the copyholder ; all the incidents were at common law, and enforceable in the common law courts ; and it has frequently been said, that a conveyance by surrender and admittance is a common law conveyance, and subject to the rules of the common law. In *Fisher v. Wigg*, 1 P. W. 14, this was the opinion of *Holt*, C. J., although *Gould* and *Turton*, Js., differed from him ; and in *Idle v. Cook*, 1 P. W. 70, which occurred very few years after, the majority of the court concurred with *Holt*, C. J., in holding, that a surrender was to be considered as a common law conveyance. In that case, *Powis*, J., in discussing the question, what words were sufficient to create an estate tail in a surrender, says : "In a conveyance at common law, as this is, the donor must by express words give direction from whose body the heirs inheritable are to issue." Again, in *Sutton v. Sutton*, 2 Atk. 101, it is said : "In the cases of surrenders of copyhold estates the same construction must take place, as in all other conveyances at law ; and so held, in *Idle v. Cook*, by the whole court,† that a limitation of uses in a copyhold surrender must be construed by the same rules as if it were a limitation in any other conveyance at common law." The same was held by Lord *Hardwicke* in *Lovell v. Lovell*, and by Lord *Kenyon* in *Wright v. Kemp*, 3 T. R. 470. In *Gib. Tenures*, 258, it is laid down, that "as well estates as descents of copyholds, are to be guided according to the rules of common law, as a necessary consequence upon the customary estates." And accordingly we find many cases in which it has been held, that customary estates of freehold cannot be made to commence in *futuro*. In *Dunnal v. Giles*, 1 Brownl. 41, it was held, that "If I surrender to the use of *B.* after my decease, it is not good." And in *Clamp's* case, as reported by *Leon*, 4 Leon.

† According to the report in 1 P. W. 70. *Gould*, J., differed with the rest of the court.

§, "A copyholder in possession surrendered the reversion of his land post mortem suam to the lord to an use, &c.; it was adjudged that thereby nothing passed." In *Seugood v. Hone*, Cro. Car. 366, the same principle was recognised. *John Reeve*, copyholder in fee, surrendered to the use of certain persons, with this stipulation, "this surrender not to stand and be in full force until after the death of J. R." J. R. died, and the surrender was presented at the next court, and the surrenderees admitted, and upon that clause it was resolved, "that the surrender was good, and that clause, being repugnant to the premises, shall be rejected as void and idle, and shall not destroy the premises;" whence it may be inferred that such a clause if not void, would have rendered the surrender inoperative. *Simpson v. Solherne* is a very important case. According to the report in *Cro. Jac.* it was there expressly decided, first, "that a copyholder in fee cannot surrender *habendum* after his death, no more than a tenant in fee can convey his lands *habendum* after his death, for then he should leave a particular estate in himself, which is against the rules of law, and there is not any difference betwixt a copyhold and a freehold to that purpose." Secondly, that a "conditional surrender to operate in *futuro* is bad. And although [792] the report in 2 Bulst. is somewhat different, yet it is not according to that account by any means an authority for the plaintiff. *Coke*, C. J., is there made to say, the case may peradventure somewhat vary from *Clampe's* case, because in the latter the surrender was *post mortem*, in the former *habendum post mortem*; but *Houghton*, J., says, "a surrender of a copyhold estate to the use of another is a conveyance, and a man cannot make a conveyance to begin upon a contingency; no case there is of this:" and *Coke* J. adds, "By devise such an estate might be made, but not so as here it is, in point of a surrender, which cannot be good." In *Barker v. Taylor*, Golb. 451, *Clampe's* case is recognized; and the same point was ruled in *Cambridge v. Whilton*.[†] The case of *Allen v. Nash*, cited on the other side from *Noy's* reports, is very differently reported by *Brownlow*, Part i. 127, it is there said that the surrender was to the second son for life, after the death of the tenant and his heirs, and it was adjudged *not* to be a good surrender; and in the *Lex Custum*. 117, the case as reported by *Noy* is said to be a bad decision. *Roe v. Griffits*, and the whole of that class of cases where the question was not discussed, but the whole passed *sub silentio*, cannot have any weight. But supposing a surrender to take effect in *futuro* could be valid, still it does not follow that a vested estate in a copyhold can be defeated by the execution of a power to revoke the uses of a surrender and declare others in lieu of them. In a note to *Gib. on uses*, 353, Mr. *Sugden* expresses his opinion that a vested estate cannot be so defeated, "and he relies upon *Co. Copy.* s. 36, p. 83, where it is laid down that "a copyhold interest cannot be transferred by any other [793] assurance than by copy of court roll according to the custom." A passage was cited from *Co. Copy.* 81, to show that in customary grants upon surrenders the law is not so strict as in grants at the common law, and some instances of surrenders to the use of persons not in *esse* were put; but Lord *Coke* proceeds, "The reason of the law is this; a surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee before the lord hath admitted him according to the surrender; and, therefore, if at the time of the admittance the grantee be in *rerum natura*, and able to take, that will serve." There is not a word there to support the opinion that a vested estate of copyhold may be devested by the execution of a power. If then the Court should be of opinion that a surrender to uses to arise in *futuro* may be good, still the plaintiff cannot be entitled to judgment, unless it is further held that a power to revoke vested estates and limit new ones may be reserved in the deed originally declaring the uses of the surrender.

[†] March. 176. This report contains the argument of the plaintiff's counsel only, and concludes with a prayer of judgment; the result does not appear.

Tinney, in reply. It must be admitted that a copyholder has the legal estate, but the question turns upon the application of the incidents to such estates. It is said that a vested estate will in this case be destroyed, if the power is held good, but in the case of a surrender by a copyholder in fee to him who shall be heir of *J. S.*, until the heir is ascertained, the estate remains in the surrenderer, and that is afterwards devested. So in the case of a surrender to the use of an intended wife after the marriage, and in the mean time to the use of the *surrenderer and his heirs, which was the state of facts in *Bently v. Delamor*, Freem. 267. In like manner here the estate may be devested, the power to do that being reserved by the same instrument by which the estate was originally granted. The case of *Simpson v. Sotheorne* could not decide that shifting uses of copyholds were not good, for *Coke C. J.* there said it was unnecessary to give an opinion upon the point. The case at the utmost only decided that a surrender must be an immediate conveyance, and determined nothing as to the uses which might be declared upon it. As to the report of *Allen v. Nash* by *Brownlow*, where it is said that "a surrender to *A.*, after the death of *B.* and his heirs," was bad; that is very true, because it would tend to a perpetuity, but *non constant*, it would have been held bad if the words *and his heirs* had been omitted. Shifting and springing or executory limitations are allowed in wills, because they do not contravene any rules of law, as wills do not convey lands by transmutation of possession. The same reasoning applies to surrenders of copyholds, which may, therefore, in like manner be limited to such uses.

Cur. adv. vult.

The following certificate was afterwards sent:

This case has been argued before us by counsel. We have considered it, and are of opinion, that the plaintiff has an estate in fee simple at the will of the lord, according to the custom of the said manor, in the said copyhold messuages and hereditaments with the appurtenances.

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD.†

† *Littledale J.* not having heard the whole argument, did not sign the certificate.

Trinity Term, 7 Geo. 4, 1826.

WHEREAS by statute 6 Geo. 4, c. 50, s. 23, a provision is made, that where a rule shall be drawn up for a view, the rule shall, if the Court or Judge granting the same think fit, require the person applying for the view to deposit in the hands of the under sheriff a sum of money, to be named in the rule, for payment of the expenses of the view.

And whereas it is desirable that some general rule should be made upon this subject:

IT IS, THEREFORE ORDERED, That upon every application for a view there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under sheriff, that the sum to be deposited shall be 10*l.* in case of a common jury, and 18*l.* in case of a special jury, if such distance do not exceed five miles; and 18*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall

forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under sheriff: And it is further ordered, That the under sheriff shall pay and shall account for the money so deposited, according to the scale following, that is to say,

*For travelling expenses to the under sheriff, the showers, and jurymen, each, per mile,	0 1 0
Fee to the under sheriff, where the distance does not exceed five miles from his office,	1 1 0
Where such distance exceeds five miles,	2 2 0
And in case he shall be necessarily absent more than one day, then for each day after the first, a further fee of	1 1 0
Fee to each of the showers the same as to the under sheriff, calculating the distance from their respective places of abode.	
Fee to each common juryman, per diem,	0 5 0
Fee to each special juryman, per diem,	1 1 0
Allowance for refreshment to the under sheriff, for showers, and jurymen, whether common or special, each, per diem,	0 5 0
To the bailiff, for summoning each juryman whose residence is not more than five miles distant from the office of the under sheriff,	0 2 6
And for each whose residence does exceed five miles, of such distance,	0 5 0

BY THE COURT.

“The KING v. THOMAS WILLIAM COKE, Esq.†

[797]

Where a poor-rate was imposed upon “a lighthouse, together with the duties and contribution money payable in respect of ships passing by the same,” and the lighthouse was occupied by a servant of the owner, and was situated in the parish, but the duties were collected out of the parish: Held, that these duties did not constitute part of the annual profits of the house or land where the light was placed, and were not rateable to the poor.

UPON an appeal by *T. W. Coke*, Esq., against a rate for the relief of the poor of the parish of *Lydd*, the sessions confirmed the rate, subject to the opinion of this court upon the following case:

By letters patent, dated the 28th of June, 13 G. 2, that king granted to *Thomas Lord Lovell*, his executors, &c., all that the lighthouse at or near *Dungeness*, in the county of *Kent*, and free leave, license, power, and authority to maintain, continue, and renew the same with lights, to be continually burning therein in the night season, from time to time; and, (if need were,) to alter, remove, and change the same, and to rebuild another at any place near the same, by the advice or direction of the master, wardens, and assistants of the *Trinity House of Deptford Strand* for the time being; and such lighthouse, so rebuilt, to maintain, continue, and renew with lights, to be continually burning therein in the night season, in such manner as might be for the safety and direction of the traders that way: and for defraying the necessary charges

† Two or more Judges of this court sat in banc, as on former occasions, from Thursday the 15th of June to Saturday the 24th of June inclusive; and again from Monday the 30th of October to Saturday the 4th of November inclusive; during which periods this and the following cases were argued and determined.

in maintaining, continuing, altering, renewing, removing, and changing or rebuilding the same, the king did thereby grant, that during the term of years thereafter granted, the said *Thomas Lord Lovell*, his executors, &c. should and might collect and receive to his and their own proper use, towards the charges aforesaid, 1d. by the ton from all merchants, masters, or owners of all ships, hoy, and barks passing by the said lighthouse outward bound, and the same inward bound, and the same for strangers, as often as they should pass by the lighthouse, for sixty years from the 24th of June, 1768, subject to the yearly rent of 6l. 13s. 4d. payable to the crown half yearly. The letters patent then provided for the collection of the tolls, and that no other person should erect any lighthouse within five miles of *Dungeness*. All the estate and interest under the said letters patent are, and have for many years past, been vested in the appellant Mr. *Coke*. The lighthouse and lights are kept up at his expense, and a person paid and employed by him resides in the lighthouse for the purpose of attending, and attends the lights. The duties or contribution money are collected at the various ports of arrival and departure, of ships passing the lighthouse, by persons paid and employed by Mr. *Coke*. There is not any port or any custom-house within the town, liberty, or parish of *Lydd*, nor have any duties or contribution money ever been collected within the said town, liberty, or parish, nor do any of the ships, in respect of which the duties or contribution money are paid, come within the said town, liberty, or parish, but the same pass up and down channel in front of the said parish and lighthouse, in the open sea, at different distances from the shore, along which the said parish extends eight miles and upwards; the lighthouse standing on the sea shore above high water mark and within the said parish. The annual value of the lighthouse, independently of the duties or contribution money, would be 4l. Mr. *Coke* does not reside or inhabit within the town, liberty, or parish of *Lydd*, nor occupy or possess any property within the town, liberty, or parish in any manner whatever, except as aforesaid. Personal property, stock in trade, or the profits of manufactures, never have been rated in the parish of *Lydd*, nor are assessed by the rate in question, up to the time of making which the lighthouse had been rated as a cottage only, at the sum of forty shillings, and the duties or contribution money had never been rated or taken into account in making the rate. The rate in question was made on the 2d of April, 1825, and Mr. *Coke* is rated therein as "the occupier of the lighthouse, with the duties or contribution money in respect of ships, hoy, and barks passing by the same," the annual value of the same being stated to be 2250l. The duties or contribution money yearly collected for Mr. *Coke* under the above-mentioned letters patent amount to the sum assessed in the rate, over and above the expense of keeping up the lighthouse and lights.

Boteler, *Darby*, and *Burton* in support of the order of sessions. The defendant was liable to be rated to the full amount of the annual profits of the lighthouse. Those profits arise principally from the tolls: and although tolls are not rateable, *per se*, yet they are, when mixed with a rate upon other property, which, as having substance and locality within the parish, is properly rateable there, *Rex v. Sir A. Macdonald*, 12 East, 324. Here the lighthouse has substance and locality within the parish, and is therefore rateable in respect of the value it derives from the tolls. *Rex v. Rebowe*, Bott. 142, pl. 177; Cowp. 583, and *Rex v. Tynemouth*, 12 East, 46, will be relied upon as authorities to show that the profits of a lighthouse are not rateable; but in those cases the tolls themselves were rated. Here the rate is upon the lighthouse, with the duties payable in respect of it. In *Rex v. Tynemouth* Lord *Ellenborough* intimated an opinion, that the property could be rated in some other way; as if the lighthouse, whose light is the *meritorious cause* of earning the tolls, were in consequence let at a larger rent. It is a general principle applicable to the rating of property of this description, that the rate to be

made in every parish must be in proportion to the meritorious cause of earning profit existing in that parish; thus, in the case of a canal, the rate in any given parish through which the canal passes must be in respect of that proportion of the tolls which the part of the canal situate in the parish, (that being the meritorious cause of earning the profit there,) bears to the whole canal. Here, the entire amount of the tolls being ascertained, the only question is, whether the whole or any part of the tolls is earned in the parish of *Lydd*. It is true, that the vessels from which the meritorious cause, (the light,) earns the profit, do not, as in the case of a canal, come into the parish where the meritorious cause exists; but that is immaterial if the lighthouse yield an annual profit there, for that annual profit is rateable whether it be derived from the actual produce of the land, or from a chattel annexed to the freehold, or from a privilege attached to it. Any principle, therefore, which affects the rateability of land where the profit arises from actual produce, will equally affect it where the profits arise from a chattel annexed or a privilege attached to it. Now, [^{*801} the case of *Rex v. The New River Company*, 1 M. & S. 503, is an authority to show, that where the profits of the land are derived from actual produce, those profits are rateable although they arise or are received out of the district in respect of which the rate is made. There the water could not become valuable to the company until it was conveyed to *London* or *Westminster*; and the court were of opinion, that the land was rateable in respect of its improved value in *Amwell*, although the profits were received out of the parish. Upon the authority of that case, therefore, the lighthouse must be rateable for all its profits, by reason of its being locally valuable in *Lydd* and earning the tolls there, although the profits be derived from ships which do not come within the parish. The light, as was said of the water in the case of the *New River*, may here be considered actual produce; and if so, it is immaterial whether its intrinsic property convey it to the ships, or whether it be conveyed by other means as the water was in the case of *Rex v. The New River Company*. In that case the produce could not be valuable in a different parish from that in which the rate was made, until it was detached from the local visible property; but in this case the light, (for the opportunity of using which the ships are to pay,) remains attached to the local property in the parish of *Lydd* at the very time when it becomes valuable, and, indeed, would be of no value were it not attached to it. [*Bayley*, J. The building, if let at a "higher" rent in [^{*802} consequence of the light being in it, might have been rateable for its improved rent.] In *Rex v. The New River Company*, Lord *Ellenborough* said, that that circumstance made no difference, except that the rent was a more easy criterion of the value. There are other decided cases where the objection, that the value was derived from extrinsic circumstances, might have been taken if it had been thought available, as in *Rex v. The Mayor of London*, 4 T. R. 21, and *Rex v. The Birmingham Gas Light and Coke Company*, 1 B. & C. 506. In the former case it was not found that the barges, which paid the tolls, ever came into the parish in respect of which the rates were paid, or in the latter, that the consumption of the gas took place in the parish. [*Holroyd*, J. The benefit in this case is not conferred within the parish.] The light is in the parish of *Lydd* and confers the benefit, and in consequence of conferring that benefit becomes valuable to the occupier. Besides, it is not essential that the benefit should be conferred in the parish, for in *Rex v. The New River Company*, no benefit, by the terms of the charter, could be conferred upon the company until the water arrived in *London* or *Westminster*, and yet the visible property in *Amwell* was held to be rateable in respect of the profit derived from that benefit. This lighthouse is valuable in respect of its tolls, on the ground that the defendant has an exclusive privilege of maintaining, in the parish of *Lydd*, the lighthouse with lights; and, although the grantee might pull down the lighthouse and build another, still that other must be in the parish of *Lydd*. The light, at all events, makes this house more valuable

*803] so long as "it continues in the house, in the same manner as a billiard table or any other chattel annexed to the freehold, so long as it remains, gives the freehold a greater annual value. [*Bayley, J.* The light need not be attached to the freehold, it might be placed on the end of a pole.] The words of the patent are, "build and renew the same *with* lights," so that it clearly contemplated that the light should be attached to the freehold, but this does not affect the question. In the case of a soke mill, the abstract right to the mulfure forms part of the rateable value of the mill. *Rex v. Bradford*, 4 M. & S. 317, the privilege of selling liquors was considered a profit appurtenant to a particular house arising from its local situation. The privilege, therefore, to keep the light in the house being profitable, the profits give a value to the house.

Nolan and *Tindal*, contra. Tolls are not rateable *per se*, and in order to make them rateable where the proprietor of the tolls resides out of the district for which the rate is made, they must be annexed to something real and substantial, locally situate within the district rated, or accrue there as profits in respect of the use of the land there occupied by the person assessed. First, the privilege of keeping the light or the tolls payable in respect of it are not appurtenant to any particular land or house in *Lydd*. The object of the grant may be attained without fixing the light in any building, as by placing it in a moveable frame. The privilege is not connected with or appurtenant to the house *804] or land, although it be exercised there. Suppose that instead of "having the privilege of firing a gun, or of ringing a bell, &c., with tolls payable by ships passing, and that he had placed his cannon in a bastion, or his bell in a belfry, he would not have been liable to be rated for the tolls, because the privilege granted to him was exercised in a building erected upon the land. Secondly, the tolls do not accrue in respect of any use of the land in the parish of *Lydd*, occupied by the party assessed. The tolls are payable for the use of the light out of the parish, and not for any use made of the land or house in the parish where the light is placed. In that respect this differs from all the cases where tolls, when connected with the land, have been held to be rateable. In the case of a canal the tolls are paid for the use of the portion of the canal, locally situate in the district. The tolls arise out of, and are inseparable from the canal. So, in the case of a soke mill which is let at a higher rent because it has a right to the mulfure of all the corn and grain, that forms a part of its rateable value, the right and the profit accruing from it are inseparably annexed and appurtenant to the mill.

Bayley, J. It seems to me that this house is rateable, but that the rate to the extent to which the parties are desirous of carrying it cannot be supported. The rate is upon the lighthouse, with the duties or contribution money, in respect of ships, hoyts, and barques passing by the same. To make the defendant rateable to the full extent of 2000*l.* a year, it must be shown that he comes within the words of the stat. 43 *Eliz.*, and is the occupier of a house or land of that annual value. The authorities cited in the course of the argument are *805] distinguishable "from the present case, except the two cases *Rex v. Reboue*, Const. 142. pl. 177; *Cowp. 583*, and *Rex v. Tynemouth*, 12 East, 46, where it was expressly decided that the tolls of a lighthouse were not rateable. A considerable interval of time elapsed between the decisions in those cases. And where there has been one uniform course of proceeding as to property of this description for a very considerable period of time, we ought not to introduce any alteration, unless it be founded upon sound legal principles. The privilege of erecting lighthouses was, I apprehend, originally in the Crown. I believe it was afterwards vested in the *Trinity House*. The tolls are contributed by the proprietors of ships, and if the sums of money which they from time to time pay be properly proportioned, they will contribute a sum sufficient to remunerate the proprietor for the expence of keeping up the

lighthouse, and to leave a moderate and reasonable profit for the trouble of renewing the light. If the proprietor of the lighthouse be rateable to the poor, the contribution which he will expect from the proprietors of ships must be proportionally larger, and they, in reality, will pay the rate, which will therefore become a burthen upon commerce. In *Rex v. Sir A. Macdonald and Others*, 12 East, 324, the rate was upon the loch, and the defendants were rated as occupiers in respect of the use of the land which they had in the parish, for the loch dues were payable in respect of the use of the loch which itself formed part and parcel of the land. In *Rex v. The Oxford Canal Company*, 4 B. & C. 74, the company were rated as the occupiers of the *towingpath-land*, and that part of the canal lying within the parish of *Sow*. *The rate was [*806 specifically upon the land. The proprietors of the canal were occupiers of the land, and it was in respect of that occupation, and that only, that they were chargeable. The decision of the Court was that the Canal Company were liable to contribute to the parish of *Sow* in respect of the use of the land in that parish. *Rex v. Bradford*, 4 M. & S. 317, is very different from the present case. There the defendant was assessed as the occupier of a canteen. The commissioners for the affairs of barracks demised to *Bradford* a canteen in *Hythe* barracks to hold for one year, provided the barrack should be so long held by government, and used as a barrack. *Bradford* was to pay for the same the rent of 15*l.* for the canteen and buildings, and the further sum of 510*l.* for the privilege of using the same as a canteen, and selling therein liquors and other articles legally sold by sutlers, and there was a power of distress for the aggregate amount. It was held that the canteen was rateable for the entire value of the house and privilege, that being a profit appurtenant to the tenement, arising from its local situation, and *Bradford* being the occupier of a tenement of that value. In *Rex v. The New River Company*, 1 M. & S. 503, there could be no doubt that the rate was properly imposed. There the land in the parish of *Amwell* produced a certain quantity of water, which when it had travelled up to *London* fetched a given price. *The New River Company* sold, in *London*, water which the land in *Amwell* produced. There could be no doubt there that the land in *Amwell* yielded, at the place where the water rose, a profit equal to the value of the water. It was a part of *the produce [*807 of the land of that parish; for although it was sold, and the value realized at a different place, it still constituted part of the profit of the land in the parish, and was rateable there in the same manner as land producing vegetables is rateable in the place where they are grown, and not where they are sold, and that, although the proprietor of the land be under a contract never to sell in his own parish, but at a distant place. *Rex v. The New River Company*, 1 M. & S. 503, does not bear upon the present case, because the proprietor of the lighthouse in this case is at liberty either in that house or in any other which he may think fit to erect or to rent, to burn lamps, and to produce a stream of light which shall be visible at a considerable distance at sea. But even if by the terms of the letters patent it were imperative on the grantee to burn his lights within this particular lighthouse, still if the privilege is not given to him by reason of his being the occupier of that house, it would not be appurtenant to, but distinct from, the house where it was to be exercised; and the duties payable to him in respect of the light, would be profits arising from the exercise of that privilege, and not from the house or land where it happens to be exercised. The grantee would, in that case, have an exclusive privilege of carrying on in that particular house (if I may so express myself) a particular description of trade. But there would be no necessary connection between the freehold interest in that house, and the light which is to be kept up in it. The apparatus which is to contain or produce the light may, or may not, be attached to the freehold, and if it were *wholly unconnected with the freehold, it might produce all the effect which is produced in a lighthouse. Suppose that effect were produced by hanging up a quantity of lighted coals with

a reflector behind them, any sums payable by the owners of ships for the benefit which they might by possibility derive from that fire, would not constitute any part of the profit of the house or land where the lighted coals or reflector happened to be placed, but would be profits arising from the privilege. Then as all the purposes contemplated by the grant may be attained by forming the apparatus to produce the light in such a way as not to be connected with the building, and in that case the tolls payable by the ships would not constitute any part of the profits of the land, and would not, therefore, be rateable; it seems to follow, that the exclusive privilege of having the lights, even if the grant required them to be placed in a particular house, is distinct from that house or building, and the duties and contributions are profits arising from the exercise of the privilege, and not from the house or land where it is exercised, and those profits are not rateable as constituting part of the value of that house or land. And if it be once ascertained that the tolls and duties, *qua* tolls and duties, are not rateable, then, although the business must be carried on in a house, or even in this specific house, a distinction must be taken between the value of the house in which that particular trade (for I consider it a species of trade,) is carried on, and the profit arising from the trade itself. Now here the nature of the trade is that the proprietor of the lighthouse is to keep certain lights burning. Those lights are not of necessity attached to the freehold, and [809] if they are not attached to the freehold, they "would be personal property. The proprietor of the lighthouse does no more than keep a candle or a fire lighted, and for keeping his lights, whether produced by candle, or by burning coals, or by oil, and for keeping mirrors behind those lights, the tolls and duties which are the subject of the rate are imposed. Such tolls down to the present time never have been rated, and in my opinion they are not rateable.

HOLROYD, J. This is a rate made, not upon the lighthouse alone, but on the lighthouse together with the duties or contribution-money in respect of ships, hoyas, and barks passing the same. I am of opinion that the lighthouse is rateable for the sum at which it may be valued, but that the tolls and duties are not rateable. We cannot hold them to be rateable unless we overturn the cases of *Rex v. Reboue*, Const. 142. pl. 177. Cowl. 583. Nolan's P. L. vol. i. p. 99, and *Rex v. Tynemouth*, 12 East, 46, and the principles upon which those cases have been decided, as well as others in which it has been held, that tolls, although not rateable per se, are rateable where they can be considered as money paid for the use and occupation of the land. The case of *Rex v. Reboue* was very similar to the present. There, the King, by letters patent granted to Sir J. Reboue liberty to erect lighthouses at Harwich, and towards the maintenance of them certain duties and tolls were made payable by all ships passing or coming into that harbor. That was a franchise granted by the crown, it differs from many others which are called so, but the privilege granted was a franchise. The power to erect lighthouses originally belonged to the Lord [810] High Admiral, and afterwards "was granted to the Trinity House. What is the toll payable for? Not for any benefit received within the parish, for it is payable every time the ships pass the lighthouse, whether any benefit be received or not by the ships, whether they pass by day when the lights are out, or whether they pass in the night when the lights are burning. In *Rex v. Reboue* the rate was made upon the tolls and duties, and Lord Mansfield says, "They have, properly speaking, rated the fire and the profits arising from the house; the Pantheon playhouse and other places of public amusement are rated, I suppose, but not for their profits." And after taking time to consider, Lord Mansfield and all the Judges were of opinion, that Mr. Reboue ought not to be rated for the tolls: he says, "the property is not in the parish." By property he does not mean the lighthouse, but the tolls, which did not arise from any benefit received in the parish by the persons paying toll. He afterwards says, "The tolls are not locally situate in the parish, and are not ratable there." "If they were to be considered as part of the money for

which the lighthouse might be rated, they might have been rated under the denomination of tolls. At a considerable interval of time after the decision of that case, came the case of *Rex v. Tynemouth*, 12 East, 46. There Mr. *Fawke* was rated for tolls in respect of his lighthouse. Lord *Ellenborough*, after stating that the case was similar to that of *Rex v. Rebowe*, says, "What local property is there within the township on which this rate on the tolls can be levied? The tolls are not received *there*, nor do the ships from which they are "collected come within the township, the subject matter of the rate [*811 has no locality within the township." Lord *Ellenborough* is there speaking of the tolls, and not of the lighthouse as the subject matter of the rate, for the lighthouse was within the township. Now in this case the profits of the lighthouse arise from the tolls which are rated under the name of duties and contributions. I think, according to these two cases, we must decide that the tolls not being received, and having no locality within the parish of *Lydd*, are not rateable. In *Rex v. Cardington*, Cwp. 581, the tolls for passing a sluice were rated. There the party who paid the tolls used the thing for the use of which they were paid; and the benefit, for which the toll was paid, was within the parish; the Court held, that whether or not the profits of the sluice were rated as tolls, the nature of the property rated was to be considered, and the tolls being paid for a use of something which conferred a benefit within the district where the rate was made, they confirmed the rate. Here the benefit for which the tolls are paid, (which are an incorporeal hereditament,) is not one of the things mentioned in the statute of the 43d of *Eliz.* For it constitutes a benefit not received within the parish, but received by ships elsewhere, or not received at all if they pass in the day-time when no light is burning. Unless, therefore, we act contrary to the decision in *Rex v. Rebowe* and *Rex v. Tynemouth*, and to the principles acted upon in other cases where tolls have been recognized as rateable when paid or earned within the district for which the rate was made, we must decide that these tolls are not rateable.

*LITTLEDALE, J. It seems to me that the rate ought to be confined to the value of the lighthouse, exclusive of the tolls or dues. The annual [*812 value of the lighthouse is stated to be 4*l.* It is admitted that tolls *per se* are not rateable. But in some cases where they arise from, and are so far connected with a house or land that the land or house which gives occasion to the toll is made more valuable in itself, that increased value, depending upon and being regulated by, the profits produced by the toll, is the subject of rate. In all those cases the profits have arisen, and the use of the thing, out of which they have arisen, has been in the place or district where the rate is made. Here the profits do not arise, nor does the use of the light take place in the parish of *Lydd*, and this case, for that reason, does not fall within the authorities which have been referred to in the course of the argument. But then it is said that the light itself is the cause of the toll or profit by the benefit it confers on ships passing, that it is connected with the house, and that the profits arising from the light constitute part of the value of the house, and that the whole forms one entire subject matter of rate. I think the light is not connected with the land, and that the profits arising from it are not part of the profits of the land or house in which the light is situate. The light is seen at a distance, and may or may not confer a benefit on those who see it; it is not the produce of, but is collateral to, the land. The light is not any part of the freehold. It is an accidental circumstance that it is placed on the freehold, it might be placed on a moveable frame, so as to be easily displaced, or it might be suspended at the end of a pole. The owner of the lighthouse places the *light at the top of a [*813 house for his own benefit, for it might, otherwise, be liable to many accidents from the fluctuations of the wind. In all the cases which have been cited as analogous to this, the profit arising from the thing which formed the subject of the rate not only was within the parish or township, but there was also within the parish an *actual* use of the thing which was the subject of the

rate, and some person there had a certain occupation of the thing. In the case of a canal, the owner of the goods makes use of the canal which is rateable as land ; the party paying the tolls has actually the use of the property itself which is the subject of the rate. So in the case of a bridge, the thing which produces the tolls is used. So as to the tolls of a market, the tolls arise by persons bringing their goods into the market, and the profit arises within the district. So in the case of a soke mill, a party takes his own corn to be ground at the place, and he has within the parish the use of the thing which is the subject of the rate. To make tolls rateable there must not only be a profit produced within the parish, but it must also arise from the use of the thing, and in respect of it. Here the ships have not that sort of use ; they have merely a transient view of the light as they pass. They do not come within the lighthouse as they do within a dock ; in that case they have the actual use and occupation of the dock. They not only do not come near the thing itself which is the subject of profit, but they do not come within the parish. This is distinguishable from all the other cases where the tolls themselves have arisen in respect not only of what was produced in the parish, but from the actual use [§ 14] of the thing which was the subject of the rate. That being so, "I am of opinion that this rate in its full extent cannot be supported. It must, therefore, be amended.

Rate to be amended by striking out the sum of 2250*l.*, at which the defendant was assessed, and inserting 4*l.*†

† The following case, upon the subject of rating lighthouses, was decided in Michaelmas term, 7 G. 4.

The KING v. W. FOWKE.

Upon an appeal against a rate for the relief of the poor of the township of *Tynemouth* in the county of *Northumberland*, the Court of Quarter Sessions confirmed the rate, subject to the opinion of this court on the following case :

The defendant is the proprietor and occupier of a certain lighthouse, called "*Tynemouth Castle Lighthouse*," in the township of *Tynemouth*, and is entitled to certain tolls, payable in respect thereof and the light therefrom, under certain letters patent of the 17 Car. 2, viz., the sum of 1*s.* for every ship belonging to any of the king's subjects passing by the lighthouse, and belonging to or trading to the ports of *Newcastle* and *Sunderland*, or either of them, or the creeks or members of the same ; and 3*s.* for every ship belonging to any foreigner or stranger coming or passing by the said lighthouse ; and the defendant is also entitled to additional light duties under the statute 42 G. 3. c. 43. The letters patent in the 17th year of *Charles the Second* were set out in the preamble of that statute, and recited, that the king had been given to understand, that there had been a long and constant toll of 4*d.* per ship for the maintenance of a lighthouse at *Tynemouth*, which being decayed and fallen down, another had been built by *Edward Villiers*, Esq., to the great benefit and advantage of his majesty's subjects and others trading to those ports ; and that the king had been informed that a contract had been made on behalf of *Villiers* with divers masters of ships and others trading that way, and that they had voluntarily submitted to increase the toll of 4*d.* per ship to 1*s.*, and to continue the payment thereof for the perfecting of the work, which had cost 1000*l.*; his majesty approving the contract, and for the encouragement of this necessary work, granted to *Villiers*, his heirs and assigns, the custody of the lighthouse so erected as aforesaid, and the ground and soil whereupon the same was situate, together with liberty, license, power, and authority, that he and they should and might continue, renew, and maintain the lighthouse, with lights to be continually burning in the night season, whereby ships might the better come to their harbors and ports without peril. The letters patent then proceeded to recite, that forasmuch as a work of so public a nature and benefit ought to be maintained and supported, his majesty, for defraying the necessary charges and continual maintenance of the lighthouse, granted that for ever thereafter there should *and might be collected [§ 15] for every ship passing by the lighthouse the tolls therein mentioned. The preamble of the act then recited, that the widow of the grandson of the patentee having become seized in fee of the lighthouse and premises, devised all that her freehold estate at *Tynemouth Castle*, called "*Tynemouth Great Lights*," in the county of *Northumberland*, with all privileges thereto belonging, to trustees, until *W. Fowke*, therein described, should attain the age of twenty-one years ; that the master, wardens, and assistants of the corporation of the Trinity House of *Newcastle-upon-Tyne*, taking into consideration the then present state of *Tynemouth* lighthouse and light, and the great benefit which would result to the ports of *Newcastle* and *Sunderland*, if the lighthouse should be altered by taking down a part, and erecting a copper lighthouse lantern, and reciting that such

alteration and improvement in the light might be of great public utility, &c., it was enacted, that from and after the altering and improving of the said lighthouse, and exhibiting therein an oil light, there should be paid to the person who, for the time being, should be seized of, or entitled in possession, to the said lighthouse, for every ship which should come or pass by the said lighthouse and light, or receive the benefit thereof, the additional tolls therein mentioned. There was a proviso in the act, that nothing should extend to charge or make liable any person with the payment of the said tolls or duties thereby granted, except whilst the said lighthouse should be duly supported according to the alteration and improvement aforesaid, and should have such light as aforesaid duly exhibited therein accordingly. By another clause, the proprietor of the lighthouse was enabled to charge the lighthouse and premises with any sum not exceeding £500.

The alterations in the lighthouse have been made in conformity to the act of the 42 G. 3. c. 43. The lighthouse is in the township of *Tynemouth*, and the tolls or duties arising to the defendant are payable in respect of vessels passing the lighthouse and receiving the benefit thereof. Of the entire number of vessels thus paying tolls, not a thirty-eighth part come within the township of *Tynemouth*, but pass the lighthouse, and so incur the toll when sailing upon their course in the *German Ocean*, or when entering from the main sea into parts of the river *Tyne* and port of *Newcastle*, belonging to other townships. The remainder of the vessels paying toll do come within the township of *Tynemouth*, and receive their loading there. The tolls received in respect of such last mentioned vessels do not equal in amount the expense of maintaining the light and managing the lighthouse; the whole of which expenses are incurred within the township of *Tynemouth*. The tolls or duties paid in respect of ships arriving at or sailing from the said port of *Newcastle-upon-Tyne*, including the tolls or duties paid by the ships receiving their loading in the township of *Tynemouth*, are collected at the Custom-house in the parish of *All Saints*, in the town and county of *Newcastle-upon-Tyne*, by a person appointed by the defendant for that purpose; and the tolls or duties paid in respect of ships sailing from the coasting ports, are collected at the ports from whence they sail, if they clear at the *Custom-house there to a port beyond *Tynemouth* lighthouse; if to a port short of *Tynemouth*, no toll or duty is payable by them in the first instance, but if they afterwards extend their voyage to *Newcastle*, or beyond the lighthouse, then the toll or duty is paid at the port of their arrival. Some of the tolls collected at the coasting ports are remitted to the person who collects them at *Newcastle*, and others are accounted for in the first instance to the defendant; but neither does the defendant, nor do any of the receivers of the said tolls or duties reside within the township of *Tynemouth*. The township of *Tynemouth* maintains its own poor, and the defendant was rated as follows: "William Fewke, Esq., Lighthouse, 500*l.*" If the lighthouse should be let by the defendant without the tolls, it would be worth 6*l.* a year to be rented by a third person; if let together with the tolls, it would be worth 500*l.* a year to be rented by a third person.

Parke and *Ingham* were heard in support of the rate. They relied upon the terms of the letters patent, and the above clause of the act of parliament 42 G. 3. c. 43, to show that in this case, the privilege of having the light was connected with the lighthouse itself, and, therefore, that the whole was rateable.

BAYLEY, J. The tolls do not arise from the building, nor from any thing of necessity connected with it, and this case, therefore, is not distinguishable from that of *Rex v. Coke*. Here the act of parliament declares the lighthouse to be a public benefit, and it ought not to be burdened with an additional charge.

Order of sessions quashed.^t

^t The rule drawn up was, that the order of sessions be quashed for insufficiency, and that the sessions do amend and alter the rate by reducing the charge made and assessed to 6*l.*



'THE KING v. THE JUSTICES OF SOMERSETSHIRE.'

The 13 G. 3. c. 78. s. 48, requires that the accounts of the surveyors of highways should be laid before one justice, and if he refuses to allow them, they are to be taken before the justices at petty sessions, where such parts as were objected to by the one justice are to be examined, and to be allowed or disallowed, as the justices think fit: Held, that the justices at petty sessions have no original jurisdiction over the accounts, and an order having been made by them for the allowance of a surveyor's accounts, which had not been previously laid before one justice, the court granted a certiorari to remove it, and quashed the order.

A RULE nisi had been obtained for a certiorari to remove into this court an order (made by the justices at a petty sessions holden on the 4th of October

1824,) for the allowance of the accounts of the surveyor of the highways of the parish of *Churchill* in the county *of *Somerset*. The affidavit on which the rule was obtained stated, that the accounts were produced at a vestry meeting on the 24th of *September*, 1824, and by a resolution of the vestry, the surveyor was directed to submit them to the Rev. S. F. *Wyld*, the nearest magistrate, to which he assented; but instead of so doing, he carried his accounts to the special sessions on the 4th of *October*, when they were allowed by the justices. In *Trinity* term, 1825,

Adam showed cause against the rule, and contended that a *certiorari* would not lie in this case, and cited *Rex v. Justices of St Albans*, 3 B. & C. 698.

Campbell, contra, relied upon *Rex v. The Justices of the West Riding of Yorkshire*, 5 T. R. 629, and *Rex v. Mitchell*, 5 T. R. 701, and also upon a case decided in *Michaelmas* term, 19 G. 3, in which it was held, that where the thing done was not in pursuance of the act, the *certiorari* was not taken away; and he contended, that the allowance of the accounts in this case was not in pursuance of the act.

ABBOTT, C. J. I think we ought to make this rule absolute; and any objection to the issuing of the *certiorari* may be further discussed when the return is made.

A rule *nisi* for quashing the order was afterwards granted, against which *Adam* now showed cause, and insisted that, by the eighty-first section of the 13 G. 3. c. 78, the *certiorari* was taken away; for, that in allowing the accounts, the justices at the petty sessions had acted by virtue of the statute, even supposing that they had not strictly pursued its directions. Secondly, he contended that the going first before a single magistrate, according to the mode pointed out by s. 48 of the 13 G. 3. c. 78, was merely matter of form, and that the statute as to that was to be considered as directory, and not imperative. In *Rex v. The Justices of the West Riding of Yorkshire*, *Buller*, J., says, that the justices of petty sessions have the same power over the surveyor's accounts that any one justice has.

Campbell, contra, relied on the case in *Michaelmas* term, 19 G. 3., as to the power to grant the *certiorari*, and on *Rex v. Mitchell*, where the court considered that the course prescribed by the statute ought to be followed.

BAVLEY, J. The reference to the petty sessions is merely upon those parts of the account which are not allowed by the single justice; the justices at those sessions have no original jurisdiction. That being so, the allowance was not in pursuance of the powers given by the statute, and the proceeding was *coram non judice*. I am, therefore, of opinion, that the *certiorari* was properly granted, and that the order of the petty sessions for the allowance of the accounts must be quashed.

Rule absolute.†

* We have been favored with the following note of the case in *Michaelmas* term, 19 G. 3., taken from the MSS. of the late Mr. *Dealtry*. ("It is probably the same case cited in the argument in *Rex v. The Justices of the West Riding of Yorkshire*.)

Middlesex. Motion for a *certiorari* to remove an order of sessions for pulling down a turnpike gate erected by authority of the commissioners at the bottom of *Gray's Inn Lane*. An inhabitant of an adjoining street, in behalf of many other inhabitants, preferred a petition and complaint under the last general highway act, giving a power to justices in sessions to remedy the mischief occasioned by the commissioners exceeding or abusing their authority, and the sessions (adjudging that the commissioners had exceeded their power) directed the sheriff to abate the nuisance.

† *Serjt. Davy*, on behalf of the commissioners, says, that the act of parliament they act under does not appoint where the gate shall be erected, therefore they had power to place one there; and if so, the justices had no jurisdiction, that only accruing when the commissioners exceeded theirs. Rule *nisi* granted. (The general highway act prohibits a *certiorari*, but that applies only to appeals, and though no other proceedings are removable, it can only mean such proceedings as are had by competent jurisdiction.)

Cause shown against the rule *nisi* for a *certiorari*. That the justices at sessions, acting under a clause in the last general highway act, 13 G. 3. c. 78, (which gives them a power in all cases, where commissioners have caused gates to be erected in places where they have no right to erect them, to cause such gates to be removed,) adjudged that the com-

missioners could not cause a new gate to be erected on the turnpike road, solely for the benefit of the lessee, without the public receiving any advantage to compensate for this additional burthen, and therefore directed the gate to be removed; but

Per Curiam. The justices have only this power when gates are erected in places where the commissioners have no right to erect them, and not when they have been erected for improper purposes. Therefore the rule must be absolute for a *ceteriorari*.

Order of sessions returned.

In Hilary term, a rule nisi was granted to quash the order of sessions, which was afterwards done without opposition.

See also *Rex v. The Justices of Derbyshire*, 2 Ld. Kenyon's Rep. 299.



*FINCH v. The Company of Proprietors of the BIRMINGHAM [830 Canal Navigations.

Where a canal was made under the 8 G. 3 c. 38., which did not give the proprietors power to appropriate the water raised by engines from mines near the canal, and another canal was made under the 23 G. 3, c. 92, which gave to the proprietors power to appropriate the water raised by engines from mines within 1000 yards of the canal, provided the produce of such mines were carried along some part of the canal, and these two canals were incorporated by the 24 G. 3, c. 4, but it was provided, that the clauses in the two former acts should still be severally applicable to the canals made under those acts respectively: Held, that the proprietors of the latter canal were not justified in taking the water raised from a mine within 1000 yards of it, unless substantially the whole produce of the mine was carried immediately from the mine along that canal, and that it did not suffice to show that the whole produce was carried immediately from the mine along the canal made under the 8 G. 3, and that one third was carried from that canal along the canal made under the 23 G. 3.

By the 58 G. 3, c. 19, reciting that it was expedient to extend one system of management to these canals, it was enacted, "That all the canals so made as aforesaid under the former acts should be considered as included and governed by all the clauses in the 23 & 24 G. 3, so far as the circumstances and nature of the case would admit, as if the same had been described in the 23 G. 3, as part of the works to be made and done under and by virtue of that act:" Held, that this did not give a right to take water from mines the produce whereof was carried along the canal made under the 8 G. 3, c. 38.

TRESPASS for breaking and entering the plaintiff's close on divers days between the 1st of January, 1820, and the commencement of the action in Trinity term, 1825, and diverting thence the water the property of the plaintiff. Plea, the general issue. At the trial before Burrough J., at the Stafford Summer assizes, 1825, a verdict was entered, by consent, for the plaintiff, subject to the opinion of this Court upon the following case:

By the 8 G. 3, c. 38, a company was incorporated under the name of *The Company of Proprietors of the Birmingham Canal Navigation*, and empowered to make and maintain a canal from the *Severn* to the *Trent*, and two collateral cuts to certain coal-mines. This act gives no power to take water from mines, or to take water raised by fire-engines out of mines. Under the powers of this act the canal and collateral cuts were completed. One of those collateral cuts from or near *Olbury* to or near *Wednesbury Hollaway*, and commonly called the *Upper Level*, passes through some premises, the mines under which belongs to the plaintiff. By the 23 G. 3, c. 92, *another company [831 was incorporated under the name of "*The Company of Proprietors of the Birmingham and Fazley Canal Navigation*," which was empowered to make, complete, and maintain a canal commonly called the *Lower Level* as an extension of one of the said collateral cuts so made under the 8 G. 3, and certain other canals and cuts. By sect. 12 of this act it is enacted as follows: "And whereas the making of such canals and collateral cuts will be of real advantage to the owners and proprietors of certain coal-mines, and other mines and minerals already opened, and which may be opened contiguous or near to

the said canals and collateral cuts, and it will be necessary for supplying the said canals and collateral cuts with water, that the water to be raised by the fire-engines or other machines erected or to be erected for draining the said mines, should be discharged into the said canal or collateral cuts; be it, therefore, enacted, that it shall be lawful for the said company of proprietors, and they are hereby authorized and empowered at all times hereafter to have, divert, and take the water to be raised or drained by means of any fire-engine, machine, or level already or hereafter to be erected, made, or opened in or upon any lands or mines within the distance of 1000 yards of the said canals or collateral cuts, except as hereinabove is excepted, without any recompense or satisfaction to be made by the said company of proprietors for the said water so to be diverted and taken as aforesaid." The same act contains in s. 27 the following exception: "Provided always, and be it further enacted and declared, that nothing in this act contained shall extend to authorize or empower the said company of proprietors to take or make use of any of the water which shall be raised from any mines of coal, ironstone, *or other minerals, unless the coal, ironstone, and other minerals produced by such mines shall be carried or conveyed along some part of the said intended canals or cuts." Under the powers of this statute the canals and cuts thereby authorized to be made were completed. By the 24 G. 3, c. 4, reciting the 8 G. 3, c. 38, and 23 G. 3, c. 92, the canals made by virtue of those acts were united, and made one common concern, but it was provided that the 8 G. 3, c. 38, should not apply to the canals made under the 23 G. 3, c. 92, and that the latter statute should not apply to the canals made under the former. By the 34 G. 3, c. 87, the company was named, "*The Company of Proprietors of the Birmingham Canals Navigations,*" and by that and some subsequent statutes various alterations and improvements of the canals were authorized. By the 58 G. 3, c. 19, reciting the above statutes, and that it was highly expedient to extend one system of management to the whole of the canals and cuts therein referred to in such way as to render the same more simple, and to alter such parts of the former system as were by experience found improper, or had been by circumstances rendered unavailing, it was enacted, "That all and every the canals, collateral cuts, and navigable communications so made as aforesaid by the said company of proprietors of the *Birmingham* canal navigations, under and by virtue of all or any of the said hereinbefore recited acts or any of them, shall from the time of the making thereof respectively be, and be deemed, taken and considered to be, part, parcel, and member of the *Birmingham* canal navigations, and all and every such part and parts of the said canals, collateral cuts, and navigable communications, and the lands, buildings, tenements, and *hereditaments already purchased or taken for the purposes thereof, by virtue and in pursuance of the powers of the said recited acts or any of them, and as have not been already declared by any of the said recited acts to be considered as part of the works made and done under and by virtue of the said recited act of the 23d year of his present majesty's reign, shall be, and be considered to be, included and comprehended in and governed by all and every the clauses, matters, and things contained in the said recited acts of the 23d and 24th years of his said present majesty's reign, so far as the nature and circumstances of the case will admit, (save and except so much thereof as relates to exemptions from stamp duties, or to the *quantum* of rates or tolls to be collected, or as may be by this act, or have been by any other act relating to the said *Birmingham* canal navigations altered or repealed,) as if the same had been described in the said recited act of the 23 G. 3, as part of the works to be made and done under and by virtue of that act."

In the year 1819, the plaintiff, and *Thomas Price*, deceased, became lessees of the mines under thirty-six acres of land, with liberty to use at a stipulated rent such portion of the surface as they might require for getting and working the said mines; and the term of years granted in such mines is yet unexpired.

In the year 1821, the plaintiff and his then partner began to work the mines, and the water raised by the whimsey was conveyed by a feeder made by defendants under directions of *Price*, to the canal of the 23 G. 3, called the *Lower Level*. In 1821, the plaintiff, by the withdrawing of *Price*, became sole owner of the mines during the remainder of the lease, and as the water in the mines continued to increase, he erected a fire or steam-engine for drawing the mines. The plaintiff's mines are situated about 200 yards from the canal called the *Lower Level*, and the steam-engine which draws the water from them is 156 yards from the same canal. The defendants considered, that under the powers of the above statutes, they had a right to divert into this canal the water raised by the said fire or steam-engine, out of the plaintiff's mines, and accordingly by their servants in that year entered the premises of the plaintiff, and by a trench diverted the water so raised by the engine into the canal called the *Lower Level*. The defendants have repaired the trench dug from time to time, and have continued by means thereof to divert the water until the commencement of the action. The canal called the *Upper Level*, made under the powers of the 8 G. 3, passes through a part of the premises, the mines under which are comprised in the plaintiff's lease. Into this branch of the canal the plaintiff has made a basin and rail roads communicating therewith from his coal-pits, and into boats on this canal the entire produce of his mines is loaded; he having no power to communicate by water with the canal called the *Lower Level*, except by passing along the *Upper Level* to the point of junction, at a distance of about two miles; and the other parts of the *Lower Level* made under the 23 G. 3, are more distant. Although half the produce of the plaintiff's mines is thus in the first instance discharged into and carried along the *Upper Level*, a canal made under the 8 G. 3, yet as the plaintiff's customers have works and coal wharfs on various parts of the canals made under 23 G. 3, and subsequent acts, and the plaintiff himself is a partner with *W. Mathews* and Co. in works situate on the last mentioned canal, a portion amounting to nearly one third of the produce of the mines, consisting of coals and ironstone, is afterwards, in the course of each respective voyage, carried and conveyed from the canal made under the 8 G. 3, into and along the *Lower Level*, the canal made under the 23 G. 3. [825]

Campbell, for the plaintiff. The question depends upon the 12th and 27th sections of the 23 G. 3, c. 92. The defendants, by the 12th section, are entitled to take the water raised from the plaintiff's mines, unless he is protected by the proviso in the 27th section. Now that confines the privilege of the company to those mines, the produce whereof is "carried or conveyed along some part of the intended canals or cuts." To be within that enactment, it is necessary, first, that the coals, &c. should be carried immediately from the mine along the canal; it never could be intended that the owner of the mine should be rendered subject to the privilege claimed by the company, if any part of the produce were at some distant point, and perhaps without his knowledge or concurrence, carried along a part of the canal. Secondly, the meaning of the enactment is, that substantially the whole produce of the mine should be carried along the canal. In the present case, no part of the produce was carried from the mine immediately along the canal, and only one third was carried along any part of the canal. It will, perhaps, be said, that since the 58 G. 3, c. 18, was passed, the different levels are to be considered as parts of the same canal, and that the whole produce of the mine being carried immediately along the *Upper Level*, gives the company the privilege for which they contend. But in *Rez v. The Birmingham *Canal Company*, 2 B. & A. 570, it was decided, that by the latter statute the canals were not incorporated for any purposes except those of management; it does not, therefore, affect the present question. [826]

Oldnall Russell, contra. The defendants were justified in taking the water in question, on two grounds, first, that the clauses of the 23 G. 3, c. 92, are

now incorporated with the 8 G. 3, c. 38, and apply to the canals made under the latter act; secondly, that without any such incorporation the company had a right to take the water. The case of *Rex v. The Birmingham Canal Company* does not preclude the defendants from relying upon the first point; that was merely a decision as to the liability of the company to poor rates. The words of the 58 G. 3, c. 19, are very comprehensive; it recites all the preceding acts relating to those canals, and then enacts, "that all canals made in pursuance of the powers given by any of those acts should be considered as included and comprehended in and governed by all the clauses, &c. contained in the 23 G. 3, c. 92, or 24 G. 3, c. 4, as if the same had been described in the said recited act of 23 G. 3, as part of the works to be made and done under and by virtue of that act." Now, if the *Upper Level* had been made under the 23 G. 3, c. 92, it is impossible to say that the company would not have been entitled to the water. [*Littledale*, J. The 24 G. 3, c. 4, provides that the powers of the 23 G. 3, c. 92, shall not extend to the canals made under the 8 G. 3, c. 38, and the 58 G. 3, c. 19 says, "that the clauses of the 24 G. 3, c. 4, *827] shall extend to all the canals, as well as those of the 23 G. 3, c. 92.] Secondly, the produce of the plaintiff's mine has been carried along the *Lower Level*. It is said that the 27th section gives the privilege only where the *whole* produce is carried along the canal. If that were so, the act would as to this privilege be wholly ineffectual, for there can hardly be any instance in which some part of the produce of a mine is not consumed on the premises, or carried away by land. Next it was said that the produce must be carried immediately from the mine along the canal, but the owner derives benefit from the use of the canal, if the coals be carried along it in the course of the voyage on which they are sent from the mine. He should, therefore, in such a case be subjected to the privilege claimed by the defendants.

Bayley, J. There are two questions in this case. One arising upon the 23 G. 3, c. 92, before the passing of the 58 G. 3, c. 19, the other upon the latter statute. The canal called the *Upper Level* was made under the 8 G. 3, c. 38, which gave no such power as that which the defendants now seek to exercise; but the 23 G. 3, c. 92, contains two clauses upon which the point depends. By the 12th section a general power is given to take the water raised from all mines within one thousand yards of the canals made under that act, and but for the proviso in the 27th section the company would have been entitled to all such water, notwithstanding any previous appropriation of it, unless that had been made by an act of Parliament. The 27th section, however, provides that the company shall not be entitled to take or make use of the water raised from any mines of coal, &c., unless the coal, &c. produced by such mine *828] shall be carried or conveyed along some part of the said intended canals or cuts. Where one person seeks to impose a burthen upon the property of another, that must be done by clear unambiguous language. Now, had the defendants justified specially in this case, they must have alleged that the coal, not *some part of the coal*, was carried along the canal; and if issue had been taken upon that allegation, it would not have been satisfied by proof, that one third of the coal was so carried. I take the true construction of the proviso to be, that the company are entitled to the water in those cases only, where the canal is made the general mode of carriage whereby the produce of the mine is directly conveyed away; and that where the only communication with the canal is by means of another canal, and only a part of the produce is carried along it, the company cannot establish a right to take the water. Such is my view of the question raised upon the 23 G. 3, c. 92. Then, has the 58 G. 3, c. 19, made any difference? The 8 G. 3, c. 38, did not give any such privilege with respect to the canals made under that act; than the 23 G. 3, c. 92, authorised the making certain other canals, and with respect to them gave the privilege. The proprietors of these several canals were incorporated by the 24 G. 3, c. 4, but the powers as to each were expressly kept distinct; and other

canals were afterwards made under subsequent acts with the same powers as were given by the 23 G. 3, c. 92. Then the 58 G. 3, c. 19, reciting all these acts, incorporates the canals, and says that they shall be subject to all the clauses of the 23 G. 3, c. 92, and 24 G. 3, c. 4. If it were held that the privilege given by the 23 G. 3, c. 92, were by this latter statute extended to canals made under the 8 G. 3, c. 38, it would by matter *ex post facto* cast a [829] considerable burden upon the proprietors of mines. No such intention being expressed in the recitals of the act, we ought not to presume it to have existed in the legislature. I, therefore, think that the words of the act are not sufficient to confer the privilege, and that in *Rex v. The Birmingham Canal Company* it was properly held that the canals were incorporated for the purposes of management only. For these reasons I am of opinion that the plaintiff is entitled to recover.

HOLROYD and LITTLEDALE, Js., concurred.

Postea to the plaintiff.

EVANS v. ROBERTS.

A verbal agreement made on the 25th of September for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them within the fourth section of the statute of frauds, but a sale of goods, wares, and merchandise within the seventeenth section.

INDEBITATUS assumpsit, for crops of potatoes bargained and sold. Plea, the general issue. At the trial before *Garrow*, B., at the Spring assizes for the county of *Monmouth*, 1826, it appeared, that on the 25th of September, a verbal agreement was made between the plaintiff and defendant, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of 5*l.*, and the defendant paid 1*s.* earnest. It was objected, that this was a contract or sale of an interest in or concerning land, within the meaning of the fourth section of the statute of frauds. The learned Judge was of opinion, that as the seller was to turn up the potatoes, the contract did not give the buyer any interest in the land; and he directed a verdict to be found for the plaintiff, *but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained [830] accordingly,

Justice, now showed cause. By the terms of this contract the seller was to dig up the potatoes, and the buyer only to take them away. This contract did not confer upon the buyer of the potatoes any exclusive right to the land for a time, for the purpose of making a profit of the growing surface; and if that be so, then, according to *Warwick v. Bruce*, 2 M. & S. 205, this was not a contract for the sale of an interest in or concerning lands, within the meaning of the fourth section of the statute of frauds. If the vendee had entered to dig up the potatoes, and the vendor had brought trespass against him, he could not have pleaded the general issue, and have given his title in evidence under the plea of not guilty; he must have pleaded his contract, as a license to enter for a special purpose merely, viz. to take away what he had bought; and if that be so, then he had no interest in the land any more than the owner of potatoes, or of a rick of hay placed in a warehouse or barn, or raised in a heap on the land. In those cases the owner of the chattel has no interest in the land where the chattel is. This case must be governed by the cases of *Warwick v. Bruce*, 2 M. & S. 205, and *Parker v. Staniland*, 11 East, 362. It is distinguishable from *Crosby v. Wadsworth*, 6 East, 602, because in that case the contract was

for growing grass to be made into hay. The grass, by the terms of the contract, was to continue growing until it was ripe, and fit to cut. That was a grant of the whole vesture of the land ; and *the purchaser had such an exclusive possession as would entitle him to maintain trespass.

Ludlow, contra. The authorities show, that a sale of any growing product of the earth, which is not to be severed immediately, gives to the vendee an interest in or concerning the land, within the meaning of the fourth section of the statute of frauds ; *Crosby v. Wadsworth*, 6 East, 602, *Parker v. Staniland*, 11 East, 362. The very right to have the subject matter of the sale continue in the land constitutes an interest. *Waddington v. Bristol*, 2 Bos. & Pul. 452, and *Emmerson v. Heelis*, 2 Taunt. 38, are authorities in point. In the latter case, a sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being found, was held to be a sale of an interest in land.

BAYLEY, J. I am of opinion, that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale and delivery of things which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes ; the vendor was to raise the potatoes from the ground at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land ; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument, to show that this contract gave the vendee an interest in the land within the meaning of the fourth section of the statute of frauds, are distinguishable from the present case. In *Crosby v. Wadsworth*, 6 East, 602, the buyer did acquire an interest in the land ; for, by the terms of the contract, he was to mow the grass, and must, therefore, have had the possession of the land for that purpose. Besides, in that case, the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *f. fa.* ; it goes to the heir and not to the executor ; but growing potatoes come within the description of emblements, and are deemed chattels, by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold,† and may be taken in execution under a *f. fa.*, by which the sheriff is commanded to levy the debt of the *goods and chattels* of the defendant ; and if a growing crop of potatoes be chattels, then they are not within the provisions of the fourth section of the statute of frauds, which relates to lands, tenements, or hereditaments, or any interest in or concerning them. In *Parker v. Staniland*, 11 East, 362, the owner of a close cropped with potatoes, made a contract on the 21st of November, to sell them at so much per sack, and the purchaser was to raise them from the ground immediately ; and that was held not to be a contract for any interest in or concerning land. In *that case, as well as in *Warwick v. Bruce*, 2 M. & S. 205, the potatoes had ceased to grow ; and, therefore, they are distinguishable from the present ; but the reasoning of Lord *Ellenborough* in the latter case may assist us in coming to a right conclusion in the present ; he there says, " If this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the *growing surface*, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby v. Wadsworth*, 6 East, 602. But here is a contract for the sale of potatoes at so much per acre : the potatoes are the subject matter of sale ; and whether at the time of sale they

* See Com. Dig. tit. *Biens* (G.) and Gilbert's Law of Evidence, 214.

were covered with earth in the field, or in a box, still it was a sale of a mere chattel." It does not appear that the other Judges gave any opinion upon that point; but it is clear that Lord *Ellenborough's* judgment proceeded upon the ground that if the contract gave to the vendee no right to the land so as to enable him to make a profit of the *growing surface*, then it was not to be considered as giving him an interest in the land, but merely in a chattel. The opinion delivered by *Mansfield*, C. J., in *Emmerson v. Heelis*, 2 *Taunt* 38, is certainly at variance with our judgment in the present case. But it is first to be observed, that it was not necessary in that case for the court to decide the question upon the fourth section of the statute of frauds, for the contract was signed by the auctioneer as the agent of the buyer, and was equally binding whether it was for a sale of goods and chattels or of an interest in land. The plaintiff there put up to sale on the 25th of *September*, by public auction, a crop of turnips then "growing on his land, in separate lots, and under certain conditions of sale." The defendant, by his agent, attended at the sale, and being the highest bidder for twenty-seven different lots, was declared to be the purchaser; and the name of the defendant was written in the sale bill opposite to each particular lot for which he had been declared the highest bidder. *Mansfield*, C. J., there says, "As to this being an interest in land, we do not see how it can be distinguished from the case of hops decided in this court; and if the auctioneer is an agent for the purchaser, then the statute of frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged therewith." The ground of the Lord Chief Justice's opinion, as to the contract giving the purchaser an interest in the land, was that the case could not be distinguished from that of *Waddington v. Bristow*, 2 *Bos. & Pul.* 452. It becomes necessary, therefore, to consider whether the two cases be similar. In the latter case the contract was made in *November* for all the hops which should be grown in the ensuing year upon a given number of acres of land. At that time the hops which were the subject of the contract were not in existence; there was nothing but the root of the plant, and the purchaser was not to have that. The question in that case was, not whether the agreement, which was in writing, was for an interest in the land, but whether it ought to have been stamped. It was contended that it was within the exception in the stamp act, an agreement made for and relating to the sale of goods, wares, and merchandise. All the Judges concurred in the judgment that the contract in that case was not an agreement for the sale of goods, wares, and merchandise; but their opinions were founded upon different reasons. Lord *Alvanley* thought that it was an agreement for the sale of goods, wares, and merchandise, and something more, viz. for the produce of the land in a certain state at the time of delivery. The opinions of *Heath* and *Rooke*, Js., proceeded on the ground that the hops at the time of the contract did not exist as goods, wares, and merchandise. *Chambre*, J., was the only Judge who intimated an opinion that the contract gave the vendee an interest in the land. He certainly stated that the contract gave the vendee an interest in the produce of the whole of that part of the vendor's farm which consisted of hop grounds. I concur in opinion with the three learned Judges, who thought in that case that the hops were not goods, wares, and merchandise at the time of the contract; but I do not agree with Lord Chief Justice *Mansfield* that there was no distinction between the hops in that case and the growing turnips in the case of *Emmerson v. Heelis*, because I think that in the latter case the growing turnips at the time of the contract were chattels. It has been insisted, that the right to have the potatoes remain in the ground is an interest in the land: but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In *Tidd's Practice*, 1039, it is laid down that under a *fieri facias* the sheriff may sell *fructus industrialis*, as corn growing, which goes to the executor, or fixtures

which may be removed by the tenant ; but not furnaces or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor and those which go to the "heir." *836] The former may be seized and sold under the *fi. fa.*, the latter cannot. The former must, therefore, in contemplation of law, be considered chattels. It appears, therefore, that when it was necessary at common law to distinguish between what was land and what was not, a growing crop produced by the labor and expense of the occupier of lands was, as the representative of that labor and expense, considered an independent chattel, not going as the land does, but in a different direction. Upon the same principle the purchaser of a growing crop, who by his contract acquires a right to have the crop continue in the land of the seller until it arrived at maturity, must, before the passing of the statute of frauds, have been considered to have had an interest not in the land, but in a chattel independent of the land ; and that being so, I cannot suppose that by the fourth section of that statute, which enacts, that unless certain provisions be complied with, no action shall be brought upon any contract or sale of any interest in or concerning lands, tenements, or hereditaments, the legislature contemplated, as the subject matter of such contract or sale, that interest which passes from a vendor to a vendee by a sale of a growing crop of potatoes. The statute 56 G. 3, c. 50, indeed, is a legislative declaration that growing crops may be seized and taken in execution under a *fi. fa.*. It prevents their being so seized in cases where the tenant is restrained by covenant in his lease from removing them off the premises. The case of *Mayfield v. Wadsley*, 3 B. & C. 57, also shows, that where there is a sale of growing crops, distinct from any assignment or letting of the land, the crops do not constitute part of the inheritance, or any interest in land, but are mere chattels, and may be recovered under "a count for goods bargained and sold."

*837] Upon these grounds, I am of opinion that there was not in this case any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them within the fourth section of the statute of frauds ; but that there was a contract for the sale of goods, wares, and merchandise within the meaning of the seventeenth section, though not to the amount which makes a written note or memorandum of the bargain necessary. The rule for entering a nonsuit must therefore be discharged.

HOLROYD, J. I also think that this rule ought to be discharged. This is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute. He clearly had no interest so as to entitle him to the possession of the land for a period, however limited ; for he was not to raise the potatoes. Besides, this is not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract an interest in any specific portion of the land. The contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away. In *Parker v. Staniland*, 11 East, 366, Lord *Ellenborough* says, "The lessee *prima vesturæ* may maintain trespass *quare clausum fregit*, or ejectment for injuries to his possessory right ; but this defendant could not have maintained either ; for he had no right "to the possession of the close ; he had only an easement, a right *838] to come upon the land for the purpose of taking up and carrying away the potatoes ; but that gave him no interest in the soil." In this case the potatoes are not to be dug up by the buyer ; but even if that had been part of the contract, I think he would not have had an interest in the land, but a mere easement. In *Emmerson v. Heelis*, 2 Taunt. 38, it did not appear that the subject matter of the contract was fit to be taken at the time of the contract. The purchaser was not to pay till January, and it may have continued to grow till that

period. In *Poulter v. Killingbeck*, 1 Bos. & Pul. 397, *indebitatus assumpsit* was brought for moieties of crops of wheat sold by the plaintiff to the defendant, and accordingly reaped for his the defendant's own use. It appeared that the plaintiff by a parol agreement had let land to the defendant, from which he was to take two successive crops, and to render the plaintiff a moiety of the crops in lieu of rent. While the crops of the second year were on the ground, an appraisement of them was taken by both parties, and the value ascertained. The action was brought to recover a moiety of the value. It was objected that the agreement was within the statute, because it related to land, but the Court overruled the objection, *Eyre*, C. J., observing, "that as the case originally stood, the plaintiff had a claim to a moiety of the produce of the land under a special agreement, but that special agreement was executed by the appraisement. The circumstance of the appraisement afforded clear proof that the plaintiff sold what the defendant had agreed was his, and the price having been ascertained, brought this to the case of an action for goods sold and delivered." Lord *Ellenborough*, in observing upon that case in *Crosby v. *Wadsworth*, 6 East, 602, says, "The contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce, no longer did so: it was originally *an agreement to render what should have become a chattel*, i. e. part of a severed crop in that shape, in lieu of rent, and by a subsequent agreement it was changed to money instead of remaining a specific render of produce." So in this case the contract being for the sale of the produce of a given quantity of land, was a contract to render what afterwards would become a chattel; and although some advantage might accrue to the vendee by the potatoes remaining in the land, I think that was not an interest in or concerning land within the meaning of the 4th section of the statute of frauds.

LITTLEDALE, J. I am of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them within the meaning of the 4th section of the statute of frauds. The words lands, tenements, and hereditaments in that section appear to me to have been used by the legislature to denote a fee simple, and the words any interest in or concerning them were used to denote a chattel interest, or some interest less than the fee simple. In the 5th section, which requires a will of lands, tenements, and hereditaments to be attested by three witnesses, the words "lands and tenements" are clearly used to denote a fee simple, and do not extend to leaseholds. The legislature contemplated an interest in land which might be made "the subject of sale. I think, therefore, they must have contemplated a sale of an interest which would entitle the vendee either to the reversion or the present possession of the land. Now this contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty. In *Co. Lit. 55 b.*, it is laid down, "If tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God." Upon the death of the tenant for life the land belongs to the reversioner, but the growing crop goes to the executor of the tenant for life, as part of his personal estate. Lord Coke then states, "If a man be seised of land in right of his wife, and soweth the ground and he dieth, his executors shall have the corn, and if his wife die before him, he shall have the corn." Upon the death of the husband or wife, the interest of the former in the land ceases, yet the growing corn is considered as part of his personal estate, and belongs to him or his executors. Lord Coke afterwards puts other cases, and in all of them he distinguishes between the land and the growing produce of the land; he considers the latter as a personal chattel independent on, and distinct from the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think

that a sale of any growing produce of the earth (reared by labor and expense) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land within the meaning of the fourth section of the statute of frauds; but a contract for the sale of goods, wares, and merchandise within the seventeenth section of that statute. Such an interest goes to the executor and not *to the heir, [841] and anything which goes to the executor and not to the heir, may be taken in execution under a *fieri facias*. This is the rule of law as to tenants' fixtures, which bear a very close resemblance to those growing crops which are not the spontaneous produce of the earth, but are raised by the labor and expense of the occupier of the land. It has been held, that vats, coppers, &c., set up in a house by a lessee for years in relation to his trade, may be taken in execution under a writ of *fieri facias* issued against him, *Poole's case*, 1 Salk. 368; but that fixtures of a similar description cannot be taken in execution under a *fieri facias* issued against a party who was seised in fee of the house in which they were situate, upon the ground that they would go to his heir and not to his executor, *Winn v. Ingilby*, 5 B. & A. 625. Now, a growing crop of corn or potatoes, or of any vegetable which is produced not spontaneously by the earth, but by the labor and expense of the occupier, goes to the executor and not to the heir of tenant in fee simple. It would seem, therefore, that such a growing crop may be seised under a *fieri facias*, issued against the owner of the inheritance as his goods and chattels, even while they are annexed to the freehold. I cannot, therefore, consider the annual produce of land which is proceeding to a state of maturity, and which, when taken at maturity, will be severed from the ground and become *movable* goods and chattels, as an interest in or concerning land within the meaning of the fourth section of the statute of frauds, which seems to me to mean land taken as mere land, and not its annual growing productions; consequently the rule for entering a nonsuit must be discharged.

Rule discharged.

*BULLEN v. DENNING.

By deed lessor demised certain lands in the county of *Dorset*, except and always reserved, out of the demise and grant unto the lessor, all timber trees, and other trees, but not the annual fruit thereof: Held, that apple trees were not within the exception.

TRESPASS for felling and cutting down the plaintiff's apple trees, and carrying away and converting the same to the defendant's use. Plea, not guilty. At the trial before *Burrough*, J., at the Spring assizes for the county of *Dorset*, 1826, it appeared that by indenture of lease bearing date the 24th of December, 1778, *Vere Earl Poulett* demised and granted to *John Perkins* certain premises therein described, being within and parcel of the manor of *Marshwood*, in the county of *Dorset*, then in the possession of *Perkins* or his assigns, except and always reserved out of the demise and grant unto the Earl, his heirs and assigns, all royalties, franchises, mines, and quarries, and the produce thereof. And also all timber trees and other trees, but not the annual fruit thereof, and all saplings and standils likely to become trees, then or thereafter growing, or being in or upon the demised premises, with free liberty of ingress, egress, and regress, for the said Earl, his heirs and assigns, into, upon, and from the said demised premises, to search for, fell, cut down, work up, dig, take, and carry away the same, and to plant any new tree or trees in the banks of the hedges.

of the said premises; to hold unto *Perkins*, his executors, administrators, and assigns, from and immediately after the death of the said *John Perkins* for the term of ninety-nine years, if three persons therein named should so long live, under the yearly rent therein mentioned: proviso, that if *Perkins*, his executors, &c., should, "during the term, commit or suffer to be committed, [843] on any part of the premises, any waste or damage to the value of 10s., or should cut down or fell any maiden or sound pollard tree, or top, poll, or injure any maiden tree then or *thereafter* growing or standing on the said premises, without the license of the Earl, his heirs or assigns, first had or obtained, the lease should be void. The interest of Earl *Poulett* in the demised premises having vested in the plaintiff, the defendant, who was tenant of the demised premises to the devisee of *Perkins*, in 1824, and while two of the three *cestui que ries* mentioned in the lease were in being, cut down three apple trees which had been planted by the tenant after the granting of the lease. It was contended that apple trees were not excepted out of the demise, and, consequently, that the reversioner could not maintain trespass; and *Wyndham v. Way*, 4 *Taunt.* 316, was cited. The learned Judge reserved the point, and a verdict having been found for the plaintiff, a rule *nisi* for entering a nonsuit was obtained in last *Easter* term.

Tindal and *R. Bayly* now showed cause. The words of the exception, "all timber trees and other trees," are sufficiently large to comprehend apple trees. *Wyndham v. Way* is not in point, because there it was to be collected from the language used, "all trees, wood, coppice wood, &c.," that the word "trees" was meant to apply to trees useful for their wood only. But in this case the lessor has demised the fruit only and not the bodies, and *Grantham v. Hawley*, Hob. 132, is an authority to show that such a grant is valid. But assuming that, "if the exception had stopped at the words "all timber [844] trees and other trees," fruit trees would not have been excepted, the other words, "not the annual fruit thereof," which refer to the annual produce of fruit trees, show beyond all doubt that the bodies of those trees were intended to be excepted. It may be said, that in legal phraseology the term *fruit* is sometimes applied to the produce of timber trees as well as to the produce of those trees, which, in popular language, are termed fruit trees, and that by the terms, "not the annual fruit thereof," the parties may have intended to save out of the exception the acorns of the oak or the masts of the elm, and not the mere produce of the apple trees; but the word *fruit* must be construed in that sense in which it is supposed to have been used by the parties at the time of making the contract; and considering that the demised premises are in a county where apples constitute a valuable portion of the produce of the land, and that it was important to the tenant that he should have them, but of no importance to him to have the produce of other trees, there can be no doubt that the parties used the term *fruit* to denote the produce of those trees, which, in popular language, are denominated fruit trees.

Erskine, Coleridge, and Bere, contra. It will be most favorable both for the landlord and tenant to hold, that apple trees are not within the exception; for then the landlord may maintain an action of waste against the tenant, for an injury done to the trees, and may compel the tenant to keep the orchards properly and well stocked. In lieu of these advantages, all that the lessor can have (if the other construction prevail) is, that he may prevent the "cutting [845] down of the trees (which the tenant is not likely to be guilty of, so long as they are in bearing) and perhaps have the branches and bodies of the trees when blown down, which are of very little value. Then as to the tenant, if they are not within the exception, he acquires in those trees that general property which a termor has in all such as die, not being timber. He acquires, also, the right to use and prune the trees, and generally to manage the orchards in the best way for his own and his landlord's interest, which, under the other construction, it may be doubtful whether he has. But, secondly, if the apple trees

be within the exception, then the trees are the landlord's. He may cut them down, but he cannot enter to plant new trees, nor compel the tenant to keep the orchard stocked, and the tenant is left at the mercy of his landlord as to the orchards. The grant of the fruit will protect him no more than in the case of acorns, walnut, beech, &c.; for it must extend to them also; and yet it can never be contended that such a grant prevents the landlord from cutting down what he pleases. It is a grant of the fruit only of such trees as he chooses to spare, and for so long as he spares them. In *Tregmiell et Ux v. Reeve*, Cro. Car. 437, an exception of the timber trees, "saving that his said wife should have and take the shrowds and loppings of them," was held to protect all the trees from being cut down by the owner of the fee, but in this case no part of the trees was saved out of the exception. The words of the exception, without the saving which follows, would not include apple trees, for they do not pass under the general name of trees, *Wyndham v. Way*, 4 Taunt. 316; *Waller v. Travers*, Hardres, 309; *London v. *The Chapter of the Collegiate Church of Southwell*, 346] Hob. 303; *Lord Zouch v. Moore*, 2 Roll. Rep. 274, 355, 358. Then if that be so, the effect of the saving out of the exception is only to leave that at large which the exception would otherwise have included; it cannot extend the exception. Accordingly, in *Leigh v. Shaw*, Cro. Eliz. 372, where there was a lease of a rectory, except the mansion-house, saving a chamber; the chamber was held to pass by the lease, because a saving out of a saving makes it as if it had never been excepted. Besides, the exception must always be construed favorably for the lessee, *Earl of Cardigan v. Armitage*, 2 B. & C. 197. If, therefore, the exception itself would not have extended to the apple trees, *a fortiori* the saving which is to restrain the extent of the exception in favor of the lessee cannot make it include the trees, because that would be to prejudice the lessee. A legal and sufficient meaning may be given to the words of the saving, "not the annual fruit thereof," without holding it to refer to the produce of apple trees; for fruit is a common term in the law for the annual produce of timber and other trees, as distinguished from what are properly called fruit trees. In *Dyer*, 36 a., it was said, "it cannot be denied that the property of great trees, viz. timber, is reserved by law to the lessor, but he cannot grant it without the termor's license, for the termor has an interest in it, viz. to have the mast and fruit growing upon it, and the loppings thereof for fuel." The word *fruit* is used in the same sense, in *Dyer*, 90 a. and 332 a.; and these authorities are cited in *Liford's case*, 11 Co. 48, where it is laid down that the "lessee shall have the young of all birds that breed in the trees, and all 347] fruits. The word is also used in the same sense, in *Co. Litt. 53 a., Berry v. Heard*, Cro. Car. 242, and *Com. Dig. tit. Biens, H. Trees*.

BAYLEY, J. I incline to think that apple trees are not within the exception. It is a general rule of construction that where there is any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception being the words of the lessor, are to be construed favorably for the lessee, and against the lessor, *The Earl of Cardigan v. Armitage*, 2 B. & C. 197. The question in this case is, whether looking to the subject matter of the demise, and the several clauses of the lease, fruit trees were clearly intended to be excepted, or whether there be any reasonable degree of doubt whether that were intended or not. Now a grant of "timber trees and other trees" will not pass fruit trees. Here the exception is, "of all timber trees, and other trees, but not the annual fruit thereof." Some meaning must, undoubtedly, be given to the latter words, for if the fruit saved was the fruit of orchard trees, it would follow that the bodies of those trees would be within the exception. But the term *fruit* in legal acceptation is not confined to the produce of those trees which in popular language are called fruit trees, but applies also to the produce of oak, elm, and walnut trees. In the old books the lessee is stated to have an interest in the trees in respect of the shade for cattle, and the fruit thereof. Therefore the words "the annual fruit thereof" may be satisfied by

applying them to the produce of timber trees, and that being so, it does not appear clearly from the language of the exception that fruit trees were intended to be included in it, and then, unless there are other clauses in [848 the lease from which that intention can be clearly collected, we are bound according to the rule of construction to which I have already alluded, to hold that they are not excepted out of the demise. Looking to the nature of the subject matter of the demise, which is land situate in a county where cider is made, and where apples constitute a great part of the annual produce, I think it is not very likely that the lessor would make apple trees the subject of express exception, because, as the lessee was at all events to have the apple trees standing during his term, the lessor by the exception could acquire a right only to the body of the tree if it happened to be blown down, and that would be of little or no value. It is probable, besides, that the tenant would not consent to have the apple trees excepted, because it would subject him to great difficulties in the management and regulation of his farm, for if the trees were to belong to the landlord, the tenant could not cut them down, even if they became barren. Then we find in the lease a proviso that the lessor may re-enter if the tenant lops or tops any maiden tree. A newly planted apple tree is a maiden tree, and yet, if it be included in the exception, the tenant will not be at liberty to lop it, and unless it be lopped it will produce nothing. There is a liberty reserved to the landlord to plant any new trees in the banks and hedges. Now if that clause had been intended to include apple trees, it cannot be supposed that the liberty would have been confined to banks and hedges. There is one clause in the lease which caused me to entertain a doubt during the course of the argument, I mean that by [849 which the tenant covenants, in the place of every timber or other tree thrown down and decayed during the term, to plant or set another fresh grown young tree of the same kind in its stead. As there is no other express stipulation by the tenant, to plant any tree, it occurred to me that it must have been intended to include apple trees, but upon further consideration I think that such a consequence does not necessarily follow. The landlord, probably, may have thought it unnecessary to have an express covenant for that purpose, because it would be so much to the interest of the tenant to plant apple trees. Then, as it does not appear that the word *tree* in the other parts of the lease was intended to include apple trees, and as the tenant's continuing to have right to the fruit trees does not in any degree militate against the interest of the landlord, for the tenant is not at liberty to destroy the trees in the orchard, it seems to me there is nothing in the other clauses of the lease to show clearly that the parties intended to include apple trees in the exception. And as the words of the exception will not of necessity include them, I think the words of the saving part do not make it clear that the parties so intended, but leave the matter in doubt, and then the words of the exception must be construed in favor of the lessee, and against the lessor, and so construing them I think we are bound to hold that apple trees are not within the exception. The rule for entering a nonsuit must, therefore, be made absolute.

HOLROYD, J. The question in this case arises upon a regular lease by indenture, containing all the formal parts belonging to such an instrument. It is, therefore, to be construed according to the rules of law laid down for the construction of such instruments, and in the *sense which, by prior decisions, has been imposed upon the words there used. If any other [850 meaning had been intended, that should have been expressed in clear unambiguous language. Here is a demise of certain premises with an exception of timber trees and other trees, but not the fruit thereof. Now it is a rule of construction, that where there is a grant and an exception out of it, the words of the exception are to be considered as the words of the grantor, and to be construed in favor of the grantees, 5. Co. 10 b. And there are several authorities to show, that the words *other trees* do not extend to fruit trees. If fruit trees

are not included in the first part of the exception, and if the words of the exception are to be considered the words of the lessor, and to be construed in favor of the lessee, the question is, what is the effect of the saving words, "not the annual fruit thereof?" They were intended to operate in favor of the lessee. But it is argued, that they shall operate against him by extending the exception. We cannot infer that to have been the intention of the parties, if those words can have any other legal effect consistent with the sense imposed by prior decisions on the words "timber trees and other trees." Now the word "fruit," in our old law books, is frequently used to denote the produce, not only of orchard but of timber trees; and if that word be so construed here, the saving will not have the effect of operating against the lessee, by enlarging the exception. I think that it ought to be construed in that sense, and so construing it, apple trees are not within the exception. I think that this construction is consistent with the other parts of the lease which have been commented on by my Brother *Bayley*. If the parties had intended to [851] "except apple trees, they should have used words which, consistently with former decisions, would leave no doubt of that intention.

LITTLEDALE, J. I am of the same opinion. The word *trees*, generally speaking, means wood applicable to buildings, and does not include orchard trees. The words, "not the annual fruit thereof," may apply either to the produce of orchard or to that of timber trees. Those words may, therefore, be satisfied without holding them to apply to the produce of orchard trees. And as it is doubtful whether it was intended to except fruit trees, the words of the exception must be construed favorably for the lessee. I think we are therefore bound to hold that fruit trees do not come within it, and that this rule must be made absolute.

Rule absolute.



The KING v. The Chapel Wardens and Overseers of the Township of BILSTON.

Where the owner and occupier of an ironstone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose: Held, that he was not rateable to the poor in respect of the engine.

UPON an appeal against a rate whereby a mine-engine and engine-pit were rated to the relief of the poor of the township of *Bilston*, in the county of *Stafford*, the sessions amended the rate by striking out the item objected to, subject to the opinion of this court upon the following case:

The engine and pit were erected, sunk, and used by the appellants, solely for the purpose of drawing water from ironstone mines in their occupation. Nothing was raised from those mines except ironstone.

[852] **Oldnall Russell*, and *Shuttle*, in support of the order of sessions. It is clear that the ironstone mines themselves were not rateable, and the engine was merely an adjunct to them, and therefore exempt. Wherever machines have been held rateable they have been annexed to some other rateable property and treated as a part of it; as in the case of the weighing machine, *Rex v. St. Nicholas, Gloucester*, Cald. 262, or the carding machine, *Rex v. Hogg*, 1 T. R. 721. In this case the engine produces no profit, but the expense of it is, in truth, a drawback from the profits of the mines; and if those profits were rateable, in calculating the rateable profits it would be necessary to allow for the expense of the engine, 1 *Nolan*, 226. So, also, the shaft or pit produces no profit; the capital is consumed in sinking it; the only profit

arises from the ore, which is not rateable, *Atkins v. Davis*, Cald. 333. If the shaft and engine were rateable, the under-ground machinery and rail-roads would also be rateable; but that would clearly be rating the mine itself, which is exempt from the charge imposed on other property by the 43 Eliz. c. 2. The rate in question could only be paid by the sale of the ore raised from these mines.

D. F. Jones, and *Whateley*, contra. The engine rated in this case was affixed to the land upon the surface, and not in the mine; it was an adjunct to the land, and increased the value of it, and was therefore rateable. The surface may be in one person and the mine in another. In such case, the surface would be rateable for the improved value arising from the engine. *Suppose the engine belonged to the owner of the surface, and he let it to the owner of the mine, upon what principle could it be said that it was not rateable? and there does not appear to be any real difference whether the owner of the mine erects the engine, or hires it of another person. If the owners of these mines were to lay a rail-road over the surface of the adjoining land for the purpose of carrying away the ore, that would be rateable, *Rex v. Bell*, 7 T. R. 508, and yet it would be of no value, but on the contrary, a burthen, if it were not connected with the mine; and the same may be said of the weighing machine and carding machine. Where a coal-mine was worked merely for the purpose of raising coal to be used in manufacturing iron from ore raised out of another mine belonging to the same person, it was held that the coal-mine was rateable, *Rex v. Cunningham*, 5 East, 478.

BAYLEY, J. I am of opinion that the court of quarter sessions came to a right conclusion. This appears to me a very plain case. The carding engine and weighing machine were each considered as part and parcel of a building, and were rated as such. So, also, in the case of the canteen; the privilege of selling liquors was considered as annexed to the house, and as forming part of its value. Here, a person working a mine in his own land, has erected an engine for the purpose of working that mine, and which is of no other use. The occupier of the mine, as such, is not rateable under the provisions of the 43 Eliz. c. 2. In many such mines there are rail-roads under ground, which greatly enhance the value of the mine, and therefore of the land, *but they cannot be rated, and, in principle, they are on the same footing as this engine. This is a mode of drawing the water from the mine; the rail-road is to facilitate the conveyance of the ore to the foot of the shaft. Each is of use in carrying on the mining operations, but of no other use. Suppose a conveyance or lease of this mine, with the machinery, had been made, it is clear that the engine would have passed to the grantee or lessee; it must, therefore, be considered as part and parcel of the mine, and is, as well as the mine itself, exempt from poor-rates.

HOLROYD, J. I likewise think it clear that the sessions were right. The engine was not profitable, but burthensome, except as it respected the mine itself. As it regarded the land, independently of the mine, it was clearly burthensome. Now the profits arising from the mine are exempt from taxation under the 43 Eliz. c. 2. The engine is, therefore, in like manner, exempt.

LITTLEDALE, J., concurred.

Order of sessions confirmed.

***DOE on the Demise of the Earl of DARLINGTON v. BOND, et al.**

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10s., and the lessor re-entered, and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10s. value, and substituted others of a different description : Held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury, whether, under all the circumstances, such waste to the value of 10s. had been committed.

EJECTMENT for premises in *Camelford* in the county of *Cornwall*. Plea, the general issue. At the trial before *Gaselee*, J., at the *Cornwall* Spring assizes, 1828, it appeared, that in 1805, the premises in question had been demised to one *Abel Uglow*, by the trustees under the will of Sir *W. Molesworth*, for ninety-nine years, determinable on three lives, which were still in being. In 1819 the lessor of the plaintiff became assignee of the reversion, and in 1823 the Marquis of *Hertford*, under whom the defendants held, became assignee of the lease. The premises, at the time of the demise, consisted of a building one story high, occupied as two tenements, and a back lin-hay or bullock-house, and a garden. In the lease, there was a proviso that, "if the lessee, his executors, administrators, or assigns, should commit, or permit any manner of waste in or upon the demised premises to the value of 10s., and the same did not amend, or other satisfaction for the same give within three months after notice, the lessor might re-enter." In October, 1824, certain alterations were commenced by order of the Marquis of *Hertford*. The building, before occupied as two tenements, was raised, and converted into five separate dwellings. The back lin-hay or bullock-house was pulled down, the materials of which were worth 10*l.*, and the workmen began to erect a building on the site, *856] which was intended for three cottages ; but before it was completed, "the lessor of the plaintiff caused an *adit* to be dug under the premises, (by virtue of a power to open mines, &c. reserved in the lease,) and certain other mining operations were carried on, which destroyed the new buildings. On the 10th of October, 1825, notice was served upon the Marquis of *Hertford*, and the tenants in possession, requiring them to restore the premises to the state in which they were at the date of the lease, within three months from that time ; and nothing having been done in pursuance of the notice, this action was commenced. For the defendants it was contended, amongst other things, that the evidence did not prove waste to the value of 10s. Several points were left to the jury, but no question was put to them as to the amount of waste committed. A verdict having been found for the plaintiff, a rule *nisi* for a new trial was granted in *Easter* term, on the ground that the jury ought to have found the value of the waste.

Carter now showed cause, and contended, that the removal of the bullock-house was clearly waste, and that as the materials of it were proved to have been worth 10*l.*, there could be no doubt that the removal of that building was waste to the value of 10s. If, indeed, the old bullock-house had been pulled down merely for the purpose of rebuilding it, and it had been accordingly rebuilt, that would not have been waste ; but here buildings of a different nature were substituted for it. The erection of those new buildings could not alter the character of the act which had before been done, nor could the value of them be set off so as to reduce the value of the waste committed.

*BAYLEY, J. It seems to me that the meaning of the proviso is, *857] that the lessor shall be at liberty to re-enter if waste be done, producing an injury to the reversion to the value of 10s., and the same be not amended or satisfaction made for it within three months after notice. But in this case it was possible that the value of the reversion might be increased by the alteration ; it was, therefore, a question for the jury, whether waste to the value of

10s. had been committed. As that question was not submitted to their consideration, I think that the rule for a new trial must be made absolute.

HOLROYD and LITTLEDALE, J.s., concurred.

Rule absolute.

C. F. Williams was to have supported the rule.

HENRY SIMMONS v. HEZEKIAH SWIFT.

Where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him: Held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary, in order to ascertain the amount to be paid, and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered.

Simile. That an action for goods bargained and sold could not, under such circumstances, have been maintained, per Littledale, J.

INDEBTATUS *assumpsit* for bark sold and delivered, the usual money counts, and a count upon an account stated. At the trial before Littledale, J., at the Spring assizes for the county of Monmouth, 1826, the jury found a verdict for the plaintiff for the sum of 196l. 2s. 8d., subject to the opinion of this court upon the following case. The plaintiff and defendant were both [1858 dealers in timber and bark, the plaintiff residing at Whitebrook, in Monmouthshire, and the defendant in the town of Monmouth. Previously to the 23d of October, 1824, the plaintiff was possessed of a quantity of oak bark, which was stacked at a place called Redbrook, on the banks of the river Wye, about two miles below the town of Monmouth, and which in July preceding weighed twenty tons. Upon the 23d of October, the following agreement for the sale of the said bark was signed by the plaintiff and the defendant. "I have this day sold the bark stacked at Redbrook, at 9l. 5s. per ton of twenty-one hundred weight, to Hezekiah Swift, which he agrees to take, and pay for it on the 30th of November."

It was afterwards verbally agreed between the parties, that one William Simmons, a brother of the plaintiff, should see the bark weighed on behalf of the plaintiff, and one James Diggett should see it weighed on behalf of the defendant. Within five days after the signing of this agreement, the defendant sent several of his barges and his servants to Redbrook, and took a quantity of the bark, amounting to eight tons and fourteen hundred weight. He sent for William Simmons, who was at work in a wood near to Redbrook, to see the bark weighed on behalf of his brother, which William Simmons accordingly did, and was paid for his trouble by his brother's wife. William Simmons said he was not directed by his brother to see the bark weighed, and did not know that it had been sold until he was fetched from the wood by the defendant's messenger. James Diggett attended the weighing on the part of the defendant. The bark so taken by the defendant was carried by his barges down the river Wye to Chepstow. The remainder of the stack was covered with a tarpaulin belonging to the defendant, [1859 but which tarpaulin had been upon the premises at Redbrook, having been lent by the defendant for that purpose to the person who sold the bark to the plaintiff; and had been used to cover a part of the stack before the signing of the agreement by the plaintiff and defendant. About eight or nine days after part of the bark had been so removed by the defendant, a Mr. James Madley, upon whose premises

at *Redbrook* the bark was stacked, met the defendant, and asked him when he intended to take the remainder of the bark away, as it was stacked over part of a sawpit which he, (*Madley*,) wanted to use; the defendant answered that he should have it taken away in a few days. The defendant did not at any time take away the remainder of the bark, nor was it weighed. Towards the latter end of *November* there was an extraordinary flood, which overflowed the banks of the river *Wye*, and rose nearly to the height of five feet around the remainder of the stack of bark, and did it very considerable injury. There was sufficient time for the defendant to have removed the whole of the bark before the flood happened. The defendant was seen examining the remainder of the bark after it had been injured by the flood, and the tarpaulin before mentioned remained upon the bark until the 29th of *January*, 1825, when it was removed by some of the defendant's servants who were passing up the river in a barge. On the 4th of *December*, 1824, the plaintiff called at the defendant's counting-house, and the defendant said he was ready to pay for the bark which had been removed, viz. eight tons and fourteen hundred weight, and by the plaintiff's direction an account was made out of the bark which the defendant had taken away as aforesaid, and the defendant paid the amount by a check, *860] *which was duly honored. The plaintiff signed the account as settled, but at the same time said that no advantage should be taken of his so doing, and required the defendant to take and pay for the rest of the bark, which he refused to do. Bark is an article which varies very considerably in weight according as the air is moist or dry, and according to the season of the year. The question at the trial was, whether the plaintiff was entitled to recover in this action for the bark which remained standing at *Redbrook*. According to the weight of the bark in *July* preceding, a quantity remained, which at the price mentioned in the agreement of the 23d of *October*, 1824, amounted to the sum of 10*£l. 5s. 8d.*, for which the verdict was taken.

Oldnall Russell for the plaintiff. The property in the bark vested in the defendant as soon as the contract was made, and the subsequent delivery of a part was in law a delivery of the whole, *Slubey v. Hayward*, 2 H. Bl. 504, *Hammond v. Anderson*, 1 N. R. 89. The case of *Hanson v. Meyer*, 6 East, 614, will be relied on to show that the property had not vested; but there something remained to be done by the vendor, it was part of the contract, that the goods sold should be weighed before they were delivered. Upon the facts found in this case no act remained to be done by the vendor. The contract was for an absolute sale, the purchaser was to take the bark and pay for it on a day specified; and it was not made a condition that the bark should be previously weighed. The purchaser was at liberty to take the bark immediately, and *861] in fact did take a part. Since the *decision of *Hanson v. Meyer* several cases somewhat similar have occurred, in which it was held that goods contracted for had not vested in the purchaser, *Rugg v. Minett*, 11 East, 216, *Wallace v. Breeds*, 13 East, 522, *Austen v. Craven*, 4 Taunt. 644, *White v. Wilks*, 5 Taunt. 176, *Busk v. Davis*, 2 M. & S. 397, *Shipley v. Davis*, 5 Taunt. 617; but in each of them it was made necessary, either by express contract or by the usage of trade, that some further act should be done by the vendor before the goods were transferred to the purchaser. [*Bayley*, J. When did the delivery in this case take place?] As soon as the vendee took away a part of the goods. In 2 Bl. Com. 448, it is said, "As soon as the bargain is struck the property of the goods is transferred to the vendee, and that of the price to the vendor, but the vendee cannot take the goods until he tenders the price agreed on." [*Holroyd*, J. The declaration is for goods sold and delivered, not for goods bargained and sold.] If the property vested in the defendant, then a delivery of part was clearly a delivery of the whole.

Campbell, contra. This action for goods sold and delivered cannot be maintained unless the plaintiff makes out not only that the property in the whole of the bark vested in the defendant, but also that the whole was delivered. He

must show that he had divested himself of all lien upon the bark, and that the defendant might have maintained trover for it, without paying or offering to pay the price, *Goodall v. Skelton*, 2 H. Bl. 316. This case is directly within the authority of *Hanson v. Meyer*, 6 East, 614, the "bark was sold at a certain sum per ton, it was therefore necessary to weigh it in order to ascertain the price." Weighing, then, was made necessary by the contract, and it was an act to be done by the vendor. If weighing was to precede the delivery, the bark, until weighed, remained in the possession of the vendor, and the vendee could have no right to weigh it, but was bound to call upon the vendor to do it. The authority of *Hanson v. Meyer* has never been called in question, it is therefore sufficient for the decision of this case; it proves that the property never vested in the defendant, and if it had vested still there was no delivery.

BAYLEY, J. Two questions are involved in this case: first, whether the property in the bark was vested in the defendant so as to throw all risks upon him; secondly, whether there had been such a delivery of the bark as would support this form of action. It is not, perhaps, necessary to give any opinion upon the first point, but I think it right to do so, as it is most satisfactory to determine the case upon the main ground taken in argument. I think that the property did not vest in the defendant so as to make him liable to bear the loss which has occurred. Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods; although he cannot take them away without paying the price. If any thing remains to be done on the part of the seller, until that is done the property is not changed. In *Rugg v. Minett*, and *Wallace v. Breeds*, the thing which remained to be done was to "vary the nature or quantity of the commodity before delivery; that was to be done by the seller. In other cases the thing sold was to be separated from a larger quantity of the same commodity. This case was different; the subject matter of the sale was clearly ascertained. The defendant agreed to buy the bark stacked at *Redbrook*, meaning, of course, *all* the bark stacked there; but it was to be paid for at a certain price *per ton*. The bargain does not specify the mode in which the weight was to be ascertained, but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. He might insist upon keeping possession until the bark had been weighed. If he was anxious to get rid of the liability to accidental loss, he might give notice to the buyer that he should at a certain time weigh the bark, but until that act was done it remained at his risk. In *Hanson v. Meyer* weighing was the only thing that remained to be done, there was not any express stipulation in the contract that the starch (the subject matter of that contract) should be weighed; that was introduced in the delivery order, but the nature of the contract made it necessary. So here the contract made weighing necessary, for without that, the price could not be ascertained. Suppose the plaintiff had declared specially upon this contract, he must have alleged and proved that he sold the bark at a certain sum per ton, that it weighed so many tons, and that the price in the whole amounted to such a certain sum. The case of *Hanson v. Meyer* differs from this in one particular; viz. that the assignees of the vendee who had become bankrupt were seeking to recover the goods sold; but the language of Lord *Ellenborough* as to the "necessity of weighing in order to ascertain the price before the property could be changed, is applicable to the present case, and decides it. I therefore think that the bark which remained unweighed at the time of the loss was at the risk of the seller; and even if the property had vested in the defendant, I should have thought that it had not been delivered, and consequently that the price could not be recovered on a count for goods sold and delivered.

HOLROYD, J. I also think that the plaintiff cannot recover. By a contract for the sale of specific goods, it is true, as a general position, that the property is changed, although the seller has a lien for the price, unless the contract is for a sale upon credit; then the goods remain at the risk of the buyer. But *Hanson v. Meyer* is a direct authority, that in such cases as the present, the seller does not part with the goods until the weighing has been accomplished. Secondly, I think that the bark was not delivered. If there was a delivery the seller could have no lien for the price, even if the contract did not make the bark deliverable until the 30th of November; there was neither a performance of the weighing nor an offer to perform it.

LITTLEDALE, J. I entertain some doubt whether the property did not pass by this contract; and that doubt, as it seems to me, is not inconsistent with the decision in *Hanson v. Meyer*. The question there was, whether the assignees of the purchaser had a right to call for a delivery of the goods sold. Lord *Ellenborough* said, payment of the price and the weighing of the goods necessarily preceded the *absolute* vesting of the property; *which expression [865] I take to have been used with reference to the then question, viz. whether the property had so vested in the purchaser as to entitle his assignees to claim the delivery. So in this case, although the property might vest in the purchaser, it would not follow that he could enforce a delivery until the weight of the bark had been ascertained, and the price paid. Here there was not a delivery in fact, nor was the delivery of part a constructive delivery of the whole. This differs from the cases of lien or stoppage in *transitu*, in which it may be considered, that a delivery of part is in the nature of a waiver of the lien, or right to stop in *transitu*. I think further, that an action for goods bargained and sold would not lie merely because the property passed. The mere bargain would not suffice, because no specific price was fixed, nor could the plaintiff recover on a *quantum valebat*; for the contract was to pay by weight; and, therefore, until the commodity was weighed there would be nothing to guide the jury in the amount of damages to be given. The seller was at all events bound to offer to weigh the bark, but he never did so. For these reasons I think he cannot recover.

Postea to the defendant.

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4. B. devised land to trustees in trust, to permit his daughter to receive the rents to her own use for her life, and from and after her death he devised the same "unto the heirs of the body of his daughter, share and share alike, their heirs and assigns for ever." At the time of the death of the testator the daughter had one child, and afterwards had eleven others: Held, that the words "heirs of the body" in this will meant children, and that the child born before the testator's death took a vested remainder in fee, subject to open and let in those who might be born afterwards.

EJECTMENT for the recovery of messuages and lands in the parish of *Buckland Monachorum*, in the county of *Devon*. At the trial before *Littledale*, J., at the last Summer assizes for the county of *Devon*, the jury found a verdict for the plaintiff, subject to the opinion of this court on the following case:

Richard Northmore, of *Sheepstor*, in the said county, being seized in fee of the premises in question, by his last will and testament, bearing date the 23d of June, 1764, and duly executed and attested for the passing of real estates

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Richard Northmore, of *Sheepstor*, in the said county, being seized in fee of the premises in question, by his last will and testament, bearing date the 23d of June, 1764, and duly executed and attested for the passing of real estates

of inheritance, devised as follows: I give and bequeath unto my said wife, *M. Northmore* and *Elizabeth Northmore*, all that my messuage and tenement called *Sowton*, being in the parish of *Buckland Monachorum*, in the said county, and the reversion and reversions, remainder and remainders thereof, to hold to them, their heirs and assigns, in trust, to permit and suffer my said wife, *M. Northmore*, to inhabit, dwell in, use, occupy, and enjoy the parlor and chamber over the south side of the dwelling house on the said premises, until the determination of the term which *J. Foot* now hath of and in the tenement of *Coombe Hill*, without paying any rent or other consideration therefore; and to permit and suffer my daughter *Joan*, now the wife of *Jacob Creber*, and her assigns, from and immediately after my death, to hold and enjoy, and to receive and *take the rents, issues, and profits of all and every of the said premises, except as aforesaid, to her and their own use and benefit, for and [867] during the term of her natural life, free and clear of and from her said husband, *Jacob Creber*, and so that he may not intermeddle therewith, and that the same may not be subject or liable to the payment of any of his debts; and from and after her death, then I give, devise, and bequeath the same and every part thereof, unto the heirs of the body of the said *Joan Creber*, share and share alike, their heirs and assigns forever." The testator died so seised in January, 1766, without altering or revoking his will, leaving the said *Jacob Creber* and *Joan* his wife him surviving. *Joan Creber*, at the death of the testator, had one child, *Richard*. She subsequently had eleven other children, and died in 1811. The first five, the seventh, tenth, and eleventh died in her lifetime intestate and without issue. *Mary*, the sixth, and *Henry*, the ninth, are represented by the defendant *James*, who was the twelfth and last child, their interest having been duly conveyed to him. Both survived their mother, *Joan Creber*. *William*, the eighth, died in 1800, but he left two daughters now living, who are the lessors of the plaintiff. *Henry* was the eldest surviving son at his mother's death, but *William* was his elder brother, and represented by his daughters.

The said *Jacob Creber* the father, the husband of *Joan Creber*, the devisee named in the will, died in April, 1806, and upon his death, the said *Joan Creber*, his wife, went and lived upon the said premises called *Sowton*, with her son *James Creber*, the defendant, who rented the same of her at 32*l.* per annum, from thence to the time of her *death, which happened on the [868] 23d of December, 1811, and has ever since remained in possession thereof.

R. Bayley for the lessors of the plaintiff. As *Joan Creber* took an equitable estate for life, and the subsequent devise to the heirs of her body carried the legal estate, it must be conceded that the two will not coalesce, *Fearne*, 52. Then the lessors of the plaintiff take by purchase contingent remainders, for they being the two daughters of the eldest son of *Joan Creber*, answer the description of heirs of the body of *Joan Creber* at the time of her death, *Newcomen v. Barkham*, 2 Vern. 729, *Harris v. Barnes*, 4 Burr. 2157; S. C. 684. They can fulfil the condition of taking share and share alike, for, but for those words, they would have taken jointly. They are, therefore, entitled to the whole. But assuming that the words "heirs of the body" are not to be construed in their strict legal sense, but that in this will they mean *children*, and will comprehend grandchildren, the lessors of the plaintiff are then entitled to recover nine-twelfths. For in that view of the case, *Richard*, the eldest son, took a vested remainder upon the death of the testator, subject to open and let in the children subsequently born, *Baldwin v. Karver*, Cowp. 809, *Doe v. Perryn*, 3 T. R. 484, *Meredith v. Meredith*, 10 East, 808. *Joan* had twelve children, eight died in her lifetime without issue, and their shares descended on the lessors of the plaintiff. In *Gretton v. Haward*, 6 Taunt. 94, the testator devised to his wife his real estate and personal estate, she first paying his debts and funeral expenses, and after her decease, to *the heirs of [869]

her body, share and share alike, if more than one, and in default of issue by the testator, to be at her own disposal; there were children of the testator and his wife, and it was held that the wife took an estate for life with remainder to all the children as tenants in common in fee.

Coleridge, contra. First, the devise being to the heirs of the body of *Joan Creber*, share and share alike, their heirs and assigns, created a joint tenancy, or a tenancy in common. Secondly, the remainder did not vest until the death of the tenant for life, and consequently the lessors of the plaintiff are not entitled to more than one fourth. The words of the will, "the heirs of her body, share and share alike, their heirs and assigns for ever," prevent its being a tenancy in severalty, for if that construction were adopted, no effect would be given to these words, and there is no reason for rejecting them. For as the first estate was only for life, there is no reason in law why the children, being purchasers, should not take jointly or in common, nor is there any thing to show that that was not the intent of the testator, for if the remainder had even vested, upon the testator's death, in *Richard*, the only son, it would open to let in the other children as they came in *esse*, either as joint tenants or tenants in common, *Doe v. Perryn*, 3 T. R. 484, is in point. There three children were born subsequently to the testator's death, and the remainder was held to vest in the first-born, subject to opening. What is true of him would be true of *Richard* here; if the remainder vested on the testator's death, it would open to let in the other *children. Secondly, the remainder vested not at the death of the testator, but at the death of *Joan Creber*, the tenant for life. The words are, "from and after her death then I give and devise to the heirs of her body;" and this comes after a previous devise of the legal estate in fee to trustees. Now there could be no heirs of her body while she was alive. It is true, that, strictly speaking, the eldest male issue only would be the heir of her body after her death; but it is sufficient to show that there was a class of persons who satisfied that term in a qualified sense, as in this case, "all the children living at her death;" *Henry v. Purcell*, Sir W. Bl. 1002. It is clear, that in this case the death of the parent was the period looked to. There can be but two periods to look to; the death of the testator and the death of *Joan Creber*. According to the principle involved in the maxim of *nemo est heres viventis*, the first cannot be the right period. That construction ought not to be adopted when any other can be; *Russell v. Long*, 4 Ves. 551. In most of the cases in which the estate has been held to vest in the life of the ancestor, there have been words in the will which showed that the testator used the word heirs in a popular sense, to denote the individual who, at the time of his will, was the apparent or presumptive heir of a particular person. As in *Burchett v. Durdant*, Carth. 154, where the testator devised to *R. D.* for life, and after his decease to the heirs male of the said *R. D. now living*. The remainder was held to vest in *G. D.*, who at the time of the devise and the death of the testator was *R. D.*'s only son; the words "now living" being a sufficient description of his person. There are *other instances of the same kind given in *Feeare*, 212. In *Gretton v. Haward*, 6 Taunt. 94, the testator was the husband, and left six children him surviving; as he directed the estate to be divided, he could not be supposed to disinherit any child dying before his widow. In *Edwards v. Symons*, 6 Taunt. 213, the term was "children," not heirs. Then, if it be an exception to the general rule, to make the children take as heirs, living the ancestor, there are no circumstances here to bring the case within the exception; and if that be so, then the remainder did not vest till the death of the tenant for life, and the lessors of the plaintiff are entitled to one-fourth only.

BAYLEY, J. I am of opinion that the lessors of the plaintiff are entitled to recover, not the whole, but nine-twelfths only of the estate devised by the testator. It has been insisted that they were entitled to recover the whole, on the ground that the words "heirs of the body" were used in a strict legal sense,

and that they applied to the lessors of the plaintiff, who, as the daughters of the eldest son of *Joan Creber*, were the only persons who answered that description; and that would be true, if there were nothing on the face of the will to show that the testator used those words in a different sense. But here there are the words "share and share alike," which show that the testator did not mean the property to go to the eldest male issue only, which he must have intended if the words "heirs of the body" be taken in a strict legal sense. It has been said that those words were not used in a strict legal sense to denote the eldest male issue, but that the testator may *have contemplated a [872] state of things very remote, but which actually has happened, viz. that the eldest son should leave two daughters, who would then be heirs of the body of *Joan Creber*, and might take share and share alike. I think that is a state of things too remote to be supposed to have been in the contemplation of the testator. The words "heirs of the body" not being used in the strict legal sense, we are bound, first, to ascertain in what sense they were used. When that is ascertained, then the will must receive the same construction as if words apt and proper to denote the intention had been used in the will, instead of the words "heirs of the body," or as if those words imported the very sense in which they were used. Then if the words heirs of the body were not used in a strict legal sense, the first question is, in what sense were they used? I think they were used in a sense similar to that expressed by the words, "descendants, children, or issue." That being so, if the testator had used the words children or issue, which are words apt and proper to express the sense in which he used the words "heirs of the body," then, according to *Doe v. Perryn*, 3 T. R. 484, the estate limited to the children was a contingent remainder in fee, which, on the birth of each child, vested in that child, subject to open and let in those who were born afterwards. It is a settled rule, that wherever a remainder can be construed to be a vested remainder, it is to be considered vested, and not contingent. Because if the remainder be contingent, it is liable to be defeated by the destruction of the previous estate. If in this case the remainder was contingent as long as *Joan Creber* lived, the trustees might have destroyed it by *destroying their previous estate. Each taker might dispose of his [873] remainder, whether vested or contingent. But if it was contingent it might be destroyed. I am, therefore, of opinion that the remainder vested, upon the death of the testator, in *Richard Creber*, and that it opened on the birth of each child, who immediately took a vested remainder in its share; and that eight having died without disposing of their shares, they vested in the lessors of the plaintiff as the representatives of the eldest brother. The several cases cited as to the application of the rule *nemo est hæres viventis*, do not apply to the present case, because in those cases there was nothing to show that the testator intended to use the words "heirs of the body" in any other than the strict legal sense, but where it can be collected from expressions in the will, that those words are used in a different sense, as a designation of a person, then the remainder vests notwithstanding the general rule, that *nemo est hæres viventis*, as where the limitation to the heirs special was qualified by the words *now living*, *Burchett v. Durdant*, Carth. 154, or some other circumstances, have appeared in the will to manifest the testator's intention that the estate should vest, *Long v. Beaumont*, 1 Peere, W. 229, *Goodright v. White*, 2 Black, 1010. I think that there is in this case sufficient on the face of the will to show that the words *heirs of the body* were used to denote children, and, therefore, that it was the intention of the testator, that the remainder should vest in the first-born child, subject to open and let in the other children as soon as they came into esse. That being so, the lessors of the plaintiff are entitled to recover nine-twelfths of the property.

**HOLROYD*, J. I think that the lessors of the plaintiff are entitled to recover nine-twelfths. If the words "heirs of the body" are to be construed strictly, the remainder would not vest till *Joan Creber's* death. If they

are to be construed to mean children, then the rule *nemo est heres viventis* does not apply, because the will must be construed as if the testator had used in the devise the word "children," instead of the words "heirs of the body." It has been said, that the testator meant those children only who were living at the death of *Joan Creber*. There is nothing in the will to show that that was his meaning. The words "share and share alike," and "their heirs and assigns," show that the words "heirs of the body" were not used in a strict legal sense. It appears to me, that according to *Gretton v. Haward*, 6 Taunt. 94, which is very applicable to the present case, those words must be construed "children;" and that being so, then at the death of the testator a remainder vested in *Richard*, which was divested *pro tanto* on the birth of every child. It must be vested in its nature, because there was no other contingency but the birth of children; and there is nothing in the will to show that he did not mean all children. I think, therefore, that by the words "heirs of the body," the testator intended all the children of *Joan Creber*, not merely those who were living at the death of *Joan Creber*.

LITTLEDALE, J., concurred.

Judgment for the plaintiff.

*The Duke of SOMERSET v. FOGWELL.

Where a subject is owner of a several fishery in a navigable river, where the tide flows and refluxes, granted to him (as must be presumed) before magna charta, by the description of "*separalem piscarium*," that is an incorporeal and not a territorial hereditament, and a term for years in it cannot be created without deed. *Sembla*, that the owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be owner of the soil.

TRESPASS for breaking and entering the plaintiff's close called the *River Dart*, in the parish of *Berry Pomeroy*, in the county of *Devon*, between a certain place called *Hem's Mouth* and a certain place called *Penny's Quay*, and taking the plaintiff's fish therein. Second count for breaking and entering the several fishery of the plaintiff in the river *Dart*. Third count for breaking and entering plaintiff's free fishery. Fourth count *de piscibus asportatis*. Plea, general issue. At the trial before *Burrough*, J., at the Spring assizes for the county of *Devon*, 1626, the plaintiff gave in evidence letters patent of the 44 *Eliz.*, by which she granted to *Edward Seymour*, Esq., his heirs and assigns, "all those domain lands and manors of *Berry Pomeroy* and *Bridgetown Pomeroy*, and the castle of *Berry Pomeroy*, with all their rights, members, liberties, and appurtenances in the county of *Devon*, then lately parcels of the lands and possessions of *Edward* late Duke of *Somerset*, and once parcels of the lands, possessions, and hereditaments of *T. Pomeroy*, knight;" and, after making use of general words to pass the lands, &c., and tithes of *Berry*, her majesty granted "all waters, fisheries, &c., to the aforesaid manors, castle, and premises, and to each and every of them belonging or appendant, known, accepted, held, used, or reputed or deemed as part or parcel of the same premises." The letters patent then granted to the aforesaid *E. Seymour*, his heirs and assigns, the aforesaid manor, castle, messuages, lands, &c., and *876] all *and singular the premises aforesaid, with their appurtenances, as fully, freely, and perfectly, and in as ample a manner and form as the same premises, or any part thereof, could or ought to have come to the hands of the then queen, or to the hands of *Henry VIII.*, and *Edward VI.*, late Kings of *England*, or to the hands of either of them, or to the hands of *Mary*,

late Queen of *England*." The plaintiff produced two chirographs of fines, the first levied in *Michaelmas* term, in the 2d of *Edward* 6, in which *Edward*, Duke of *Somerset*, was plaintiff, and *Thomas Pomeroy*, knight, and *Joannah* his wife, were deforciants of the manors of *Berry Pomeroy*, *Huberton* and *Herberton*, with the appurtenances, and of 200 messuages, &c., &c. *Ac de separali piscaria in aqua de Dart.* The other fine was levied in the 2d and 3d of *Philip and Mary*, in which *Edward*, Duke of *Somerset*, was plaintiff, and *Thomas Pomeroy*, knight, and *Joannah*, his wife, were deforciants of the manor of *Berry Pomeroy*, *Bridgetown Pomeroy*, *Huberton* and *Herberton*, with the appurtenances, and of 200 messuages, 40 cottages, 2000 acres of land, &c., &c., with the appurtenances, in *Berry Pomeroy*, *Bridgetown Pomeroy*. *Ac de separali piscaria in aqua de Dart.* It was also proved that the duke and his ancestors had, from the year 1765, regularly received an annual rent for the fishery from different tenants for fishing in the river *Dart* between *Hemsworth* and *Penny's quay*, and that no other persons during that period had claimed a right to fish within those limits; and that the defendant, in *September*, 1825, committed the trespass complained of, by taking fish within those limits. On the part of the defendant it was contended, that the duke had granted a lease of the fishery to one *Mills*, *and that *Mills* was in possession of the fishery under such lease at the time of the trespass complained of; and that the action, therefore, ought to have been brought in his name, and not in that of the duke, and an agreement in writing, but not under seal, was given in evidence. It was dated on the 7th of *May*, 1824, and the duke thereby agreed to let, and one *N. Mills* agreed to take all his, the said duke's fishery, of whatsoever nature, kind, or description the same might be, and to which the duke, at law or in equity, was entitled in, upon, and out of the river *Dart*, and the adjacent shores and banks of the same river, in the county of *Devon*, with all rights, privileges, and appurtenances whatsoever attached to or appertaining to the said fishery, as fully and amply as the said duke was entitled to the same; and also all that sand bank situate and lying in the parish and manor of *Berry Pomeroy*, in the county of *Devon*, *habendum* to *N. Mills*, his executors, &c., from the 25th of *May* then last past, for three years, yielding and paying therefore unto the duke, his heirs and assigns, the yearly rent of 40*l.* on the days therein mentioned; and also yielding and paying to the duke, his heirs and assigns, the yearly rent of 5*s.* on the days and in the manner aforesaid, for and in respect of the said bank. The learned judge was of opinion, that there was evidence for the jury to presume that there had been before the reign of *Henry* the Third, a grant of the exclusive right of fishing in the river *Dart*, which was then vested in the plaintiff, and that as it was a right in a navigable river where the tide flowed and refluxed, it was an incorporeal hereditament which lay in grant and not in livery, and that a term for years could not be created in it without deed. And he directed the *jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A verdict having been entered for the plaintiff on the second and fourth counts, *Selwyn*, in *Easter* term, obtained a rule *nisi* for entering a nonsuit.

Erskine now showed cause. The place in which the trespass was committed was in the navigable part of the river *Dart*, and within the flux and reflux of the tide. The Duke of *Somerset* proved at the trial an immemorial and exclusive exercise of the right of fishing in that place. Such an exclusive right may be legally acquired by a subject under a grant from the crown prior to *Magna Charta*, and there was ample evidence to support the presumption of such a grant in this case. The questions will be first, whether the duke's right be properly described in the counts on which the verdict is taken; secondly, whether trespass be the proper remedy for an injury to such right; thirdly, whether the action be rightly brought in the duke's name. The verdict was taken upon the second and fourth counts only. The second count

is for a trespass in the duke's several fishery; now an exclusive right of fishing, whether it be claimed in *proprio solo*, or in *alieno solo*, in private waters or in public rivers is properly described as a several fishery. It is true that Mr. Justice *Blackstone*, 2 Bl. Com. 39, intimates an opinion that ownership of the soil is essential to the existence of a several fishery, but that opinion is at variance with Co. Lit. 122 a., and with other authorities there

*879] cited by Lord *Coke* and by Mr. **Hargrave* in his note to that passage. The true distinction between a several and free fishery is thus pointed out by Lord *Mansfield*, in *Seymour v. Lord Courtenay*, 5 Burr. 2814. "In order to constitute a several fishery it is requisite that the party claiming it should so far have the right of fishing independent of all others, as that no person should have a co-extensive right with him in the subject claimed, for where any person has such co-extensive right there it is only a free fishery." Now the Duke of *Somerset* exercised an exclusive right in the place in question, and the chirographs of the fines describe the fishery as a several fishery. The right, therefore, is properly described in the second count, and trespass is the proper remedy for an injury to that right. For in order to maintain trespass, it is sufficient if the party at the time when the act complained of, is done, has the actual or constructive possession of the thing which is the subject of the trespass, *Smith v. Miller*, 1 T. R. 480. The owner of a several fishery has the exclusive right of taking the fish within particular limits, and thereby has the constructive possession of all fish within those limits, and may, therefore, in trespass, describe them as *his fish*, *Smith v. Kemp*, 2 Salk. 637; *Child v. Greenhill*, Cro. Car. 553; *Sutton v. Moody*, 1 Ld. Raym. 250; *Seymour v. Lord Courtenay*, 5 Burr. 2814. So the grantee of waifs, estray and wreck within a manor, or of felon's goods within a hundred, may before seizure by him maintain trespass against a wrong doer, F. N. B. 91 b. 91 D. 91 F.

*880] *The Duke of *Somerset*, therefore, having by virtue of his right of several fishery an exclusive property in the fish, may maintain the present verdict either under the second or fourth counts, unless he has divested himself of his right of action by the lease to *Mills*. The question in this case is not as in the case of *Rex v. Ellis*, 1 M. & S. 652, how far a valid demise of a fishery would convey an interest in the soil, neither is it how far the demise of the soil would carry with it the right of fishery, because the lease to *Mills* is not under seal, and does not purport to demise the bed of the river. And, therefore, if this were the case of a private river, in which the right of fishing emanated from and depended upon the right of soil, such a lease would be insufficient to convey to the lessee any legal interest whatever. But here the fishery in question being in a navigable river, within the flux and reflux of the tide, is a royal franchise wholly independent of any right to the soil. The Duke of *Somerset* may or may not be also owner of the soil under some grant from the crown, but the two subjects would nevertheless remain wholly independent of each other, and the acquisition of the right to the soil could not affect the nature of the fishery, which would still only be vested in him as a royal franchise, and as such could not be transferred to another except by deed. The lease to *Mills*, therefore, could only operate as a license to fish, and as it could not convey any legal interest to him, could not divest the duke of the constructive possessory right of the fish, which would be sufficient to entitle him to a verdict under the second and fourth counts of the declaration.

*881] **Selwyn*, contra. It may be conceded that a several fishery may exist distinct from a property in the soil, and where that is the case, that such several fishery being distinct from the ownership of the soil, may be considered as an incorporeal hereditament lying in grant, and not in livery; and in that case that no demise of it can be made but by deed. The question, whether a several fishery necessarily includes in it ownership of the soil or not, is fully discussed by Mr. *Hargrave* in his note to Co. Litt. 122, (a) where after

stating the several authorities and arguments upon the subject, he says, "Hence as it should seem, the arguments are short of the purpose, for at the utmost they only prove that a *several piscary* is *presumed* to comprehend the soil, till the contrary appears, which is perfectly consistent with Lord Coke's position, that they may be in different persons, and, indeed, appears to be the true doctrine on the subject." Then if that be so, as the Duke of *Somerset* had a *several fishery*, it must be presumed that he had the soil also, because the contrary was not shown; and if he had the soil, he might put himself out of possession of it by a parol of demise, and the words of the agreement, "all his the said fishery," were sufficient to convey to *Mills* the right in the soil. And if that be so, then this action ought to have been brought in his name.

Cur. adv. vult.

The judgment of the Court was now delivered by

BAYLEY, J., who (after stating the pleadings) proceeded as follows. The material question in this case was, whether the plaintiff had, by his agreement entered into with *Mills*, put it out of his power to maintain the *action. [*882 He had entered into an agreement to let to *Mills* all his fishery in the river *Dart*, with all rights and privileges appurtenant to the said fishery for a period extending beyond the time when the alleged trespass was committed. If by that instrument he legally dispossessed himself of the right for the term therein mentioned, the defendant is entitled to have a nonsuit entered. For the plaintiff it was contended that the fishery lay in grant, and that a term, even for years, could only be created by deed. On the other side it was admitted, that such would be the consequence if the fishery lay in grant and not in slavery; and looking at the authorities, we find many which establish that a term for years in a thing lying in grant cannot be created without deed. Several such cases are collected in 14 Vin. Abr. tit. Grant (G. a.) and most of them are also in 2 Roll. Abr. 63, tit. Grant (G.). I will mention a few of them as the point is of importance. In Co. Litt. 85 a, which is a commentary on the words "*per fait ou sans fait*," in Lit. s. 116, it is said, "Here *Littleton* affirmeth that the wardship of the body may be granted over without deed, and herein note a diversity between an original chattel of a thing that properly lieth in grant, and a chattel derived out of a freehold of any thing that lieth in grant. As for example, if a man make a lease for years of a villeine, this cannot be done without deed, neither can the lessee sign it over without deed, because it is derived out of a freehold that lieth in grant. But the wardship of the body is an original chattel during the minority, derived out of no freehold, and therefore as the law createth it without deed, so it may be assigned over without deed." It is singular that both in 2 Roll. Abr. *62, and in Vin. Abr. [*883 Grant, (G. a.) this passage is cited, with the word *will* instead of *villeine*, but that is clearly a mistake. In 2 Roll. Abr. 63, pl. 14, it is said that a parson cannot grant his tithes to a stranger for life or for years without deed, because it is entirely in grant; and pl. 16 shows, that it makes no difference whether the grant be for one year or for several. In pl. 17, a distinction is taken between a grant of tithes to a stranger and to the owner of the land. In the latter case it may be without deed, because it is in the nature of a composition for the tithes retained, and not a grant of tithes. In Vin. Abr. Grant (G. a.) pl. 29, Godb. 74, is cited, where it is said *arguendo*, that a warren may be demised without deed; and reference is made to the 9 Ed. 4, 47. There may be a difference according to the sort of warren leased, viz. where a warren with the land is leased (in which case by the warren the land would be intended), and where the franchise only is demised. In the former case the lease might be good without deed; and if that was the nature of the lease spoken of in Godb. the position is correct, otherwise not; and in 9 H. 4, 47, it is said that warren cannot be leased without deed; and the same is laid down in Bro. Abr. tit. Lease, pl. 12; and this doctrine is adopted in *Saunders v. Owen*, 2 Salk. 487

The question then is, whether the subject matter of the agreement between the plaintiff and *Mills* lay in grant, as an incorporeal, or in a livery as a corporeal thing. No conveyance of the right of fishery or of the soil was produced at the trial, but it appeared not to be an ordinary fishery resulting to the owner of

*884] the adjoining land in respect of the land, but a fishery *in a navigable river, where the tide flows and reflows, and therefore in the nature of a royal franchise, which Sir *W. Blackstone* calls a free fishery, 2 Com. 39. Such a franchise could not be created after *Magna Charta*, but there was evidence in this case from which its existence from time beyond legal memory might be presumed. Two chirographs of fines, one in the reign of *Edward the Sixth*, the other in the reign of *Philip and Mary*, was given in evidence, in which it was called a several fishery in the river *Dart*. Much discussion has taken place at different times as to whether a several fishery necessarily imports an ownership of the soil; but considering the nature of the franchise, and the law as to rights of fishery in other rivers, I have no difficulty in saying, that in my judgment this was not a territorial, but an incorporeal franchise. In Co. Lit. 4 b. it is said, "If a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of *seisin secundum formam chartarum*, the soil doth not pass, nor the water, for the grantor may take water there; and if the river become dry he may take the benefit of the soil, for there passed to the grantee but a particular right, and the livery being made *secundum formam chartarum*, cannot enlarge the grant. For the same reason, if a man grant *aquam suam*, the soil shall not pass, but the piscary within the water passeth therewith." In the case here put the grant was made by the owner of the soil, capable of granting it, and yet a grant *separatis piscariis* followed up by livery, which properly applies to a thing corporeal, did not convey the soil, livery being made *secundum formam chartarum*. If then a fishery only is granted, nothing passes but a right to take the fish,

*885] *and to use such means as are necessary for that purpose, which is in truth nothing more than a liberty to fish: the grantee has no property in the water, none in the soil. And this is the case where the grant is made between subject and subject, and, consequently, is to be construed against the grantor, a principle inapplicable to grants made by the crown, whereby nothing passes, unless the intention that it should pass is manifest. In the great case of the fishery of the *Banne*, Davis, 56, it appeared, that the king had the fishery of the *Banne*, a navigable river, as parcel of the ancient inheritance of the crown; and Jac. 1, by letters patent, granted to Sir *R. M'Donnell* in fee the territory of *Rout*, parcel of the county of *Antrim*, and adjoining to the river *Banne*, in that part where the fishery was; and by the letters patent the king granted "*omnid castra messuagia, &c. piscarias, pescationes, aquas, aquarum cursus, &c.*" and it was held, that the fishery of the *Banne* did not pass by the grant of the land adjoining, and by the general grant of all piscaries; for that it was a royal fishery not appurtenant to the land, but a fishery in gross, and was by itself part of the inheritance of the crown; and that general words in a grant by the king would not pass such a special royalty, which belonged to the crown by prerogative. And it was further agreed, that the grant of the king passes nothing by implication. In the present case it appeared, by the fines given in evidence (which were probably in the language of the original grant) that the Duke of *Somerset* had nothing more than a fishery, without the property of the soil or the water; for that would have been the case even had

*886] the grant *been made by a subject, and therefore *a fortiori* he could take nothing more by a grant from the crown. It was contended in argument that the owner of a several fishery must be presumed to be the owner of the soil. That may be true where the terms of the grant under which he claims are unknown; but when they appear, and are such as convey an incorporeal hereditament only, the presumption is destroyed. If, then, the grant to the Duke of *Somerset* gave nothing more than an incorporeal hereditament, of course that alone

could be granted by him. He does not, indeed, profess to grant more, the agreement purports to grant the fishery only, and that agreement not being under seal, could not operate as a demise for years of that which lies in grant. That being so, *Mills* took nothing under the agreement; the right of the Duke of *Somerset* remained in him at the time of the trespass, and the action is consequently maintainable.

Rule discharged.†

† *Hoskins v. Robins.* 2 *Stand.* 323. (12.)



The KING v. HUGHES.

By the governing charter of a borough, there were to be ten aldermen and ten capital burgesses, and vacancies in the body of alderman were to be filled up out of the capital burgesses: Held, that the acceptance of the office of alderman by a capital burgess, even under a void election, operated as a surrender of the latter office; and that a person so elected, and afterwards ousted on *quo warranto*, was not thereby restored to the office of capital burgess: and, therefore, where a capital burgess became an alderman *de facto* by means of a void election, and in the character of alderman attended and voted at an election of a mayor, but was afterwards ousted on *quo warranto*: Held, that he could not be considered as having attended and voted as a capital burgess.

INFORMATION in the nature of a *quo warranto* against the defendant for usurping the office of mayor of the town and borough of *Stafford*. The defendant's plea set out a charter of the 12 *Jac.* 1, by which the *king [887] granted to the bailiffs and burgesses of *Stafford*, that they should be a body corporate, and that there should be a mayor, ten aldermen, and ten capital burgesses, and then averred acceptance of the charter, and that the defendant was elected and sworn mayor according to the directions of the charter. There were several replications to this plea, upon which several issues both in law and in fact were raised. The only issue in fact which is material to the question decided by the court was, whether at the defendant's election in 1825 there were present a majority of the capital burgesses. At the trial before *Park*, J., at the Spring assizes for the county of *Stafford*, 1826, the facts, as far as they relate to that issue, were as follows: By the charter, the corporation was to consist of a mayor, ten aldermen, and ten capital burgesses; and vacancies in the body of alderman were to be filled up out of the capital burgesses. On the 24th of *October*, 1825, the defendant was elected mayor. There were present at the election four capital burgesses and eight aldermen, including two persons named *Turnock* and *Knight*, but an information in *quo warranto* was filed against them, charging that they, on the 20th of *September*, 1824, exercised the office of aldermen, and they were removed from that office by judgment of ouster in *Hilary* term, 1826. *Turnock*, on the 20th of *September*, 1824, had been elected an alderman, and on the same day, in his stead, one *Rogers* was elected a capital burgess. *Turnock* concurred in the election of *Rogers*, and the latter executed the office of capital burgess ever after, and *Turnock* continued from that time to exercise the office of alderman till the judgment of ouster. On the 14th of *October*, 1821, *Knight* was elected an alderman, and in his stead one *Hawthorn* was elected a capital burgess. **Knight* concurred in that election, and *Hawthorn* acted ever after as a capital burgess. When *Rogers* and *Hawthorn* were elected burgesses they completed the number of ten, exclusive of *Turnock* and *Knight*, who had been elected

[888]

aldermen. *Turnock* was elected a justice in *October*, 1824, and was sworn in, and continued to serve the office until he was ousted. *Knight* was elected and sworn in a justice in *October*, 1821 and 1822, and again in 1823. By the terms of the charter a person cannot be elected a justice until he is an alderman. Upon this it was insisted, that the election of the defendant as mayor in 1825 was bad, because there were present at his election four capital burgesses only, whereas there ought to have been six. On the other hand, it was contended that *Turnock* and *Knight*, who were present at the election and voted as aldermen, were not, in point of law, aldermen, and consequently they had never ceased to be capital burgesses; and if that were so, that there were present at the election six capital burgesses and six aldermen. The learned judge inclined to think that *Turnock* and *Knight* continued to be capital burgesses, but he directed the jury to find a verdict for the defendant, with liberty to the relator to move to enter a verdict for the crown. The jury having found accordingly, a rule *nisi* was obtained by *Campbell* in last *Easter* term to enter a verdict for the crown, against which

Oldnall Russell, and *Bayly* now showed cause. *Knight* and *Turnock* at the time of the defendant's election in 1825 were not aldermen *de jure*. The judgment of ouster against them in *Hilary* term, 1826, is conclusive to show that in 1825 they were not aldermen *de jure*, and in fact that they had never [889] been aldermen, *Rex v. The Mayor of York*, 5 T. R. 66, and per *Holland*, J., in *Rex v. Hughes*, 4 B. & C. 368. Then if that be so, they were remitted to their original character of capital burgesses, and must be considered as having given their votes in that character, which they might rightfully do, and not in one in which they would be acting wrongfully. It may be conceded that the acceptance of the office of alderman, where the election is valid, and the acceptance gives a perfect title, operates as an implied surrender of the office of capital burgess. But in this case the party never acquired a legal title to the office of alderman, and therefore cannot be supposed to have intended to vacate the first office. The acceptance of a new lease by a lessee for years will, generally speaking, operate as the surrender of a prior lease. But if the new lease be void, acceptance of it by the lessee does not operate as a surrender, *Com. Dig. tit. Surrender, I. 1, 2, Roe d. Lord Berkeley v. The Archbishop of York*, 6 East, 86. Besides, a corporate officer who accepts an office incompatible with another, does not surrender, but vacates the first office; and then the presumption is that he intended to resign the first, provided that he was legally admitted to the other office. Here *Turnock* and *Knight* never acquired a good title to the office of aldermen, and, therefore, they cannot be supposed to have resigned that of capital burgess.

Bayley, J. I am of opinion that the defendant has not been duly elected in this case, and that the verdict must be entered for the crown. It is conceded that, in order to make a good election, there must be present [890] the majority of the aldermen and the majority of the capital burgesses. The objection here is, that at the election in 1825, there was not present a majority of the capital burgesses. To constitute a majority there ought to have been six. There were present four persons *de facto* capital burgesses. There were also eight *de facto* aldermen at that time, but two of those were afterwards ousted from that office; and then the question is, whether, by being removed from the office of aldermen, they become *ipso facto* capital burgesses. In 1821, *Turnock* and *Knight*, two of the eight aldermen, were elected from the office of capital burgesses into the office of aldermen, and they were sworn into that office. From that time to the time of this election in 1825, they ceased to exercise the duties of capital burgesses, and did exercise the duties of aldermen. Upon their being appointed aldermen, vacancies were declared in the number of capital burgesses. Those vacancies were filled up, and they occurred in filling them up. From 1821, down to the time in question, the duties of capital burgesses were discharged not by *Turnock* and *Knight*, but

by persons who succeeded them as capital burgesses. It is true they were not legal aldermen, but they were aldermen *de facto*; and if they had continued so for six years, they would have been good aldermen, and unimpeachable; but having been removed from that office, they insist, as a position of law, that they never vacated the office of capital burgesses; that from 1821, until the time when they were removed from the office of aldermen, they continued to be capital burgesses. Now Lord Chief Baron *Comyn*, in his Digest, tit. Officers, (K. 5,) lays it down, that a man shall lose his office if he *accepts* another office incompatible. The offices of "alderman and capital burgess are incompatible. These parties accepted the offices of aldermen; they were sworn into them; they discharged all the duties of them, and if six years had elapsed they would have been unimpeachable aldermen. There is no hardship on them in holding, that the legal result of this is, that they ceased to be capital burgesses. On the contrary, a great hardship would result to other parties if they were at liberty now to say, that they never ceased to be capital burgesses. One consequence among others would be, that every act done by the parties introduced into their places as capital burgesses, would be illegal. If, in common council, they concurred in giving an opinion or a vote, they would be liable to be ousted by *quo warranto*, and treated as wrong doers. Besides, on the election of these two persons as aldermen, the corporation state there is a vacancy in the office of capital burgesses. *Knight* and *Turnock* concur in making that statement, and *Fooke* and *Rogers* are made burgesses. Then who ought to suffer, the party who is deceived, or the party who lends himself to mislead? It is the duty of a person elected to the office of alderman to ascertain whether he is legally elected or not. He is a party to the election, and he, at his peril, is bound to take care that it is a valid election before he accepts the office; and if it turns out that he accepted it improperly, is he to be restored to every thing which he had previously given up? and is the individual introduced into his place to be treated as a wrong doer and to be entirely removed? Suppose there was a compensation for the discharge of the duties of a capital burgess, who ought to have it? Clearly the man who from the year 1821, down to the election in 1825, discharged these duties, and not that man who has abstained from these duties, *and who has actually concurred in filling the office with another person. Besides, if *Turnock* and *Knight* never ceased to be capital burgesses, it might follow, as a consequence, that under certain circumstances there would be more than ten capital burgesses, which would be contrary to the charter, or that two persons must be considered as filling the same office at the same time, which cannot be. For suppose two aldermen *de facto* to have been removed from their office by judgment of ouster given more than six years after they had accepted the office, on a *quo warranto* information filed within the six years, in what condition would those persons have been who were introduced as capital burgesses? They were elected capital burgesses; they were sworn in and admitted; they discharged the duties for a period of six years; and consequently a *quo warranto* would not lie against them, stat. 32 G. 3, c. 58, s. 1. They would, therefore, be good unimpeachable capital burgesses. And then, in what condition would the corporation be? There would be ten good capital burgesses, with reference to whom no question could be raised, and *Turnock* and *Knight* would be supernumeraries. But if they never ceased to be capital burgesses, there would be a mayor, aldermen, and twelve capital burgesses, whereas by the charter there can be no more than ten capital burgesses. That would be one of the consequences resulting from a decision, that these parties are capital burgesses. On the other hand, it is a plain, intelligible, and reasonable rule to lay down, that if you accept an office which is incompatible with the office which you previously filled, you thereby vacate that office; and a removal from the office which you accepted does not restore you back again to the office which you previously vacated, but that is still well filled by the person [893]

introduced into it in your stead. For these reasons, I am of opinion that *Rogers* and *Hawthorn* were good capital burgesses, (though it is not necessary to decide that question,) but that neither *Turnock* or *Knight* was a capital burgess at the time of the election in 1825, and, therefore, the requisite number of capital burgesses was not present at the time of that election, and consequently the rule for entering a verdict for the crown must be made absolute.

HOLROYD, J. I am of the same opinion. It does not appear to me that the least doubt can be entertained upon this question. I think that when *Turnock* and *Knight* accepted the office of aldermen to which they were elected, (whether legally elected or not), and when they took upon themselves to perform the duties of the office to which they were admitted, they virtually ceased from that moment any longer to fill the office of capital burgesses. The charter directs that there shall be a certain number of aldermen and a certain number of capital burgesses. It is admitted that if any of the capital burgesses are removed so as to become good aldermen, they cease to be capital burgesses from the time when they accept the office of aldermen. It appears to me, too, that if any of the capital burgesses take upon themselves the office of aldermen, so as to be aldermen *de facto*, they cease to be capital burgesses from the moment when they take upon themselves the office of aldermen. If the acceptance of the office of aldermen did not operate as a vacating of the inferior office, there might, under the circumstances mentioned by my brother

*894] *Bayley*, be more than the full number of capital burgesses required by the charter, or two persons must have filled the same office at the same time, which in law cannot be. That circumstance appears to me to be decisive of the present question. The effect of the stat. 32 G. 3. c. 58. s. 1, is, that the capital burgesses who have performed the duties of that office for the space of six years cannot be removed. And as by the charter the same person can not at the same time fill the office of alderman and that of capital burgesses, it follows that the aldermen *de facto* could not during that period fill the office of capital burgesses, but that from the moment of their acceptance of the office of aldermen they must have ceased to be capital burgesses; and that if the lower office become vacant by a man's accepting a higher, his subsequent removal from the higher office does not reinstate him in the inferior, which another person holds, and which, if he continues to hold for six years, he cannot be ousted from. The rule for entering a verdict for the crown must, therefore, be made absolute.

LITTENALE, J. I am entirely of the same opinion. In this case, in order to make a valid election, it was necessary that there should be present six capital burgesses. In point of fact there were only four persons who at that time were in possession of and discharged the duties of that office. But it is insisted, as there were present two other persons who were then discharging the duties of aldermen, but who afterwards appeared by a judgment in *quo warranto* to have had no right to act as aldermen, that these two persons are, therefore, remitted to their original character of capital burgesses, and that although they *895] appeared at the election in the character of aldermen, yet that the law would refer their votes to the legal right which they had, and would, therefore, consider them as given in their character of capital burgesses. The question is, whether at the time of the election they were in point of law capital burgesses. The general rule is, that if a man accepts an office incompatible with another, it operates as an abandonment or deprivation of the first office. In the *King v. Trelawney*, 3 Burr. 1616, Lord Mansfield intimates an opinion (though the point is not there decided) that if the two offices of steward and burgess are incompatible, the acceptance of the latter would imply a surrender of the former. I entirely concur in that opinion. It seems to me to be founded upon reason and principle, and great confusion would be produced if it were not so. It is conceded, that if the office accepted be one to which the party has a good title, such acceptance will operate as a surrender or deprivation of

the first office; but it is said that the acceptance will not have that effect, unless the office accepted be one to which the party elected can make a title. It seems to me, that if the acceptance of an incompatible office to which the party elected has a good title, operates as a surrender or deprivation of a former office, that the acceptance of such an office to which he has no title will have the same legal effect upon the well known principle, that a party shall never be permitted to take advantage of his own wrong. It is the duty of the party elected, to ascertain before he accepts an office whether he is legally entitled to it, and if he accept it without having title, the very acceptance of it is a wrongful act, and the law considers him a wrong *doer, because he usurps an [896] office to which he has no title; I think he cannot be permitted afterwards to say that he is legally in possession of his former office, because his acceptance of the new office was wrongful. The case of *Roe on the demise of Lord Berkley v. The Archbishop of York*, 6 East. 86, was a question of private right, the question there was merely in what nature or character a person had title to land. But this is a question respecting the exercise of a public right, it is not a mere question respecting a man's own title. A person has a title to the office of alderman or capital burgess of a borough not for his own benefit, but for the benefit of the borough. Besides, here the parties actually abandon the former office, and accept another, the duties of which they cannot exercise consistently with those of the office which they before held; and they actually concur in nominating their successors to the office which they have given up. It seems to me that if there had been an issue to try whether *Turnock and Knight* had resigned their office of capital burgesses, there was ample evidence to prove that they had resigned it. It is clear that an officer constituted by election may resign by parol, *The King v. The Mayor of Rippon*, Salk. 438. In that case a declaration in the corporate assembly was held to amount to a good resignation, the corporation having accepted it, and chosen another in the place of the person who resigned. Then if a parol resignation be sufficient, it clearly is not necessary for a party to say I resign my office, any more than it is necessary in delivering a deed to say "I deliver;" but the fact of giving up the office, and taking another, is quite "sufficient." In support of such [897] an issue the first piece of evidence would be that *Turnock and Knight* had been elected into a new office; but that would not be of itself sufficient, for they might not think proper to accept it. The next piece of evidence would be that they were sworn in,—that is an act of their own; then that they actually discharged the duties of the office; and further, that they voted for the persons who were to succeed them respectively in the office of capital burgesses; and that the latter discharged the duties of the office of capital burgesses. It seems to me, upon the whole, that the acceptance of the office of aldermen, although it turned out that the parties who accepted it had no title to it, operated as a surrender of the former office, and, therefore, that at the moment when they accepted the office of aldermen they ceased to be capital burgesses, and that consequently their votes could not be received as capital burgesses on the election of the defendant. The rule for entering a verdict for the crown must therefore be made absolute.

Rule absciuite.

CHANNON v. PATCH.

A lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber ; Held, that as tenant for life or years would have been entitled to them, if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them.

This was an action of trespass tried before *Littledale*, J., at the Summer assizes for the county of *Devon*, 1825. The jury found a verdict for the plaintiff, *with nominal damages, subject to the opinion of this court on the following case :

The declaration charged the taking and carrying away divers pollard oak trees and other trees, and divers loads of timber. Plea, first, the general issue ; secondly, that the defendant was lessee for years (determinable on lives) of certain lands, being part of a tenement called *Buckwaters*, under a lease of the 1st of *January*, 1785, from *J. Buller* ; that there was an exception of all timber trees or young saplings likely to become trees, with free liberty of ingress for the lessor to fell, root up, and carry away the same. The plea then, after stating the defendant's possession, as well as continuance of the term, concluded in the following words : "And because the said pollard oak trees and other trees in the said declaration mentioned, at the said time when, &c. were found and being in and upon the said demised premises, and whereon the same had theretofore respectively stood growing, and being in a dry, rotten, hollow state, and only fit for fuel, and the same not being at the time of making the said first-mentioned indenture, to wit, on the 1st of *January*, 1785, nor at any time thereafter, or during the continuance of the said term, or at the said time when, &c. any manner of timber trees or young saplings likely to become trees, standing, growing, and being in and upon the said demised premises, he the defendant at the said time when, &c. seized, took, and carried away the said pollard oak trees and other trees in the declaration mentioned as and for firebote, the same then and there being reasonable estovers for the use, profit, and enjoyment by the defendant of the said demised premises, with the appurtenances, as he lawfully might, &c." The plaintiff joined issue on the first plea, and replied **de injuria* generally to the second, on which issue was joined. It appeared in evidence that *S. W. Buller*, Esq. was now by descent seised of the reversion of the demised premises, and that early in 1824 he had caused all the timber and pollard trees, sound and *unsound*, on the estate to be marked ; and that in *May*, 1824, he had caused, among others, two pollard oak trees (the trees in question) to be felled, which grew on the hedge of a field parcel of the demised premises. The bark was ripped on the day on which they were felled, piled up to dry on the ground where the trees were cut, and, after remaining there a week, carried home to *Mr. Buller's*. The trees remained where they were felled till early in the month of *November*, following. About the latter end of *October*, they were bought of *Mr. Buller*, with another tree felled in an adjoining field, for 14*s. 6d.*, and paid for by the plaintiff ; and afterwards, in *November*, they were removed by the defendant, subsequently to a notice forbidding him so to do, off the demised premises, and carried to an orchard, parcel of another tenement called *Pithayes*, which was then occupied by the defendant under a lease of the same date with that of *Buckwaters*, granted by the same lessor, and to which also *Mr. Buller* was in like manner entitled in reversion. There was no house on *Buckwaters'* farm, but there was one on *Pithayes* used for all the purposes wanted in respect of the occupation of *Buckwaters*, and in which the defendant resided. The demised premises were forty-six acres in the whole, partly arable and partly pasture. After the felling of the two pollard trees in *May*, there were in the

whole upon the demised premises 142 oak pollards and seventeen ash pollards, including sound and rotten. The two pollard trees for which the action was brought were found by the jury to have been pollards, and decayed, and only fit for fire-wood at the time when, &c., and also at the date of the lease, and to have been unfit for any of the ordinary building uses. Supposing there had been a farm-house on the premises corresponding with the extent of *Buckwaters'* farm, the stock of wood upon it properly applicable to fire-bote was about sufficient for two years' consumption.

Coleridge, for the plaintiff. The plaintiff as the vendee of the reversioner was entitled to these trees, for as they were marked, felled, barked, and sold by the reversioner, the property must have been in him unless the defendant had such an absolute and exclusive right to all the trees on the estate fit for fire-bote, as not only made the acts done by the landlord wrongful and actionable, but void, so that they vested no possession in him. But a tenant for years at common law has not any exclusive right to all the wood fit for fire-wood, his right is limited to wood to be consumed on the premises, and he can only take such as is sufficient for that purpose, 2 Bl. Com. 35; Co. Litt. 53 b. If that were not so, there would be nothing to prevent a tenant from selling fire-wood, yet that is clearly illegal, *Lord Courtown v. Ward*, 1 Sch. & Lef. 8. The analogy between a tenant's right to estovers and common of estovers is very close. Now a party having common of estovers in the woods of another who cuts down the wood, cannot take part of that which is cut down, but is driven to his action, *Basset v. Maynard*, Cro. Eliz. 820; Fitzh. N. B. 58, 159, *Mary's* case, 9 Rep. 112 b., *Douglas v. Kendal*, Cro. Jac. 256, and if the common of estovers appertain to a house, it must be spent in the house, and not abroad, *Valentine v. Penny*, Noy, 145. If the landlord, therefore, has the general right, or has only a right concurrent with the tenant, two consequences follow: he may cut so long as he leaves sufficient for the tenant subject to the tenant's right of action for the entry, if it be unlawful. Secondly, even if he cuts to excess, and does not leave enough for the tenant, the property in the trees vests in him or his vendee, and the tenant's remedy is by action. It is not stated in the pleadings that there were not sufficient pollards left for all the purposes of the lessee, and it lay upon the defendant to show that. Nor is it found that a sufficiency was not left, but merely that if there had been a farm house there was about two years' consumption. Supposing an insufficient quantity were left, still the defendant had no right to take the trees when cut, but should have brought an action on the case against the landlord. The latter had at least some right to the pollards on his estate. Although they were decayed and rotten, they still formed part of the inheritance, and did not pass wholly and exclusively to the tenant. The general principle is, that all trees, whether timber or not, are parcel of the inheritance. If demised with the land, the lessee acquires certain rights in them, viz. to the fruits and the shade in one, and in addition to that such rights as the grant of estovers gives in the other. The landlord can cut down neither, still the tree when down is his.

**Jeremy*, contra, referred to the third resolution in *Hervakenden's* case, Coke, 62. There it was resolved, that if trees, being timber, were blown down by the wind, the lessor shall have them, (for they are parcel of his inheritance,) and not the tenant for life or tenant for years; but if they be rotards, without any timber in them, the tenant for life or tenant for years shall have them. He was then stopped by the court.

BAYLEY, J. That is an authority to show that this action is not maintainable. For if the lessor would have had no right to these trees if they had been severed from the inheritance by the act of God, he can have no right to them when they have been so severed by his own wrongful act. The lessor by his lease parted with his right to every part of the inheritance for the whole term, and he cannot by his own wrongful act hasten the expiration of the term as to one part of the property demised. Here the vendee claims under the lessor,

and can have no better title to maintain this action than he had. The judgment of the court must be for the defendant.

HOLROYD, J. If these trees had been blown down, they would have belonged to the tenant; *Countess of Cumberland's case*, Moore, 812. The landlord (under whom the plaintiff claims as vendee) cannot by wrongfully cutting down the trees acquire a right to them so as to entitle him to maintain trespass against the tenant for taking them away. That would be allowing him to take advantage of his own wrong, for the lessee, during the term being entitled to the usufruct of the trees, might ^{*903]} have maintained an action on the case against the landlord for wrongfully cutting them down.

Judgment for the defendant.[†]

[†] See *Sadgrouse v. Kirby*, 6 L. 2, 483, and 1 Bos. & Pull. 13.

LE HUNTE v. HOBSON.

Testator, by will duly executed, devised as follows: "On the attainment of the age of twenty-one years of the eldest son of G. H., I give my real estate in P. to the said son for life, remainder to his first and every other son in strict settlement, and so on to every son of the said G. H., remainder over." The eldest son attained the age of twenty-one, suffered a recovery to the use of himself in fee, and died, leaving a son, who died an infant and unmarried, and three daughters. The second son of G. H. attained the age of twenty-one, and left a son still living: Held, that this son of the second son of G. H. took an estate tail under the will.

On the hearing of this cause before Lord Gifford, the Master of the Rolls, on the 28th of April, 1825, his Lordship directed the following case to be stated for the opinion of this court:

James Le Hunte, formerly of Artrament in Ireland, being, at the time of making his will hereinaster mentioned, and from thence until the time of his death, seised in fee simple of divers messuages, farms, and lands situate in the county of Pembroke, and being of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 20th of December, 1779, which was duly executed and attested as by law is required for passing real estates, and he thereby gave and devised as follows, that is to say: "I give and devise my real estate in Pembrokeshire to Daniel Stanford, Esq. and the Rev. Dr. Harvey, and their heirs, until some son of Major George Le Hunte shall attain his age of twenty-one years, on special trust, nevertheless that they and their heirs, or the heir of the survivor of them, shall, during that period, out of the issues and profits thereof pay a debt charged to be due by my late uncle Richard Le Hunte to one Hornflower, a mercer of Kidderminster, or his representatives, of 75*l.*, with interest; ^{*904]} and in the same manner, any other debts of my said uncle Richard that may appear to be really due and unsatisfied; but during the time they are levying the same, I desire that they should allow 50*l.* per annum for the education of the eldest son of the said Major George Le Hunte for the time being, from the time such sums shall be levied till such son of Major G. Le Hunte shall arrive at the age of nineteen years, and 150*l.* per annum after, and such allowance to be English money, and the residue to be erected into a sum towards discharging the 500*l.* due to the representatives of my late aunt Warburton. And on the attainment of the age of twenty-one years of the said eldest son of Major G. Le Hunte, I give the same real estate to the said son for life, remainder to his first and every other son in strict settlement, and so on to

every son of the said Major *G. Le Hunte*, remainder to the right heirs of my late uncle." The testator died soon after the date of his will, without having altered or revoked the same, leaving *Richard Le Hunte*, the eldest son of Major *G. Le Hunte*, and *William Augustus Le Hunte*, the second son of Major *G. Le Hunte*, and two other sons of Major *G. Le Hunte*, him the said testator surviving. The said last named *Richard Le Hunte*, the son of Major *G. Le Hunte*, attained his age of twenty-one years in the year 1790, and thereupon entered into the possession or receipt of the rents and profits of the said *Pembroke*shire estates, and he continued in such possession or receipt during the remainder of his life; and in 1801 he suffered a recovery of the said estates, and by the deed, making the tenant to the *præcipe* for that recovery, it was declared that the same should enure to the use of himself in fee. *Richard Le Hunte*, the son of Major *G. Le Hunte*, died on the 21st of March, [905] 1813, leaving *Richard Le Hunte*, his only son, and the defendants *Maria Hobson*, *Sophia Le Hunte*, and *Louisa Le Hunte*, all infants, his only daughters, and no other issue, him surviving. The last named *Richard Le Hunte* died in September, 1821, an infant, without ever having been married, leaving the defendants *Maria Hobson*, *Sophia Le Hunte*, and *Louisa Le Hunte*, his only sisters and coheiresses at law him surviving. The said *W. A. Le Hunte*, the second son of Major *G. Le Hunte*, attained his age of twenty-one years about the year 1791, and he died on the 9th of February, 1820, leaving the complainant, his eldest son and heir at law, him surviving.

Rolle for the plaintiff. Under the will of *James Le Hunte*, the plaintiff is entitled to an estate tail in the lands in question. The testator, after several preliminary devises, gives the estate to the eldest son of Major *George Le Hunte* for life, remainder to his first and other sons in strict settlement. *Richard*, the eldest son, took under that devise an estate for life only, and the recovery suffered by him was unavailing. It will be said that the remainder to his first and other sons had the effect of giving *Richard* an estate tail, in order to carry into effect the general intent of the testator. But in this case there is no difficulty as to that, and the words, giving the estate to his sons as purchasers, must be construed as words of purchase and not of limitation, unless the latter construction be necessary in order to give effect to the general intent of the testator, *Allanson v. Clitherow*, 1 Ves. sen. 24. There is no ambiguity in the meaning of the "words, "in strict settlement," by which the estate given to the sons of *Richard* is described, they mean that the father should take an [906] estate for life, and the first and other sons an estate tail *successive*, *Roberts v. Kingsby*, 1 Ves. sen. 238. But if they were ambiguous, those words should be rejected, and then the sons would take an estate for life. It may, however, be argued, that although *Richard Le Hunte* took for life, and his sons for life, still, in the limitation over to the second son of Major *Le Hunte*, there are no words of limitation to the children, but it cannot be imagined that the testator did not intend to limit the estate to them in the same manner as to the children of *Richard* the eldest son. The words of the will very fairly admit of such a construction, for after the devise to the eldest son and to his sons, the testator says, *and so on* to every son of Major *Le Hunte*. The words *so on* apply as well to the devise to the grandchildren of Major *Le Hunte*, as to the devise to his younger sons. Besides, the former part of the will shows that the devise is to the eldest son *for the time being* on his attaining the age of twenty-one, now had *Richard* died under twenty-one, the second son would have been the first taking under the devise by the description of the eldest son of Major *Le Hunte* for the time being, and then there would have been an express limitation to his children; such a construction must, therefore, be put upon the will, as will give the estate to the children of the second son, although his elder brother lived to attain the age of twenty-one, for it cannot be supposed that the testator intended that such a circumstance should make any difference to the children.

**Tindal*, contra. *Richard*, the eldest son of Major *Le Hunte*, took an estate tail, and the recovery suffered by him was good; the estate, therefore, is now the property of his three daughters in fee. The words of the devise are, "On the attainment of the age of twenty-one years of the eldest son of Major *G. Le Hunte*, I give the same real estate to the said son for life, remainder to his first and every other son in strict settlement, &c." Now, it is clear that the word *son* may mean *issue*, if that construction is necessary to effectuate the general intention of the testator, *Sonday's* case, 9 Co. 127; *Wilde's* case, 8 Co. 17; *Wharton v. Gresham*, 2 W. Bl. 1083; *Chorlton v. Craven*,^t *Robinson v. Robinson*, 1 Burr. 38. The question then is, whether the testator appears to have had any general object in view which cannot be carried into effect without putting such a construction upon the words of his will. It is clear that the family of Major *George Le Hunte* was the object of the testator's bounty, and that he did not intend the estate to go over until the whole of that family should be extinct. The devise extends not only to the children who were living at the time when the will was made, but to those who might be born afterwards. Now it is a principle of law, that an estate cannot be limited to an unborn son for life, and afterwards to his son; and, therefore, as it is necessary to hold in order to carry the testator's general intention into effect, that every son of Major *Le Hunte* was capable of taking the estate, and as it must be presumed that he intended all the sons to take in the same manner, they must all take, if at all, an estate tail, otherwise the children of the sons of Major *Le Hunte*, born after the making of the will, would not succeed to the estate. The argument for the plaintiff is, that the words *so on* have the effect of limiting the estate to the second son and his sons, in like manner as to the first son and his sons; if so, they must have the same operation in limiting the estate to each son of Major *Le Hunte*, whether born before or after the making of the will; and, therefore, if the argument for the plaintiff prevails, those words will have the effect of giving a life estate to the sons of Major *Le Hunte* born after the making of the will.

Roffe in reply. It is not necessary to dispute that the word *son* may mean *issue* when that construction is necessary in order to give effect to the intention of a testator; it is sufficient to say that no such necessity exists in the present case. It was plainly the intention that each son of Major *Le Hunte* who became entitled to the estate under the will should take for life, and the grandsons in strict settlement. There is no difficulty in carrying that into effect as to all the sons born before the making of the will. Such a devise as to the after-born sons is certainly inconsistent with the rules of law; as to them therefore it cannot be carried into effect, and either the devise to such after-born sons must be held void, or they must take an estate tail.

Cur. adv. vult.

The following certificate was afterwards sent:

We have heard this case argued by counsel, and have considered it, and are
*909] of opinion that the complainant is entitled to an estate tail in the land
in *Pembroke*shire by virtue of the said will.

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD.

^t Cited by *Pratten*, arg. in *Mellish v. Mellish*, 2 B. & C. 524.

JAMES SAUNDERSON, ANN his Wife, and LYDIA WHITE, Spinster,
v. GRIFFITHS.

In an action by *A.*, his wife, and *B.*, the declaration stated, that the plaintiffs had agreed to let to the defendant certain lands; that the defendant became tenant to the plaintiffs, and in consideration that the plaintiffs had promised the defendant to perform all things in the agreement by them to be performed, the defendant promised, &c. The agreement given in evidence purported to be made by an agent for the wife of *A.* and *B.* only, but *A.* had subsequently received rent from the tenant: Held, that the consideration was not proved as alleged, inasmuch as *A.* was not bound by the agreement before the receipt of rent, and therefore was not a joint contractor *ab initio*. Another count stated, that the defendant was tenant to the plaintiffs, and in consideration had promised to use the lands in a husbandlike manner. The proof was, that he had agreed to farm the land in a husbandlike manner, to be kept constantly in grass: Held, that this also was a variance.

DECLARATION stated that by an agreement made between the plaintiffs and the defendant, the plaintiffs agree to let to the defendant certain premises therein described. The agreement was then set out. Averment that the defendant became and was tenant to the said plaintiffs of the premises upon the terms mentioned in the agreement, and was put into possession; and in consideration of the premises, and that the plaintiffs had then and there undertaken, and promised the defendant to do and perform all things in the said agreement by them to be done and performed, he the defendant undertook and faithfully promised the said plaintiffs that he, during the continuance of his tenancy, would perform the terms and conditions thereinbefore particularly mentioned. Several breaches were assigned for not repairing during the term, underletting without license, and for not using the farm in a husbandlike manner. Another count stated that in consideration that the "defendant had become and was tenant to the [910] said plaintiffs of a certain other farm-lands and premises, being the free-hold of the said *Anne* and *Lydia*, he the defendant undertook and promised to use the lands in a husbandlike manner. At the trial at the Spring assizes, 1826, before the justices of the Court of Great Sessions for the county of *Glamorgan*, the plaintiffs proved an agreement for a lease made on the 1st of February, 1822, between *A. Murray*, agent, on behalf of Miss *White* of Park Street, London, and Mrs. *Saunderson* of Brighton, of the one part, and the defendant of the other part, whereby the said *A. Murray*, on behalf of Miss *White* and Mrs. *Saunderson*, agreed to let unto the defendant all that part of the grass lands south of *Miskin House*, formerly occupied by *Lewis Williams*, containing about fifty-seven acres, and the defendant agreed to a term for one year from that date, to continue in force from year to year, and to farm the land in a good and husbandlike manner, to be kept constantly in grass, and to bestow all the muck and manure made upon the lands yearly; the defendant also agreed to take the grass occupied by *Thomas Williams* of *Miskin House*, from the 2d of August next, at the yearly rent of 5*l.* for the land south of *Miskin Road*, and 3*l.* for the lands occupied by *Thomas Williams* of *Miskin House*, the term to commence the 2d of February, 1822, for the first parcel, and the 2d of August for the second parcel. There were stipulations by the tenant not to let or underlet without the landlord's license, to keep in repair all gates, &c. There was a stipulation by the landlord to put the fences and premises into repair as soon as convenient, to allow rough timber for the defendant's repair to be marked and pointed out by the steward, and the parties were to enter into and execute a lease of the above premises; and [911] this agreement was signed by *A. Murray* and the defendant. *Murray* proved that he demanded the rent from the defendant for Mr. and Mrs. *Saunderson* and Miss *White*; that he had received the same for Mr. and Mrs. *Saunderson* and Miss *White*, and that he had paid over one moiety to Mrs. *Saunderson*, by the direction of her husband, and the other moiety to Miss *White*. It was objected that there was a variance between the agreement

declared on in the first count and that given in evidence, the agreement declared on being described to have been made by the three plaintiffs, and that given in evidence only purporting to have been made on behalf of two ; and that the same objection applied to the other count, for the consideration there stated for the promise was that the defendant had become tenant to the three plaintiffs, whereas he was tenant only to two. The learned Judges were of opinion that the objections were fatal, and the plaintiffs were nonsuited. A rule to set aside the nonsuit was obtained in last *Easter* term, against which

Malkin and *Whitcombe* now showed cause. The agreement set out in the first count of the declaration is stated to be an agreement made by the three plaintiffs. The agreement proved only purported to be the agreement of two. It was necessary to prove that the agreement was the agreement of the three *ab initio*, because the promise to perform the stipulations therein contained on the part of the plaintiffs is alleged as the consideration for the promise of the defendant ; and if there was any period during which any one of the plaintiffs [912] was not bound to perform the stipulations, the consideration is "not proved. Assuming that the receipt of rent by *Murray* on account of Mr. *Saunderson* may amount to a ratification of his authority to make the agreement, still until such rent was received, there was no promise by the plaintiff, Mr. *Saunderson*, to perform the stipulations in the agreement. Before such receipt of rent the tenant could not have maintained an action against Mr. *Saunderson* for breach of the agreement. Then, as to the other count, it alleges that the defendant was tenant to the plaintiffs. The proof is, that he was only tenant to two. Besides, that count is founded upon a contract by the tenant to use the lands in a husbandlike manner. It was proved that he undertook to use them in a husbandlike manner, *keeping the same in grass*. The latter part of the stipulation qualifies the former, and it ought to have been so stated in the declaration. *Latham v. Rutley*, 2 B. & C. 20, is an authority in point. Upon this point *Clark v. Gray*, 6 East, 364 ; *Thornton v. Jones*, 2 Marsh. 287 ; *Tompany v. Burnend*, 4 Campb. 20, were also cited.

Mauls, contra. The receipt of rent by *Saunderson* was a ratification of the authority of *Murray* to make the agreement on his behalf ; and then the maxim, *omnis ratihabitio retro trahitur et mandato equiparatur* applies to the present case. As soon, therefore, as he received the rent he became bound by the contract *ab initio* ; and if that be so, then the consideration stated in the first count is proved. The receipt of rent was, at all events, an acknowledgment that the defendant was tenant. As to the objection to the other count, the [913] keeping in "grass is not a qualification of the agreement to use the farm in a husbandlike manner ; for the keeping of the land in grass would be according to good husbandry.

BAYLEY, J. I am of opinion that the nonsuit in this case was right. Looking at the form of the first count of the declaration, and the nature of the consideration there stated for the promise made by the defendant, I am of opinion, that in order to support that count, there ought to have been proof of an agreement to which the husband was a party *ab initio*, and that proof of a subsequent ratification by him of an agreement to which he was originally no party, was not sufficient. There was a contract of demise in writing, and therefore no parol evidence to explain or vary that contract was admissible. The agreement imports to have been made by *Murray*, as the agent of Mrs. *Saunderson* and Miss *White*. Mr. *Saunderson* was a stranger to that agreement, unless his subsequent ratification of it made him a party to it. We have been pressed with the maxim, *omnis ratihabitio retrotrahitur et mandato equiparatur* ; but I think, that when the nature of the contract stated in the first count of the declaration is considered, it is apparent that the subsequent ratification was not equivalent to a previous authority. The contract, at the time when it was made, was intended to give to the landlord and the tenant a right of action against each other for the breach of any of the stipulations entered into by

them respectively. Now suppose, within six months after the tenancy had commenced, and before any rent had been paid, the tenant had brought an action upon the agreement against Mr. and Mrs. *Saunderson* and Miss *White* for not repairing, he must have been nonsuited, because he would "not have been" [914 able to show that Mr. *Saunderson* ever became a party to the agreement. There was, therefore, a period subsequent to the execution of the agreement, during which *Saunderson* was not bound by it. It cannot be predicated of him, that during that period he had promised to perform any of the stipulations of that agreement. The first count of the declaration, after setting out the agreement, states that the defendant in consideration of the premises, and in consideration that the plaintiffs had undertaken to perform all things in the agreement by them to be done and performed, undertook and faithfully promised. Now the plaintiffs were bound to prove the whole consideration. Here part of the consideration was, that the *three* plaintiffs had undertaken to do certain things from the time when the agreement was executed. The proof was, that one of the plaintiffs had not undertaken, in the first instance, to do those things. There having been no evidence to show that there was any such previous promise from the husband, I think that part of the consideration was not made out, and upon that ground I think that the nonsuit on the first count was right. I am also of opinion that the other count is not made out in proof. That count states a contract by the defendant to use the farm in a husbandlike manner. The contract proved was, to farm that part of the land, consisting of fifty-seven acres, formerly occupied by *L. Williams*, in a husbandlike manner, to be kept constantly in grass. Now the first objection is, that this stipulation applied to a part only, and not to all the lands demised. Another objection is, that the contract proved was, to farm the land in a husbandlike manner, to be kept constantly in grass. Now, although in most cases the keeping of the land in grass would be "farming it in a husbandlike manner, still there may [915 be some cases in which it would not be so. It was therefore a qualification of the previous stipulation, and ought to have been stated in the declaration as part of the description of the contract. Upon the whole, I think that the plaintiffs were not entitled to recover upon any of the counts in this declaration, and that the rule for setting aside the nonsuit must therefore be discharged.

HOLROYD, J. I think that the agreement set out in the first count of the declaration, and there stated to be the consideration for the promise made by the defendant, was not proved, because the agreement proved was not a joint agreement by the husband and wife to demise the land. It was either the agreement of the agent or of the persons for whom he professed to be the agent. Taking it to be the agreement of the other persons from whom he assumed to derive his authority, it was then only the agreement of two persons, and was not, in point of law, the agreement of the husband. It was said, however, that he at a subsequent time assented to that agreement, and that such subsequent assent made it his agreement *ab initio*. There might have been some weight in that argument, if the agent at the time when he made the agreement had professed to have authority to act for the husband, because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here the husband never previously authorized the agent to make the agreement on his behalf, nor is he named as a party for whom the latter professed to act. The subsequent receipt of rent, by the husband, cannot make him a joint contractor *ab initio* [916 with the persons for whom the agent had authority to act. It could amount only to an acknowledgment that the defendant was his tenant, and it might have the effect of binding the husband so far as to prevent him from turning the tenant out of possession. The fourth section of the statute of frauds enacts, "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon

which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Now I think that there was no note in writing in this case to show that this was the contract of the husband, and supposing this to amount to an agreement to demise in future, it would still be an agreement concerning land, and would, as it seems to me, fall within the fourth section of the statute of frauds; but whether that be so or not, I think there was in this case no proof of a joint contract by the husband and wife, and that the mere acceptance of rent by the husband would not make that his contract, which on the face of it did not import to have been made in his behalf. I also think that the other count was not supported by proof, because there was not any unqualified stipulation to use the land in a husbandlike manner, but so to use it keeping it in grass. The rule for setting aside the nonsuit must therefore be discharged.

Rule discharged.

*Earl of SEFTON et. al. v. COURT.

The lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor.

THIS was a feigned issue tried under the provisions of an act of parliament passed in 1822, for inclosing a certain common or tract of waste land, called *Burlish Common*, in the manor and chapelry of *Lower Mitton*, in the parish of *Kidderminster*, in the county of *Worcester*. The plaintiffs by their declaration alleged, that they were entitled to rights of common in the waste lands of the manor of *Mitton*, for sheep in respect of their freehold lands, in the parish and manor of *Kidderminster*, viz. 115 acres of land in the occupation of *W. Jones*, called *Burlish Farm*, otherwise *Birchin Coppice Farm*, and 144 acres of land in the occupation of *W. Hornblower*, called *Blackstone Farm*. This was denied by the plea. At the trial before *Garrow*, D., at the Spring assizes for the county of *Worcester*, 1826, the following appeared to be the facts of the case. Prior to 1817, Lord *Foley* was seised in fee of the two farms mentioned in the declaration, and by indentures of lease and release, he, in May 1817, conveyed the whole of his estates to the plaintiffs in trust to pay certain incumbrances. The defendant was the commissioner named under the inclosure act. *Blackstone Farm* consisted of 144 acres; 40 acres of these, before the year 1774, were common or waste land, and part of *Kidderminster Common*, and 104 acres were old inclosures. *Burlish* or *Birchin Coppice Farm* consisted of 115 acres; of these, 62 acres, before 1795, were wood land, and were called *Burlish Wood* or *Birchin Coppice*; and 53 acres, before the year 1774, were common or waste land, constituting also part of

*918] *Kidderminster Common*. In that year an act was passed for dividing and inclosing the waste lands in the manor of the foreign of *Kidderminster*, and among others *Kidderminster Common*. The act recited that *Thomas Foley*, the ancestor of Lord *Foley*, was lord of *Kidderminster* manor, and that he was seised in fee (*inter alia*) of, and in a coppice or parcel of wood-land called *Burlish*, subject to rights of common therein, and enacted, that the commissioners should allot to the lord of the manor, one-sixteenth part of the commons and waste lands intended to be inclosed, as a satisfaction and compensation for his right to the soil, of, and in the said waste lands; and further, that out of the said sixteenth they should allot a portion of it to the several persons entitled

to right of common upon *Burlish Coppice*. The commissioners by their award allotted to Mr. *Foley*, as lord of the manor of the foreign of *Kidderminster*, amongst other land, the two parcels of land consisting of 40 acres, and 53 acres, now constituting parts of *Blackstone* and *Burlish Wood Farms*. It was proved, that the tenant of *Blackstone Farm*, who at times had 300 sheep, had for a period of forty-eight years turned his sheep on *Burlish Common*, and that the tenant of *Burlish Farm*, who had generally about 80 sheep, had turned on for a period of twenty-two years. The act for inclosing *Burlish Common*, which was situate in the manor of *Lower Mitton*, passed in the year 1822. From the year 1802 to 1813, the successive lords of that manor were only tenants for life, and from 1813 to 1820 the lord was a minor. It was contended on the part of the defendant, that the lord of the manor of the foreign of *Kidderminster* could not, before the year 1774, have been entitled, in respect of his waste or common lands in that manor, to a right of common for his own cattle upon waste and common lands in the manor of *Mitton*, and that [•919] no such right could have been acquired subsequently to that period, inasmuch as the lords of that manor were incapable of making a grant. It was contended further, that even if such a right could exist in point of law, the evidence was not sufficient to show that it existed in fact, because the exercise of the right might be referred to those lands, which, before 1774, were inclosed. The learned Judge directed the jury to find a general verdict for the plaintiff, but reserved liberty to the defendants to move to confine the verdict to such part of the land as consisted of the old inclosures prior to the year 1774, and to enter a verdict for the defendant as to all the rest of the *Blackstone Farm*, and also, as to the whole of the *Burlish Farm*, otherwise *Birchin Coppice Farm*. A rule *nisi* having been obtained for that purpose,

Campbell and *O. W. Russell* now showed cause. The jury having found that a right of common belonged to the plaintiffs in respect of the lands which were inclosed since the year 1774, as well as those inclosed before that time, the first question is, whether such a right could by law exist in respect of lands which, before 1774, were waste lands, subject to rights of common. As to that question, if there can be a legal origin of the exercise of such a right, it ought to be presumed, for it ought not to be taken for granted, that for nearly fifty years the tenants of these farms have been guilty of a series of trespasses. Before 1774, Mr. *Foley* was seised in fee of the old inclosed part of *Blackstone Farm*, and he was also seised in fee of the soil in the uninclosed waste as lord of the manor, and when he turned his own cattle on the waste of his own manor, he did it in the exercise, not of a right of common, but of a [•920] right of soil; for a right of common exists where two or more persons, by virtue of grant, prescription, or custom, take in common with each other from the soil of a third person, a part of the natural profits thence produced. But the lord of a manor, when he turns his cattle on his own waste to feed, takes the profit of his own land. It may have happened, that before he granted to the tenants of his manor a right of common as to his waste, he may have had from the lord of the manor of *Mitton*, a grant of a right of common for his own cattle on the waste of that manor, and if he had, that right would not be extinguished by his subsequently granting to his own tenants, a right of common on the waste of the manor of *Kidderminster*. There may be a right of common in respect of uninclosed lands, as common of shank; Sir *Miles Corbel's* case, 7 Co. 65; *Cheeseman v. Hardham*, 1 B. & A. 706. Then there was evidence for the consideration of the jury, that the right existed in respect of the allotments as well as of the other land, for it was proved that the tenant of *Blackstone Farm*, had one general stock, consisting of 300 sheep, and that he turned the whole on *Burlish Common*, and that the tenant of *Burlish Farm* turned on eighty.

Jervis contra, was stopped by the Court.

BAYLEY, J. The jury have found that the plaintiffs are entitled to a right

of common for sheep on *Burlish Common*, in respect of *all* their freehold lands mentioned in the declaration, including those which before 1774 were waste lands and subject to rights of common. *The objection is, [921] that the plaintiffs are not entitled to a right of common in respect of those lands which were formerly part of *Kidderminster Common*, and were allotted to Lord *Foley's* ancestor under the inclosure act. It is said, first, that in point of law no such right could exist in respect of uninclosed waste lands, on which there were rights of common; and, secondly, that in point of fact no such right did exist. I think, that in point of law, the lord of a manor may, in respect of his right of soil in the waste commonable lands of his manor, have a right to turn his own cattle on the waste or common lands of another manor. The lord is seized in fee of the waste; and although he may before the time of legal memory have granted to others a right of common on that waste, yet he may also, before he made any such grant, have had granted to him the privilege of turning his own cattle on the waste of an adjoining manor. I think, therefore, that in point of law, the lord of this manor may have had a right of common in respect of those lands, which before the year 1774 were subject to right of common. But I have great difficulty in saying, that there was any evidence to show that in fact such a right existed. If the lord, besides the newly inclosed lands, had no other lands in respect of which he claimed to have a right of turning his sheep upon *Burlish Common*, the fact of his having turned on even since 1774, would have been evidence of his having a right in respect of those newly inclosed lands; but that would be a very different case from the present, for here the lord claims to have a right in respect of other lands, as well as the newly inclosed lands. There was no evidence that any person before the inclosure had ever turned on in respect of the allotments, [922] and in the absence of all evidence, it ought not to have been *presumed that the lord, in respect of his waste or common land, had a right to turn his sheep upon the waste of another manor. The fact of the tenant of *Blackstone Farm* having turned on since 1774, did not show that he so turned on in respect of the allotment; for he had such a right in respect of other land. I think that the learned Judge ought to have directed the attention of the jury to the distinction between the allotment and the other land, and to have told them that there was little or no evidence of the exercise of any right in respect of the latter. Then, as to *Burlish Coppice*, that admits of a different consideration. Before 1795, that was woodland, and it was, therefore, highly improbable that there should have been cattle *levant* and *couchant* upon it. There was no evidence to show that at any former period it had been waste land, and unless it was shown that it was made a coppice within the time of legal memory, the presumption would be that there could not be a right of common in respect of it. I do not say that such a right might not exist, but merely that it is very improbable that it should; and I think that this improbability ought to have been stated in distinct terms to the jury, and that inasmuch as their attention was not called to the distinction between the old and new inclosures, or to the improbability of any right of common existing in respect of *Birchin Coppice*, there ought to be a new trial, unless the plaintiff will consent that the verdict shall be confined to a right of common in respect of the old inclosures.

It was afterwards intimated to the court by the plaintiff's counsel, that the plaintiffs elected to have the rule made absolute in the terms in which it had been prayed; and the court made the

Rule absolute.

*JOHN WYNNE v. GRIFFITH.†

*C. and H. R. seised in fee of certain estates, by lease and release of the 1st and 2d of June, 1750, and a common recovery, settled them to such uses as C. H. R., and D. his wife, and M. R. should, by deed executed in the presence of two witnesses, appoint, and in default of appointment, as to part to the use of C. for life, and subject to C.'s life estate as to that part; and as to the whole of the residue, in default of appointment, to the use of H. R. in fee. By indenture of the 2d of October, 1751, (the execution of which by the parties of the second part was attested by three witnesses) between certain persons therein named of the first part: C., H. R., and D. his wife, and M. R., of the second part, and W. M., J. L., R. W., and P. W., of the third part: C., H. R., and D. his wife, and M. R., did grant, bargain, sell, release, confirm, direct, limit, and appoint unto W. M., J. L., R. W., and P. W., (in their actual possession, being by virtue of a lease for a year to them by the said C., H. R., and D. his wife, and M. R.) the estates before mentioned, *habendum* to them W. M., J. L., R. W., and P. W. in fee, to the several uses thereafter mentioned: Held, that under these deeds the legal 'fee in the premises so settled, did not vest in W. M., J. L., R. W., and P. W.*

The following case was sent by the Master of the Rolls for the opinion of this court.

By indentures of lease and release, bearing date respectively the 1st and 2d of June, 1750, the release being made between *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, spinster, daughter and heir apparent of the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, widow, of the first part; *John Salusbury* and *John Ellis* of the second part; and *Robert Wynne* and *Owen Holland* of the third part; and by a common recovery suffered in pursuance thereof on the 8th of September, 1750, certain lands, the estate and inheritance of the said *Humphrey Roberts*, and certain other lands, the inheritance of the said *Catherine Roberts*, and certain other lands therein described to have been theretofore purchased by the said *Humphrey Roberts*, and all other the messuages, lands, tenements, and hereditaments whatsoever, of them the said *Humphrey Roberts*, *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, or any of them, in the parishes therein mentioned, and elsewhere in the county of *Carnarvon*, with their appurtenances, were limited to the use and behoof of such person and persons and for such estate and estates, and subject to such provisoos, limitations, trusts, conditions, and agreements, as the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts*, and *Catherine Roberts*, at any time or times, by their joint deed or deeds, writing or writings, duly execected in the presence of two or more credible witnesses, should direct, limit, and appoint; and for default of such appointment to the use and behoof of such person or persons for such estate and estates, &c., as the said *Humphrey Roberts* and *Dorothy* his wife, and *Mary Roberts*, in case they should all of them survive the said *Catherine Roberts*, should at any time or times after the decease of the said *Catherine Roberts*, by their joint deed or writing, to be by them executed in the presence of two or more credible witnesses, direct, limit, or appoint; and for default of, and until such appointment respectively as aforesaid, as to certain part of the said hereditaments, to the use of the said *Catherine Roberts* and her assigns for her life, without impeachment of waste; and as to, as well those lands limited to the said *Catherine Roberts* for her life as aforesaid, from and after her decease, as also as to all the rest and residue of the said messuages, lands, hereditaments, and premises thereinbefore mentioned, whereof such common recovery should be had and suffered as aforesaid, and whereof no use was thereinbefore limited and declared, to the use of such person and persons and for such estate and estates, &c., as the said *Humphrey Roberts* by any his deed or writing duly executed in the presence of two or more credible witnesses, or by his last will and testament in writing duly executed in the

presence of three or more credible witnesses, should direct, limit, or appoint ; and in default of and until such direction, limitation, and appointment, to the use of the said *Humphrey Roberts*, his heirs and assigns for ever.

By indentures, bearing date respectively the 1st and 2d of *October*, 1751, the former being a lease for a year, and made between *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, of the one part, and *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*.) and *Pierce Wynne*, of the other part ; and the latter being of three parts, and made between *Robert Wynne* the elder, and *Robert Wynne* the younger, son and heir apparent of the said *Robert Wynne* the elder, of the first part ; *Humphrey Roberts* and *Dorothy* his wife, and *Mary Roberts* and *Catherine Roberts*, of the second part ; and the said *William Mostyn*, *John Lloyd*, *Robert Wynne* (of *Garthwin*.) and *Pierce Wynne*, of the third part ; after settling divers lands belonging to the said *Robert Wynne* the elder and *Robert Wynne* the younger, to the uses therein mentioned, it was witnessed that in consideration of the marriage then intended to be had and solemnized between the said *Robert Wynne* the younger and the said *Mary Roberts*, and of the provision therein-before made for her and her issue, and for the settling of the messuages, tenements, lands, hereditaments, and premises thereafter mentioned, to the uses therein expressed concerning the same, the said *Humphrey Roberts*, and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, did grant, bargain, sell, release, and confirm, direct, limit, and appoint unto the said *William Mostyn*, *John Lloyd*, *Robert Wynne* of *Garthwin*, and *Pierce Wynne*, in their actual possession being by virtue of the said lease for a year made to them by the said *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, as therein mentioned, certain lands therein particularly described, (which included the lands comprised in the said indentures of the 1st and 2d of *June*, 1750, and whereof such recovery was suffered as aforesaid,) with their and every of their appurtenances, and all other lands and hereditaments in the said county of *Carnarvon*, whereof or wherein *Humphrey Roberts* was then seised of any estate of inheritance, in possession, reversion, remainder or use ; and the reversion and reversions, &c. and all the estate, right, title, interest, use, trust, possession, property, claim, and demand whatsoever of them, *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, or any of them, in and to the same ; to have and to hold all and singular the said lands and hereditaments unto the said *W. Mostyn*, *J. Lloyd*, *Robert Wynne* of *Garthwin*, and *Pierce Wynne*, their heirs and assigns for ever, to the several uses, intents, and purposes following ; that is to say, in the meantime and until the said then intended marriage should take effect, to the same uses and estates as the said hereditaments then stood limited to, and after the solemnization of the said intended marriage, as to part of the lands and hereditaments, to the use of *Humphrey Roberts* and *Dorothy* his wife, and their assigns, for their lives, and the life of the longest liver of them without impeachment of waste, during the life of *Humphrey Roberts* only, for and as the jointure of *Dorothy*, and in full satisfaction and bar of her dower or thirds out of any real estate whereof the said *Humphrey Roberts* then was or should at any time thereafter during her coverture be seized ; and as for and concerning other part of the lands and hereditaments therein mentioned and described, to the use of *Humphrey Roberts* and his assigns during his life without impeachment of waste ; and as to certain other parts of the lands, (being the same as were limited to *Catherine Roberts* for life by the deed of 1750,) to the use of *Catherine Roberts* and her assigns for life without impeachment of waste ; and as to the several premises so limited to the said *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts*, for their lives respectively, from and after the respective determination of the several estates so granted to them, to the use of *W. Mostyn*, *J. Lloyd*, *Robert Wynne* of *Garthwin*, and *Pierce Wynne*, and their heirs, for and during the term of the lives of *Humphrey Roberts* and

Dorothy his wife, and *Catherine Roberts* respectively, in trust only to preserve the contingent uses and estates thereinafter limited. And as to as well the premises so limited to and to the use of *Humphrey Roberts* and *Dorothy* his wife, and *Catherine Roberts* respectively, for their lives as aforesaid, from and after their several deceases respectively, and as the said estates should end and respectively determine, as also as to the rest and residue of the premises hereinbefore mentioned, and whereof no use was thereinbefore limited or declared, to the use of *Robert Wynne* the younger and *Mary* his intended wife, for their lives, and the life of the longest liver of them, without impeachment of waste; and from and after the determination of that estate, to the use of the trustees and their heirs during the lives of the said *Robert Wynne* the younger and *Mary* his intended wife respectively, in trust to preserve contingent remainders; and from and immediately after the decease of the survivor of them, *Robert Wynne* the younger, and *Mary* his intended wife, to the use of the same trustees, their executors, administrators, and assigns, for the term of 500 years, upon trusts to raise portions for younger children; remainder to the use of the first and other sons of the marriage successively in tail, remainder to the use of the daughters of the marriage in tail, remainder to the use of *Humphrey Roberts* in fee.

By the said indenture of the 2d of October, 1751, the said *Humphrey Roberts* (for himself and *Dorothy* his wife) and *Mary Roberts*, and *Catherine Roberts* severally covenanted that they, or one of them, were or was seised of all the messuages, lands, tenements, and hereditaments, by them thereby granted and released, for a good, sure, absolute, and indefeasible estate of inheritance, and had full power to grant, bargain, sell, convey, release, and settle the same to the uses therein mentioned, that the premises should remain to these uses free from incumbrances, and that they *Humphrey Roberts* and *Dorothy* his wife, *Mary Roberts* and *Catherine Roberts*, and their heirs, and all persons lawfully claiming any estate or interest in the premises from, by, or under them, would, at the request of the trustees, *W. Mostyn*, *J. Lloyd*, *Robert Wynne* of *Garthwin*, and *P. Wynne*, do all things necessary for the better conveying, settling, and confirming to the uses thereinbefore expressed the premises thereinbefore mentioned to be settled, released, or assured.

The execution of the release by *Robert Wynne* the elder was attested by two witnesses; the execution of it by *Robert Wynne* the younger, and by *Humphrey Roberts*, *Dorothy Roberts*, *Mary Roberts*, and *Catherine Roberts*, was attested by three witnesses.

The marriage between *Robert Wynne* the younger and *Mary Roberts* was duly solemnized, and there was issue of the marriage one son, viz. *Robert Watkin Wynne*, and one daughter, *Jane*, who afterwards became the wife of *John Wynne Griffith*. *Catherine Roberts* died in 1763, *Humphrey Roberts* in 1817, and *Dorothy Roberts* in 1767. *Robert Wynne* the younger died in 1782, leaving his wife and *R. Watkin Wynne*, his only son and heir at law, and *Jane* his daughter and only other child, him surviving. By his will he directed that a portion of 6000*l.* should be raised in favor of his daughter; and by a decretal order of the Court of Chancery made on the 5th of August, 1822, in a cause in which the said *John Wynne* was plaintiff, and the said *John Wynne Griffith* and others were defendants, it was declared that the said portion of 6000*l.* had been fully paid and satisfied, and that the said term of five hundred years had ceased and determined. *Robert Watkin Wynne* died in the lifetime of his mother *Mary Wynne* without having barred the entail, leaving *John Wynne*, his eldest son and heir at law, him surviving. *Mary Wynne* died in January, 1814. Shortly afterwards, *John Wynne* suffered a common recovery to the use of himself in fee.

The question was, whether, under the said indentures of the 1st and 2d of June, 1750, and the common recovery suffered in pursuance thereof, and under the said indentures of the 1st and 2d of October, 1751, the legal fee of such

of the estates and premises comprised in the first mentioned indentures as were settled and assured by the last mentioned indentures became vested in the said *W. Mostyn, J. Lloyd, Robert Wynne of Garthwin, and Pierce Wynne?* And if so, whether a jury would be directed to presume a reconveyance of the said legal estate to the uses specified in that deed?

Preston for the plaintiff. The conveyance in fee of the 1st and 2d of October, 1751, operated as a conveyance by virtue of the seisin of *Humphrey Roberts* and *Catherine Roberts*, and not as an appointment by virtue of the power. It is important to ascertain the exact relative situation of the parties before the deeds of 1751. The deed of 1750 contains several powers of appointment. The only estate limited by that deed was an estate for life as to that part of the property vested in *Catherine Roberts*, and the fee simple subject to that life estate was in *Humphrey Roberts*. Those two parties were the only owners; the entire seisin being in them, they might have conveyed by a common law assurance without regard to their powers. Every conveyance which each of them made would *pro tanto* be an extinguishment of the power, because a person cannot do an act by virtue of power which is derogatory to an act done by him as owner. The power was not in the nature of a naked authority. It was a power arising out of the ownership. It might be defeazanced, released, or extinguished. If any one of the four had done any act which extinguished the joint power, that power would have been incapable of operation. A power of this description may be said to be apportionable. There may be a release in part, without a release of the whole. If *Catherine Roberts* had conveyed her life estate, to that extent the power would have been incapable of future exercise; or, if *Humphrey Roberts* had conveyed his fee simple, the power could never be exercised to the prejudice of his conveyance. Here the person who was the actual owner of the fee must of necessity concur in exercising the power, and then he would be only exercising a right over his own property, and not over the property of any other person. It was competent to the parties to have exercised their power, and thereby to have put an end to the ownership; or it was competent to *Catherine* and *Humphrey Roberts* to have exercised the ownership, and thereby to have put an end to the power. This being the relative situation of the parties, the question is, what was the effect of the acts done by these parties consistently with the rules of law. It is a general rule that effect is to be given if possible to the acts of parties. In *Report's* case, 6 Rep. 14, *A.* being tenant for life, remainder to *B.* in fee, they by deed indented, joined in a lease to the plaintiff; it was resolved, that presently by the delivery of the deed, it was the lease of *A.* during his life, and the confirmation of *B.*; and after the death of *A.* it was the lease of *B.* and the confirmation of *A.* *Roe v. Tranmarr*, Willis, 682, 2 Wils. 75, is a strong authority to the same effect. There a deed which could not operate as a release because it attempted to convey a freehold in *futuro*, was held to operate as a covenant to stand seized. Another rule of law is, that where a deed may enure in different ways, the person to whom it is made shall have his election in which way to take it, *Heyward's* case, 2 Rep. 35—*Darrel v. Gunter*, Sir W. Jones, 206, 2 Roll. Ab. 787. pl. 7. He may in pleading ascribe to it that operation which will best suit his interest. Thus, if an instrument will operate either as a grant or as a bargain and sale, the party to whom it is made may ascribe to it that operation which will best answer his purpose. This being the state of the law, it becomes necessary to consider the form of the instrument. There are cases where an instrument may operate as an appointment as to part, and as a conveyance as to the residue, because it may happen that a party who had a partial ownership had not a power adequate for the purpose of passing the whole interest. In this case the deed must operate as an appointment or a conveyance as to the whole. It could not be pleaded as an appointment and also as a conveyance. The party would be bound to plead it in one or the other form, and by his mode of pleading would declare his election to treat it either as an

appointment or a conveyance. Even if the grantors had professed in the deed to make the limitation by way of appointment, the grantee might have treated the deed as a conveyance, if no injury was thereby done to the grantor. Looking to the form of the deed, it was evidently intended to be a common law conveyance, for the lease would be useless unless it was to be followed by a release. The lease for the year would *pro tanto* suspend the power, yet, according to the argument for the defendant, it is immediately to be followed by an instrument which is to operate upon the power. It was evidently the intention of the parties to convey to uses, and it was therefore their object that the conveyance should operate to create uses capable of execution by the statute. There is no reference to the power except in the granting part of the deed, nor is there any express or implied intention of exercising it. The words "direct, limit, and appoint," have been introduced into the deed by mistake; they have no operation in point of law, and only show that the four persons gave their sanction to that deed as a common law conveyance, and that they concurred in extinguishing the power. Looking to all the parts of this instrument, it is evident that the parties intended to act by virtue of their own issue, and not by virtue of their power. The first use contained in the settlement is, that until the marriage the estate shall remain to the same uses as before the settlement. Supposing no marriage had taken place, if this deed operated as an execution of the power, the consequence would be, that the legal estate thereby vested in trustees, and the title would not have remained in the same state as it was antecedent to the settlement; but the parties must have gone into a court of equity to get back the legal estate. Then what acts were to be performed by the trustees? The only act they and their heirs were to do for the purposes of the settlement, was to preserve contingent remainders, but they would be as well preserved by law as by any act of the parties. The great duty which they have to perform is that which relates to the term of years, which of course was regularly and properly limited to them and their executors. The executors and not the heirs of the trustees were to be the trustees to perform those duties; and then if a trustee died, this consequence would follow; that it would be necessary to bring his heirs, in respect of the legal fee, and also his executors, into a court of equity, for the purpose of raising the terms. From all these considerations it is evident, that the true construction to be given to this instrument is that which will enable a court of law to carry it into effect without the aid of a court of equity; and for that purpose it ought to be construed as a conveyance to uses, to be executed by the statute. If this case had occurred before the statute of uses, the court would have considered the power as subordinate to the seisin. It is a rule of law, that where an instrument may operate in two modes, either as a release at common law or under the statute of uses, it should be considered to operate rather as a release at common law than under the statute, unless there is some reason for its operating under the statute. For an instrument prepared the day before the statute passed would otherwise have one operation, while another prepared the day following would have a different effect. Supposing this estate had been sold to a builder, under a conveyance to uses, in the same form as in the present case, and that there had been reserved a rent charge, by making the first use to the intent that the vendor and his heirs should have a rent charge of 500*l.* per annum, with powers of entry and distress, and subject thereto to the use of the purchaser in fee; in that case, if the instrument operated as an appointment, the former owner would have had merely an equitable rent charge, and he must have gone into a court of equity to obtain a legal rent charge, with legal power of distress and a legal right of entry. The intention there, as in the present case, could not have been to place the legal fee in trust for any purpose disclosed by the deed, since the grantee, or the party claiming under the deed, cannot have a right to put that construction upon it, which would defeat the object of the grantor; he could not, therefore, plead it as an appointment, but would be bound to plead it

as a grant of the inheritance; for that was the mode in which the grantor intended it should operate. It is not for the interest of any of the parties to say that this should operate as an appointment rather than as a conveyance at law, giving a complete dominion in law and equity over that for which the parties contracted. If no marriage had taken place an appointment would have been prejudicial to the parties, because the fee would then have been in the trustees, and the parties interested must have gone into a court of equity; or suppose that the trustee had been illegitimate and died intestate, the consequence would be that there would be an escheat of the fee; and the interest would have gone to the crown or to the lord of the manor. It is an established rule, that where a party has an interest and an authority at the same time, and he does an act generally, it shall be construed in relation to his interest and not to his authority; *Parker v. Kett*; 12 Mod. 469; *Andrews v. Emmett*, 2 Bro. Cha. Ca. 300; *Colet v. The Bishop of Coventry*, Hob. 159. That rule was founded on Sir *E. Clere's* case, in which, according to the second resolution, the act was ruled to take effect out of the interest, although by that construction a will was rendered void as to one-third. And, according to the case of *Cox v. Chamberlain*, 4 Ves. jun. 631, which is very similar to the present, the instrument is to be considered either as an appointment or a release, as will best effect the intention of the parties: There, a man having a general power of appointment, with a limitation in default of appointment to himself in fee, by lease and release, in pursuance of all powers in him vested, did grant, bargain, sell, alien, remise, release and confirm, limit, declare and appoint, the estate to trustees to uses. If the deed operated as a conveyance of his interest, then the title was good; but if it operated as an appointment, the legal estate vested in the trustees; the intended uses were mere trust estates, and the title was, under the circumstances, bad. Lord *Alvanley* held, that the instrument operated as a conveyance of the interest. That case is consistent with all the other decisions which preceded or followed it. *Goodill v. Brigham*, 1 Bos. & Pul. 192, may, on the first view, appear to be at variance with it. In that case there was a devise in fee to a feine covert with a power to dispose of the estate without the control of her husband, and it was held that such a power was void, as being inconsistent with the fee given to her in the first instance. That case proceeded on a rule of the common law, by which a fee and a power cannot exist in the same person. That rule does not apply to a case under the statute of uses, and when that distinction is adverted to, there is not any discrepancy between the last case and the case of *Cox v. Chamberlain*, 4 Ves. jun. 631: *Roach v. Wadham*, 6 East, 289, was decided upon the ground, that the intention of the parties was to be effectuated only by considering the instrument as an appointment, although it may well be doubted whether a different intention might not have been collected from the instrument. At all events, it would have been more consistent with *Cox v. Chamberlain*, and with the practice of the profession, which was founded on the rule laid down in Sir *Edward Clere's* case, (a rule which has governed titles for a period of two hundred years,) to have held the deed to operate as a conveyance and not as an appointment. (Sugd. on Pow. 311, 4th edit.) In *Roach v. Wadham*, much stress was placed upon the circumstance, that the trustee joined in the conveyance, but, in point of fact, he was a mere licensee to uses, and he had no interest whatever in the estate in question. If he had any estate, his concurrence would have afforded decisive evidence that *Watts* did not intend to exercise his power. If the instrument in this case be held to operate as an appointment, the words "bargain, grant, sell, release and confirm," are inoperative as words of conveyance. If the words "direct, limit, and appoint," operate as an appointment, the other words operate as a release and an extinguishment of the estate. On the other hand, if the words of conveyance operate as a conveyance, the words direct, limit, and appoint, must declare an intention to release and extinguish the power. Either the words of conveyance or of appointment must be rejected;

but if the words of appointment are retained and those of conveyance are rejected, then this court, which is a court of law, cannot take notice of uses and trusts, and the deed can only be construed by the rules of law. It is a rule of law, that when two parts of a deed are inconsistent with each other, the first part is to be retained and the latter rejected. According to the construction contended for, the court must reject all the words of grant, all the words of uses, and so make one-half of the deed wholly inoperative. But assuming that the estate was vested in the trustees, a reconveyance from them ought, after so great a lapse of time, to be presumed. [Bayley, J. Such a presumption ought not to be made by this court in a case sent to them from the Court of Chancery. It is a presumption of fact which is to be made by a jury, and not a presumption of law which is to be made by the court. Upon proof of the facts stated in this case, a judge would not direct a jury to presume a reconveyance, but would leave it to them to make such presumption or not, as they thought proper. It is a conclusion to be drawn by the jury from the circumstances of the case.]

Cooe contra. It may be conceded, that if this instrument is to be considered as a conveyance by *H. Roberts* and *C. Roberts*, it will operate as an extinguishment of the power, because, after *H. Roberts* had conveyed his interest, it would have been impossible for him to concur in exercising the power of appointment, so as to defeat that which he had already done. It may be conceded also, that where the objection to a deed is, that it cannot operate in a particular mode, the party claiming under it may plead it as operating in some other way to support his interest. But this is not a case where a deed can only take effect in one of two ways; for here it may take effect either as an appointment or as a release. The question, whether a particular instrument operates as a conveyance or as an appointment, has been considered in a court of law to depend entirely on the intention of the parties at the time when they executed the instrument. There is, in the cases on this subject, some obscurity arising from the ambiguous sense of the word *intention*. In almost every human action there is a twofold intention: first, there is an intention as to the mode of doing an act; and, secondly, an intention as to the object to be effected by the act. In the cases upon this subject, the first question considered has been, whether the parties, upon the face of the instrument, have sufficiently manifested their intention that it shall operate in a particular mode. If that be explicitly declared, then the Courts, without reference to the ultimate object which the parties have in view, have held that it must operate in that particular mode. But if that intention is not clearly manifest on the face of the instrument, but is left in doubt, then, in order to ascertain whether the parties had intended it to operate in one mode or the other, the Courts have looked to the ultimate object of the parties, and have construed the instrument to operate in that way which will best effect that object. That is the sound principle to be deduced from the authorities on this subject; and that principle governed the decision of this Court in the case of *Roach v. Wadham*, 8 East, 289. There the Court decided that the parties intended that the deed should operate in a particular mode, "viz. by way of appointment, because it clearly appeared, ["939] from the instrument itself, that the parties intended that it should operate in that mode. If that be the principle upon which the question in this case is to be decided, there is no difficulty in it, because it appears evident from the instrument itself, that the parties intended it should operate as an appointment, in execution of their power. If they had intended that it should operate as a conveyance of their interest, it would have been unnecessary for any other persons than *C. Roberts* and *H. Roberts* to have been parties to the deed; but it is executed by four, and one of them, *Mary Roberts*, had no legal or equitable estate in the property. If *C. Roberts*, and *H. Roberts* are considered the only conveying parties, the acts of *D. Roberts* and *M. Roberts* will be nullified, and their names may be considered as struck out of the deed. [Holroyd, J]

May it not operate as a confirmation by them?] *M. Roberts* had no estate either in possession or reversion in the property, and *D. Roberts* was a married woman. With what intent, therefore, could *Mary Roberts* execute the bargain and sale for a year? It is true, that where the same person has an interest and a power, and the deed may operate either as a conveyance in respect of the interest, or as an appointment in execution of the power, it shall refer to the interest and not to the power; but that rule does not apply to a case like this, where four persons had the power and one only the fee, and the four have executed the instrument. A reasonable construction must be put upon the act done by the four, and that act could only have been done with reference to the power. The case of *Roach v. Wadham* was not so strong a case as the present; it was an action against *the defendant as executor, and also as heir and devisee of *J. Wadham*, for arrears of a rent-charge. There the estate had been conveyed to a person named *Thomas Coates*, his heirs, and assigns, to the use of such persons as *W. Watts* should by deed appoint; and for want of such appointment, to the use of *Watts* and his heirs; and there was reserved a fee farm rent to the grantors, their heirs and assigns, with a covenant by *Watts* for the payment of it, with clauses of distress and re-entry in default of payment. By subsequent deeds of lease and release *Coates*, by the directions of *Watts*, bargained, sold, and released, and *Watts* granted, bargained, sold, aliened, released, ratified, and confirmed, and also directed, limited, and appointed the premises to the purchasers, their heirs and assigns, as tenants in common, subject to the rent and performance of covenants. The question argued was, whether the deeds operated as a conveyance or as an appointment. It is clear that they might have operated in either way, and therefore, according to the argument urged on the other side, in the present case, it was wholly unnecessary to consider the question whether it was intended at the time when the deed was executed that it should operate in one way or the other, because it was competent to the plaintiff, who was the representative of the party claiming the rent under the deeds, to have made his election that it should operate as a conveyance; but the point considered and decided by the Court was, that it was the intention of the parties at the time when they executed the instrument, that it should operate as an execution of the power. There Lord *Ellenborough* says, (p. 305,) "Had it been the intention of the parties that the estate which *Wadham* was to take should be derived out of the interest which *Watts* had, it would have been wholly unnecessary that *Coates* should have been a party to the deed." Although this reasoning has been much objected to, yet the meaning of the court must have been, that if it can be once ascertained that a person has been made a party to a deed who would not have been, a necessary party if it was intended only to operate as a conveyance, that then it should not be considered to have been the intention of the parties, that it should operate as a conveyance, but as an appointment. Now apply that to the present case. If it had been the intention of the parties that the estate was to be derived out of the interest which *H. Roberts* had, it would have been wholly unnecessary that *Mary Roberts* should have been a party to the deed. The circumstance of her having been made a party to this instrument makes it manifest that the intention was, that it should operate as an appointment in execution of the power, and effect must be given to that intention so expressly declared upon the face of the instrument, although it may not be consistent with some of the subsequent provisions in the deed. In *Cox v. Chamberlain*, 4 Ves. jun. 631, Lord *Alvanley* says, "that upon every principle upon which the court acts with regard to the construction of conveyances, it would be monstrous to hold, that where there is a power and an interest, and the act being equivocal, it is doubtful whether he acted under the one or the other, the court should adopt that which would defeat the instrument." If in that case the act *had not been equivocal, if it had appeared clearly upon the face of the instrument that the parties acted under the power, it would have been held to operate as an

appointment, although it might have had the effect of defeating the object of the instrument. In *Boughton v. Sandilands*, 3 Taunt. 342, the facts shortly were, that on the supposed legal marriage of *A.* and *B.*, the estate of *B.* had been limited in settlement with a joint power of appointment. It subsequently appeared that the parties were not legally married, and on such discovery being made, they erroneously conceived that as the marriage was void, the settlement was void also. On the marriage being legally solemnized, a new settlement with different limitations was made. It was decided, that notwithstanding the first settlement was executed under a mistake, it was valid in law, and that the second settlement should not enure as an execution of the joint power by the parties, it being clear that the parties could not have intended to execute their power, as they considered the first deed of settlement to be void; and yet in that case the ultimate intention was to make a new settlement; and although they treated the first settlement as void, yet they recited an intention not merely to rescind but to revoke the deed, and they directed, limited, and appointed as well as granted the estate. The principle on which that decision must have proceeded was, that as it was manifest on the deed, that the parties could not mean to exercise the power, the court was estopped from looking to the ultimate object for the purpose of giving effect to the mode of conveyance. But, however, supposing there was not upon the face of the instrument ^{*in} [943] this case any intention expressly declared as to the mode in which it is to operate, and that in order to ascertain that intention, the court must look to the ultimate objects of the deed, it will even in that view of the case sufficiently appear that the deed in this case must have been intended to operate as an appointment, and not as a conveyance. By the deed of 1750, *H. Roberts* was seized in fee, subject to the powers of appointment. If, therefore, the parties had not exercised their power, and *H. Roberts* had died in seisin of the estate, leaving his wife surviving, she might have claimed her dower, for she had clearly an inchoate right of dower under the deed of 1750. Now the only way in which these parties could make a valid conveyance of the property comprised in the deed of 1750, so as to bind the interest of all the parties, was either by exercising the power or by levying a fine by *H. Roberts* and *Dorothy*, his wife. If they resorted to neither of these modes of conveyance, their settlement would have been imperfect; so that if *D. Roberts* had survived her husband, she might have claimed her dower. Now, supposing *Dorothy* to have survived her husband, and to have claimed her dower, would it have been permitted to her (she having concurred in the deed of 1751,) to say that she did not intend to exercise her power, but that that deed was intended by *C. Roberts* and *H. Roberts* as a conveyance out of their seisin? The answer to that would have been, that the only way in which the deed could operate as a perfect settlement was by considering it an exercise of the power, that she had concurred in the deed of conveyance, and it must, therefore, be taken most strongly against her; and that she being a married woman, and not having levied a fine, ^{*it must, in order to bind her, operate as an appointment.} [944] Considering the question, therefore, in this latter point of view, these instruments must operate as an appointment, unless it be held that the parties are at liberty to consider them at one time operating in one way, and at another time in another.

Preston, in reply. In the case of *Boughton v. Sandilands*, 3 Taunt. 312, the parties had not formally and efficiently released the power. They only assumed to themselves a second power under a state of things which did not exist, and on a supposition, that the first settlement was altogether void; but the court thought that the first settlement was not void, and that it had, as between those parties, all the effect of a good settlement, and that what they did under the false supposition was also void. The release in this case may operate as a confirmation, for it is not necessary for that purpose that there should be the words ratify and confirm. It is sufficient that there be enough to show,

that a person who was a necessary party to a conveyance concurs in it. But it is said, that if this is a conveyance only without the aid of an appointment, the wife will be entitled to dower. The answer to that is, that there is an appointment in this case, and with the aid of an appointment, and consistently with the rules of law, the dower is extinguished. The clause may be divided into two branches. The first may be considered the conveyance of the persons having the seisin; the second, an appointment by the persons having the power: and the effect of that would be, *that it would be a conveyance by those who have the seisin, in order to give effect to the uses, and an appointment by way of extinguishment of dower. Suppose the widow was claiming her dower at law, and that the defendant pleaded several pleas, showing the creation of the power, the conveyance under the seisin, and stating that by virtue of the power he appointed, and thereby discharged the dower. Supposing she alone had the power, then in one clause the husband could have conveyed to releasees to uses, and in another the wife might have stated her intention to exercise her power; and that for the purpose of extinguishing her dower, she directed, limited, and appointed, &c.; that would not be a formal release, but it would take effect as such by operation of law. In order to give effect to the intention of the parties, it must be construed to be her confirmation and her release through the operation of the words *direct, limit, and appoint*; and in that case the whole fee would have passed. Suppose a person had an estate for life, with a power over the fee, and had used the words found in this case, it might have been pleaded as a grant as to the life estate, and as an appointment of the fee. So in this case *D. Roberts* discharged her dower by the appointment, and the party availing himself of the appointment would have had himself the whole fee. [*Bayley*, J. The case that you have put supposes that she alone had the power. Here the joint appointment is by the four—one could do nothing. What would have been the effect of a deed framed in this way? Suppose the four to have joined in a bargain and sale for a year, and then in a release in the ordinary words, and after completing the uses, it continued thus,—and for the purpose of barring the dower of the power given to them by the deed of 1750, appoint.] That is precisely the present case. In the first place, there is a conveyance and then an appointment operating by way of release in extinguishment of her dower. [*Bayley*, J. But before the appointment comes into operation the whole is conveyed by the previous part of the deed.] The case is not to be decided by the strict rules of the common law; it depends upon the statute of uses, and effect must be given to the intention of the parties. It is clear that *Catherine Roberts*, could have given the whole legal fee by concurring with the other three persons who had the power jointly with her; and if the power had been so executed, what would have been the consequence in a court of equity before the statute of uses? For her act will have the same operation and effect since the statute as it would have had in a court of equity the very day before the statute passed. Now if this question had arisen in a court of equity before that statute passed, and the parties had done exactly that which they have done in this case, viz. attempted to convey all they had in order to give a good legal estate, that would have been held to operate as an appointment by the four, and *Catherine*, who had an interest, having attempted to extinguish the power, would not afterwards have been permitted to say in a court of equity that she had any interest in possession in opposition to her act exercising the power. In *Boughton v. Sandilands*, 3 Taunt. 312. there was not any concurrence of the husband as a conveying party; for there *Eliza Boughton*, with the privity and consent of *G. C. B. *Boughton*, directed and appointed, and with the same privity and consent, granted and confirmed, &c. But the husband and wife did not exercise the power as a joint power of appointment. It would be inconsistent with all the authorities to hold the instrument in this case to operate on

the fee as an appointment. It is sufficient if it can so operate for a partial and useful purpose, so as to put an end to all those interests which would not have passed by a conveyance of the fee. [Bayley, J. Might not an operation be given to every one of the words, by supposing *Catherine Roberts* and *Humphrey Roberts* to grant, bargain, and release to the releases all the property, and then the four who have the power, to direct, limit, and appoint, to the uses thereinafter mentioned? The deed does not profess to grant to the use of the releasees. There is not any single use declared in their favor.] By so reading the deed, effect will be given to every word, and the intention of the parties will be carried into execution. It is suggested, in a note to Co. Litt. 271 b., that although it is very informal to blend together the language of the appointment and the release, yet the words may be marshalled by construction so as to give them all their intended effect.

The following certificate was afterwards sent.

"This case has been argued before us by counsel, and we are of opinion, that, under the said indentures of the 1st and 2d days of *June*, 1750, and the common recovery suffered in purgance thereof, and under the said indentures of the 1st and 2d of *October*, 1751, the legal fee of such of the estates and premises comprised in the said first-mentioned indentures, as were settled and assured [948] by the said last-mentioned indentures, did *not* vest in the said *William Mostyn, John Lloyd, Robert Wynne* (of *Garthwin*) and *Pierce Wynne*."

J. BAYLEY,
G. S. HOLROYD.
J. LITTLEDALE,†

† This case was argued on the 11th of January, 1826, and the certificate was sent on the 28th of January.

AN

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TO THE

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A.

ACTION ON THE CASE.

See MARKET.

The lessee, by deed poll, assigned his interest in the demised premises to *A.*, subject to the payment of the rent and the performance of the covenants contained in the lease. *A.* took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that *A.* continued assignee of the premises, and recovered damages against the lessee: Held, that the lessee might maintain an action upon the case founded in tort against *A.* for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. *Burnett and Others, Executors v. Lynch*, *T. 7 G. 4.* PAGE 589

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1. Where an award is void, and nothing can be done upon it without suit, the Court will not interfere to set it aside, because such suit must fail. But where a cause is referred by order of N. P. and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered; although such award be void, the Court will set it aside, for otherwise the party in whose favor the award is made will have judgment upon the verdict without any new proceeding to enforce the award. *Doe den. Turnbull and Others v. Brown*, *E. 7 G. 4.* PAGE 884

(751)

2. Where a cause is referred by a Judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a Judge's order, on moving for an attachment for not performing the award, it must be shown that the order enlarging the time was made by consent. *Hulden v. Glasscock*, *E. 7 G. 4.* 390
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The arbitrator had power to enlarge the time for making his award by indorsement on the order of reference; that order, together with two indorsements enlarging the time, was made a rule of Court: Held, that on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.

By the order of reference, costs were to abide the event; there were two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The Master taxed the whole costs of the cause, and the reference in one sum to the other defendant, by whom payment was demanded of the plaintiff. The Court refused to grant an attachment for non-payment of those costs. *Quere*, whether the Master had power to tax costs for the two defendants separately? *Dickins v. Jarvis and Smith*, *E. 7 G. 4.* 528

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tice: Held, upon general demurrer, that this plea was bad. *Grazebrook v. Davis*, *E. 7 G. 4.* 534

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- A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the license of the lessor. The lessee in January 1825, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In April 1825, a commission of bankrupt issued against the lessee, and he was duly declared bankrupt: Held, that the deed of January 1825 was an act of bankruptcy and void; that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture. *Doe dem. Lloyd v. Powell and Others, Assignees*, *H. 6 & 7 G. 4.* 308

ASSUMPSIT.

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2. Where a promissory note, expressed to be for value received, was made in favor of an infant aged nine years, and in an action upon the note by the payee against the executors of the maker, no evidence of consideration being given, the learned Judge told the jury, that the note being for value received, importeth that a good consideration existed, and that gratitude to the infant's father or affection to the child would suffice: Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient, and a new trial was granted. Semble, that an intention to evade the legacy duty would not have been a good consideration. *Holliday, an Infant, v. Atkinson*, *E. 7 G. 4.* 501
3. Where a contract was made between A. and B., whereby A., having a quantity of apples, agreed to sell his cider to B. at a certain price per hogshead, to be delivered at T. at a future time, and to lend such pipes as he had for the use of the cider, to be manufactured on his (A.'s) premises, and to be paid for before it was removed, and A., in pursuance, delivered a quantity of juice expressed from the

apples to a servant hired by *B.* to manufacture the cider on *A.*'s premises, and before the cider was completely manufactured, it was seized by the excise-officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as *B.*'s property, together with the casks, and in *assumpsit* for goods sold and delivered, brought by *A.* against *B.*, it appeared that the word *cider*, at the place where the contract was made, meant the juice of the apples as soon as it was expressed, it was thereupon held, that the contract must be construed to have been for the sale of cider in that sense of the word, and that the property passed to *B.* as soon as the apple juice was delivered to his servant. Secondly, that it was *B.*'s duty to enter the premises, and as through his default it became impossible for *A.* to deliver the goods at *T.*, the failure to do so did not bar his action. Thirdly, that *A.* might recover in this action the price of the casks lent to the defendant. *Studdy v. Sanders and Another*, T. 7 G. 4. 628

4. A pauper, being casually in the parish of *A.*, met with an accident which disabled her, and which required immediate medical assistance. The constable of that parish improperly removed her to her own (which was the adjoining) parish, and sent for the surgeon of that parish to attend her: Held, that it was the duty of the parish officers of *A.* to have taken the pauper to the nearest convenient house in *A.*, and to have provided medical attendance there, and that they could not, by improperly removing the pauper to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them, and that they were therefore liable to pay the surgeons bill. *Tomlinson v. Bentall*, T. 7 G. 4. 738

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See Assumpsit, 1. EVIDENCE, 2.

1. An attorney entered into a written contract, whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted; no time was expressly fixed for the commencement of the partnership: Held, that no time being expressly appointed, the partnership commenced from the date of the agreement; that parol evidence was properly admitted to show that the person taken into partnership was not an attorney at the time when the agreement was executed; but that it could not be received to show that the agreement was not to take effect until he should be duly admitted, for that would make the agreement different from

that which it purported to be, viz., an agreement for a present partnership. *Williams v. Jones*, H. 6 & 7 G. 4. 108

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BANKRUPT.

1. Where a commission of bankrupt issued against a person then in custody at the suit of the petitioning creditor, and who afterwards applied to the Court of K. B., and obtained his discharge under the 49 G. 3, c. 121, s. 14, on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission: Held, that he could not, in an action against the assignees, dispute the validity of the commission. *Watson v. Ware and Others*, H. 6 & 7 G. 4. 153
2. A lease contained a proviso for a re-entry of the lessor, and that the lease should be void on the lessee's assigning without the license of the lessor. The lessee, in January, 1825, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In April, 1825, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of January, 1825, was an act of bankruptcy and void; that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture. *Doe dem. Lloyd v. Powell and Others, Assignees*, H. 6 & 6 G. 4. 308
3. In December, 1811, *G.*, then abroad, being indebted in the sum of 1000*l.* to the estate of *W.*, a bankrupt, the assignees of *W.* issued against him writs of special *capias alias* and *pluries*, in Michaelmas term, 1812, and Hilary term, 1813, which were delivered to the sheriffs of London, and by them duly indorsed *non est inventus*, but the writs remained in the sheriff's office. In 1814, *G.* being on board a ship in the Downs waiting for a fair wind, went several times to Deal, but *W.*'s assignees had not notice of his being there: In 1819, *G.* returned to reside in England. In 1821, the debt of 1000*l.* being still unpaid, the assignees of *W.* struck a docket against *G.*, and upon their petition a commission issued against him, and on the 21st of March, in that year, he was declared a bankrupt. *G.* petitioned to have the commission superseded, and by an order of the Vice-Chancellor, made May, 1821, it was ordered that *G.* should be at liberty to bring trover against his

assignees to try the validity of the commission; which action he accordingly commenced, 19th May, 1821. Two days afterwards the attorney for the petitioning creditors took away the writs of special *eprius aliena* and *pluries* from the sheriff's office; and on the 11th of July, 1821, the last day of *Trinity* term, a roll of the proceedings, with the continuances on the writ of *pluries*, brought down to the term next preceding the date of the commission issued against *G.*, was docketed and carried in, and on the same day the three writs were filed of record. Upon a case stating these facts: Held, that the assignees of *W.* had not, at the time of suing out the commission awarded and issued against *G.*, or on the 21st of March, 1821, when he was declared a bankrupt, a valid debt as petitioning creditors to, support the commission. *Gregory v. Hurrell*, E. 7 G. 4. 241

4. Where a promissory note, payable with interest twelve months after notice, was expressed to be "for value received," and the maker became bankrupt before any notice was given: Held, that the payee might prove it under the commission. *Clayton v. Geeling*, E. 7 G. 4. 360
5. The court will not set aside an execution issued upon a judgment obtained by default, confession, or *nil dictum*, and served and levied by seizure upon the property of a bankrupt before his bankruptcy, the statute 6 G. 4, c. 16, & 108, not rendering the execution in such case void, but merely enacting that the plaintiff in such execution shall share ratesably with the other creditors. *Taylor v. Taylor*, E. 7 G. 4. 392

6. Where by statute it was enacted, "that in case any treasurer, collector, officer, or other person appointed by the commissioners having the control of the pavements of any places mentioned in the act, for the collection and receipt of moneys, to be collected and received by virtue of any rates and assessments, &c., shall happen to become bankrupt before he shall have fully paid and satisfied all moneys received by him or them for or in respect of any such rates or assessments, or for or on account of the commissioners, &c., the assignees shall pay in full all the money due to such commissioners (if the bankrupt's estate be sufficient,) in preference to all debts, except those due to the king: Held, that bankers employed by the commissioners without any actual appointment, were within the words "other persons," used in this section, as being in the nature of treasurers, and that inasmuch as the statute did not require the appointment of treasurers, collectors, &c., to be in writing, the employment was equivalent to an appointment. The same statute

enacted, that the commissioners might sue in the name of their clerk for the recovery of any penalty or rate, or any other sum or sums of money at any time due or payable from or by any water or gas company, or commissioners of sewers, or any other person or persons, due or payable by virtue of any local act or that act: Held, that the commissioners might sue in the name of their clerk to recover from the assignees of their banker, the balance in his hands at the time when he became bankrupt. *Frost v. Bolland*, T. 7 G. 4. 611

7. Where bankers employed by commissioners of pavements had received on account of the commissioners certain exchequer bills, which they afterwards sold, and received the proceeds, and before this money had been paid to the commissioners, became bankrupts: Held, that the commissioners were entitled, under the 57 G. 3, c. 29, s. 51, (set out in the last case,) to recover in full from the assignees of the bankrupts the balance due to them; for that the section referred to was not confined to moneys received by virtue of rates or assessments, but included all moneys received "for and on account of the commissioners," and when the bankers sold the exchequer bills, they must be considered as having received the proceeds to the use of the owners of the bills. *Dungan v. Bolland and Others, Assignees*, T. 7 G. 4. 622

8. A bond upon the face of it, appeared to be conditioned for the payment of a sum certain; but by an indenture of the same date, declarining the purposes for which the bond was executed, it was agreed, that it should be lawful for the obligees in the bond to commence an action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them; a judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breach, or executing a writ of inquiry: Held, first, that this was a bond substantially conditioned for the performance of an agreement within the 8 & 9 W. 3, c 11, s. 8, and that the obligees ought to have assigned breaches. Secondly, that the indenture, by virtue of which the judgment was entered up, was in legal effect a *cognovit actionem* within the meaning of the third section of the 3 G. 4, c. 39, or if not, that it was a contrivance to defeat the provisions of that statute; and the indenture not having been filed with the proper officer, within twenty-one days after its execution, and judgment not

having been entered up within that period, as required by the statute, the court, upon an application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn.
Hurst v. Jennings, T. 7 G. 4. 650

BARON AND FEME.

A husband is liable for necessaries provided for his wife pending a suit in the ecclesiastical court, and before alimony decreed; although a decree afterwards made directed the alimony to be paid from a date before the time when the necessaries were provided for the wife.
Keegan v. Smith, E. 7 G. 4. 375

BILL OF EXCHANGE.

See FOREIGN CHECK.

An indorsement upon a promissory note written with a pencil is a valid indorsement within the custom of merchants.
Geary v. Physe, H. 6 & 7 G. 4. 284

2. Where a promissory note expressed to be for value received was made in favor of an infant aged nine years, and in an action upon the note by a payee against the executors of the maker, no evidence of consideration being given, the learned Judge told the jury, that the note being for value received, importeth that a good consideration existed, and that gratitude to the infant's father, or affection to the child would suffice: Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient; and a new trial was granted. *Sembler*, that an intention to evade the legacy duty would not have been a good consideration.
Holliday v. Atkinson, E. 7 G. 4. 501

BOND.

See INSOLVENT ACT, 1. REPLEVIN BOND.

A bond, upon the face of it, appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed; it was agreed that it should be lawful for the obligee in the bond to commence an action, and to proceed to judgment whenever they should think fit; and upon judgment being obtained to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them: A judgment having been entered up by virtue of this deed, the obligees issued execution, without assigning breaches or executing a writ of inquiry: Held, that this was a bond substantially conditioned

for the performance of an agreement in writing, within the 8 & 9 W. 3, c. 11, & 8, and that the obligees, therefore, ought to have assigned breaches. *Hurst v. Jennings*, T. 7, G. 4. 650

BROKER.

Where a broker, having made a contract, entered it in his book, but did not sign it, and afterwards signed and delivered, bought and sold notes to the contracting parties, materially differing from each other: Held, that there was no valid contract in writing to bind the parties. *Grant and Others v. Fletcher and Another*, R. 7 G. 4. 436.

CANAL.

Where a canal was made under the 8 G. 3, & 38, which did not give the proprietors power to appropriate the water raised by engines from mines near the canal, and another canal was made under the 23 G. 3, & 92, which gave to the proprietors power to appropriate the water raised by engines from mines within 1000 yards of the canal, provided the produce of such mines were carried along some part of the canal, and these two canals were incorporated by the 24 G. 3, c. 4; but it was provided that the clauses in the two former acts should still be severally applicable to the canals made under those acts respectively: Held, that the proprietors of the latter canal were not justified in taking the water raised from a mine within 1000 yards of it, unless substantially the whole produce of the mine was carried immediately from the mine along that canal; and that it did not suffice to show that the whole produce was carried immediately from the mine along the canal made under the 8 G. 3, and that one third was carried from that canal along the canal made under the 23 G. 3.

By the 58 G. 3, c. 19, reciting that it was expedient to extend one system of management to these canals, it was enacted, "That all the canals so made as aforesaid under the former acts should be considered as included and governed by all the clauses in the 23 & 24 G. 3, so far as the circumstances and nature of the case would admit, as if the same had been described in the 23 G. 3, as part of the works to be made and done under and by virtue of that act." Held, that this did not give a right to take water from mines, the produce whereof was carried along the canal made under the 8 G. 3, c. 38. *Pinch v. The Birmingham Canal Company*, T. 7 G. 4. 890

CARRIER.

1. A common carrier gave public notice

that he would not hold himself accountable for any parcel above the value of *5*l.**, if lost or damaged, unless the same were entered as such, and paid for accordingly when delivered. A person who knew that the carrier had given this notice delivered to him a parcel containing goods (much exceeding the value of *5*l.** to be carried from *L* to *B*., and the carrier accepted them for that purpose. The price of the carriage was not then paid.) The carrier knew that the parcel contained goods much exceeding the value of *5*l.**. The parcel was lost : Held; that the carrier was not responsible. *Marsh v. Horne*, E. 7 G. 4. 322

2. Where *A*, the keeper of a coach office, and a part-owner in several coaches, made a contract with *B*, for the carriage of parcels which he was in the habit of sending from that office to various places : Held, that this bound the owners of all the coaches in which *A* was a part owner, and as well those who became partners after the making of the contract as those who were so before. *Helsby and Others v. Mears and Others*, E. 7 G. 4. 504
3. Where in case against a carrier for the loss of goods delivered to him at *Dublin* to be conveyed to *Liverpool*, it was objected for the defendant, that unless the goods were proved to be duly entered at the Custom-house, the importation was illegal, and the contract with the carrier void : Held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered. *Sussons v. Dixon and Others*, T. 7 G. 4. 758

CERTIORARI.

- I. A plaint in replevin cannot be removed from a county court in *Wales* into this court by certiorari. *Edwards v. Bowen and Another*, H. 6 & 7 G. 4. 206
2. The 13. G. 3, c. 78, s. 48, requires that the accounts of the surveyors of the highways should be laid before one justice, and if he refuses to allow them, they are to be taken before the justices at petty sessions, where such parts as are objected to by the one justice are to be examined, and to be allowed or disallowed as the justices think fit : Held, that the justices at petty sessions have no original jurisdiction over the accounts, and an order having been made by them for the allowance of a surveyor's accounts, which had not been previously laid before one justice, the Court granted a certiorari to remove it, and quashed the order. *The King v. The Justices of Somersetshire*, T. 7 G. 4. 816

CHARTER-PARTY.

By a charter party, the freighter of a ship

agreed to pay for her *200*l.** per month for six months certain, and so in proportion for any longer time that she might be in his employ. The ship was to be kept in repair by the owner. Before the termination of the voyage for which the ship was chartered, certain repairs were necessary, which occupied a period of twenty-eight days: Held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight. *Ripley and Another v. Scase*, H. 6 & 7 G. 4. 167

CHURCHWARDENS.

Land belonging to a parish was occupied by *A*, and he paid rent to the churchwardens. They executed a lease of the same land for a term of years to *B*, and gave *A* notice of the lease. In an action for use and occupation by *B* against *A*: Held, that *A* was not estopped by having paid rent to the churchwardens from disputing *B*'s title, and that the latter could not derive a valid title from the churchwardens. *Phillips v. Pearce*, E. 7 G. 4. 433

COMMISSIONERS OF PAVEMENT.

See BANKRUPT, 6, 7.

COGNOVIT ACTIONEM.

See BANKRUPT, 8.

COMMON.

The Lord of a manor may, in respect of common land in his own manor, have a right to turn his own sheep on the common of an adjoining manor. *Earl of Sefton v. Court*, T. 7 G. 4. 917

CONSPIRACY.

Indictment against four for a conspiracy : two pleaded not guilty; one pleaded in abatement, to which plea there was a demurrer, and the fourth never appeared. Before the argument of the demurrer the record was taken down to trial ; one of those who pleaded not guilty was acquitted, and the other was found guilty of conspiring with him who pleaded in abatement. The demurrer was afterwards argued, and judgment of respondent ouster given, whereupon a plea of not guilty was pleaded : Held, that the Court might, before the trial of that defendant, pronounce judgment upon the one that had been found guilty. *The King v. J. S. & Cooke*, E. 7 G. 4. 538

CONVICTION.

1. Whether a conviction of a waterman for carrying in his boat upon the river

Thanes more persons than are allowed by law, must be founded upon testimony given upon oath, *quære.*

That point being doubtful, the Court refused a *mandamus* to compel a magistrate to enforce the conviction. *Rex v. Broderip, Esq.*, H. 6 & 7 G. 4. 239

2. By the 6 G. 4, c. 108, s. 3, it was enacted, that vessels of a certain description found "in any part of the *British or Irish Channels*, or elsewhere on the high seas, within 100 leagues of the coasts of the United Kingdom," having "in any manner attached thereto" casks of certain dimensions, "of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits, (unless such casks are really necessary for the use of such vessel, or are a part of her cargo, and included in the regular official documents of such vessel,) the casks, vessel, &c. shall be forfeited. By s. 49, certain persons found to have been on board such vessels liable to forfeiture, are subjected to certain punishments. A conviction stated that *A. B.* was convicted of having been found on board a vessel liable to forfeiture; "for that it was found in the *British Channel*, having in a certain manner attached thereto divers, to wit, twenty casks (of the dimensions mentioned in s. 3,) and of the sort or description used, or intended to be used, for the smuggling of spirits, the said casks not being really necessary for the use of the vessel, and included in the regular official documents of the vessel;" Held, first, that the vessel being found in the *British Channel*, it was not necessary to allege that she was within 100 leagues of the coast. Secondly, that the statement that the casks were, "in a certain manner" attached to the vessel was sufficient. Thirdly, that it was not necessary to negative that the casks were part of the cargo, the conviction stating that they were not included in the official documents of the vessel. Fourthly, that the allegation that the casks were "of the sort or description used, or intended to be used, for the smuggling of spirits," being in the alternative, was bad. *Ex parte Pain*, H. 6 & 7 G. 4. 251

COPYHOLDER.

1. Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold: Held, that at the expiration of the two years, the copyholder might maintain an ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency, and the estate would not vest in the lord without any act done by him. *Doe dem. Evans v. Evans*. T. 7 G. 4. 584

2. Where copyholder in fee surrendered to the uses of a prior settlement, which contained a power to revoke the uses therein declared, and limit new ones: Held, that uses limited in execution of this power were good, although they had the effect of defeating prior vested estates. *Boddington v. Abernethy*, T. 7 G. 4. 776

COPYRIGHT.

The first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition. *Stockdale v. Onwlyn*, H. 6 & 7 G. 4. 173

CORONER.

Where a coroner holds two or more inquisitions at the same place on the same day, he is only entitled to one sum of 9d. a mile for travelling expences, from the place of his abode to the place where the inquisitions are holden. *The King v. The Justices of Warwick*, E. 7 G. 4. 430

CORPORATION.

1. Where a charter incorporated "the men, free burgesses of the borough of *C.*," and declared that for ever thereafter there should be within the borough to be chosen out of the free burgesses eighteen common councilmen, and then nominated eighteen persons to be the first common councilmen: Held, that this charter virtually made them free burgesses also. *The King v. Downes*, H. 6 & 7 G. 4. 182
2. By an ancient parliament roll it appeared, that the Commons by their petition exhibited in parliament prayed King *Edward* the Third, that the charter made to his liege burgesses of the town of *Bristol*, and the franchises by him granted to his said burgesses, should be ratified and confirmed in that parliament. The answer to the petition was, that it was assented and agreed in parliament that the franchises whereof the petition made mention, should be ratified and confirmed under the king's great seal. The charter was ratified by King *Edward* the third accordingly: Held, that the crown was not prevented by this proceeding in parliament from granting a new charter to the burgesses of *Bristol*, varying the mode of electing a mayor from that provided for in the charter recited in the petition to the king in parliament.

Queen *Anne*, by charter, granted to the burgesses of *Bristol*, that they should be a body corporate, &c. &c.; and she released to the corporation that power of removing its members which had been reserved by a former charter of King *Charles* the Second, and released any just

- cause of complaint which might be against the corporation for having acted in opposition to it: Held, that it did not thereby appear that the queen granted this charter in consideration of the former charter granted by King *Charles the Second*; and that the queen's charter was not therefore void, although the supposed charter of *Car. 2* did not exist. *The King v. Haythorne*, E. 7 G. 4. 410
3. By the governing charter of a borough, there were to be ten aldermen and ten capital burgesses, and vacancies in the body of aldermen were to be filled up out of the capital burgesses: Held, that the acceptance of the office of alderman by a capital burgess, even under a void election, operated as a surrender of the latter office; and that a person so elected, and afterwards ousted on *quo warranto*, was not thereby restored to the office of capital burgess: and, therefore, where a capital burgess became an alderman *de facto* by means of a void election, and in the character of alderman attended and voted at an election of a mayor, but was afterwards ousted on *quo warranto*: Held, that he could not be considered as having attended and voted as a capital burgess. *The King v. Hughes*, T. 7 G. 4. 886
- COSTS.**
- See PRINCIPAL AND AGENT.*
1. Sheriff arrested *A. B.* on the 13th of November upon a writ returnable the 15th, and suffered him to go at large without giving a bail-bond, and afterwards returned *capit corpus*. Bail above were put in on the 17th of December, and on the same day *A. B.* was rendered, but notice of render was not given until the 13th of January. An action against the sheriff for the escape was commenced on the 19th of December. The Court stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion. *Breakhouse v. The Sheriff of Derbyshire*, H. 6 & 7 G. 4. 244
2. Where the Court, after verdict for the plaintiff, granted a new trial without mentioning the costs, and the plaintiff discontinued: Held, that the defendant was not entitled to the costs of the trial. *Gray v. Cax*, E. 7 G. 4. 458
3. By the Middlesex court of conscience act, 23 G. 2, c. 33, s. 19, the defendant is entitled to double costs, if the jury find a verdict for less than 40s.: Held, that in such case, the verdict of the jury is conclusive, and a verdict having been found for 1*l.* 13*s.*, in an action brought to recover the amount of an apothecary's bill, the Court ordered a suggestion to be entered, although it appeared by affidavit that the debt originally exceeded 40*s.*, and had been reduced by partial payments on account, and although the plaintiff had failed in proving some of the items in his bill. *Chadwick v. Bunning*, E. 7 G. 4. 532
4. Upon a *quo warranto* information for usurping the office of bailiff, (he being the returning officer) of a borough sending burgesses to parliament, but not a town corporate, judgment having been given for the crown: Held, that the relator was not entitled to costs by the 9 Ann. c. 20. *Rex v. McKay*, T. 7 G. 4. 640
5. Where an attorney's bill is reduced on taxation by a sixth part, the client is entitled to the costs of taxation. They are not in the discretion of the court. *Higgins v. Woolcott*, T. 7 G. 4. 760
6. Where a true bill for perjury was found, and the judge at the assizes having refused to try it on account of manifest imperfections in the record, a new bill was preferred, whereupon the defendant was found guilty, but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred a new indictment (for the same offence,) and removed it into this Court by *certiorari*, the Court refused to stay the proceedings upon that indictment, until the prosecutor paid the costs of the former proceedings. *The King v. Tremearne*, T. 7 G. 4. 761
- COURT OF REQUESTS.**
- See Costs, 3.*
- COVENANT.**
1. Where an indenture was made "between *A.* for and on behalf of *B.* on the one part, and *C.* on the other part." *A.* being thereto authorized by writing under *B.*'s hand but not under seal, and *A.* executed the deed in his own name: Held, that *B.* could not maintain covenant on the deed, although the covenants were expressed to be made by *C.*, to and with *B.* *Berkeley v. Hardy*, E. 7 G. 4. 355
2. Where in covenant against an assignee of a lease, the plaintiff declared that all the right, &c. of the lessee vested in the defendant by assignment; and that afterwards the premises were out of repair, and defendant pleaded in bar, that for one period he was possessee of one-sixth of the premises as tenant in common with *A.*, *B.*, and *C.*; and for another period, of one-third as tenant in common with *B.* and *C.*, and that no more or greater interest in the premises ever came to him by assignment: Held, that the plea was bad in substance, as it could not be a bar to the whole action; that it was bad in form also, as it merely confessed that defendant had possession of part of the premises, and not that he was as-

signee. *Sembler*, that the defendant should have pleaded in abatement, and should have shown how the other persons became tenants in common with him. *Merceron v. Dawson*, E. 7 G. 4. 479

DEED.

See COVENANT, 1.

- 1 Sir C. H., tenant in tail, in possession of certain hereditaments and premises, subject to an outstanding term by indenture, in order to bar the estate tail, and all remainders expectant thereupon, and to limit the same to himself in fee, and in consideration of 10s., granted, bargained, and sold the said hereditaments and premises, and the reversion, &c., thereof to A. and B., their heirs and assigns, to hold to them A. and B., to the use of A., that he might become tenant of the freehold of the said premises, in order to suffer a recovery. The deed was afterwards duly enrolled as a bargain and sale: Held, that it operated as a grant of the reversion to A. and B., and that A. became solely seized of the premises, so as to be a good tenant of the freehold of the entirety. *Huggerston, Bart., v. Hanbury and Another*, H. 6 & 7 G. 4. 101
2. A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the license of the lessor. The lessee in January 1825, executed a deed which purported to convey all his real and personal property to trustees, for the benefit of his creditors. In April 1825, a commission of bankrupt issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of January 1825, was an act of bankruptcy and void, that it did not operate as a valid assignment of the tenant's interest in the lease, and, therefore, that there was no forfeiture. *Doe dem. Lloyd v. Powell and Others, Assignees*, H. 6 & 7 G. 4. 808

- 3 A woman before her marriage carried on trade, and being lame, kept a horse and gig for the purpose of going round to her customers. In contemplation of marriage, she by deed conveyed to a trustee all her household furniture, goods, and chattels, enumerated in a schedule, and the stock in trade, materials, and other articles then belonging to her, *in and about her said business*. The horse and gig were not included in the schedule, but after her marriage were used by her as before. In an action against the sheriff for taking the horse and gig under an execution against the husband, the jury found, that at the time when the deed was executed, the horse and gig belonged to the woman, "in and about her

business:" Held, that it was the property of the trustee. *Dear v. Brown*, E. 7 G. 4. 336

4. Where a party to any instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential.

Delivery to a third person for the use of the party in whose favor the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made. *Doe dem. Gaskins v. Knight*, T. 7 G. 4. 371

5. By lease and release, M. H. conveyed to J. W., and to his heirs and assigns, certain freehold and copyhold premises, to hold the same unto the said J. W., his heirs and assigns, from and immediately after the death of M. H., to, for, and upon the several uses, ends, intents, and purposes thereafter mentioned: Held, that by the premises an immediate estate of freehold was given to J. W., and that the *habendum* had not the effect of rendering the deed void, as giving a freehold in *futuro*. *Goddile on the demise of Dodwell v. Gibbe*, T. 7 G. 4. 700

6. By deed, lessor demised certain lands in the county of Dorset, except and always reserved out of the demise and grant unto the lessor, all timber trees and other trees, but not the annual fruit thereof: Held, that apple-trees were not within the exception. *Bullen v. Denning*, T. 7 G. 4. 842

7. C. and H. R., seised in fee of certain estates by lease and release, of the 1st and 2d of June, 1750, and a common recovery, settled them to such uses as C., H. R., D. his wife, and M. R., should by deed, executed in the presence of two witnesses appoint; and in default of appointment, as to part to the use of C. for life, and subject to C.'s life estate as to that part, and as to the whole of the residue, in default of appointment, to the use of H. R. in fee. By indenture of the 2d of October, 1751, (the execution of which by the parties of the second part was attested by three witnesses) between certain persons therein named of the first part; C., H. R., D. his wife, and M. R., of the second part; and W. M. J. L. R. W., and P. W., of the third part. C., H. R., D. his wife, and M. R., did grant, bargain, sell, release, and confirm, direct,

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limit and appoint, unto *W. M., J. L., R. W., and P. W.*, (in their actual possession, being by virtue of a lease for a year to them, by the said *C., H. R., D.*, his wife, and *M. R.*) the estates before mentioned, *habendum* to them, *W. M., J. L., R. W., and P. W.*, in fee, to the several uses thereafter mentioned: Held, that under these deeds the legal fee in the premises so settled did not vest in *W. M., J. L., R. W., and P. W.* *Wynne v. Griffith*, T. 7 G. 4. 923

DEMURRER.

See PRACTICE, 15.

DEVISE.

1. Testator, after giving his *T.* estate to certain persons for life, devised it "to *J. C.*, or his male heir, if any, free land, not to be mortgaged or sold; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the *first male heir of the branch of my uncle R. C.'s family*, yielding and paying unto such of the daughters of the aforesaid *R. C.*, which shall be then living, the sum of *100l.* each, at the time of the taking possession of the aforesaid estate." At the time when the will was made, *R. C.* was dead, having left five daughters, all married; the eldest had several daughters, but no son; each of the others had sons; and all these persons were known to the testator. *J. C.* died without issue, and the fourth daughter of *R. C.* died (before any of her sisters, and during the continuance of the life estates given by the will) leaving a son: Held, that her son was entitled to the *T.* estate, as being the *first male heir of the branch of R. C.'s family*, per *Hobroyd and Littledale, Js.; Bayley, J., dissentiente. Doe dem. Winter v. Perratt*, H. 6 & 7 G. 4. 48

2. Where *A. B.*, seised in fee of one moiety of certain premises in the county of *S.*, and tenant for life, with power of appointment by deed or will of the other moiety, devised as follows: "I give and devise all my freehold estates in *L.* and county of *S.*, or elsewhere, to my nephew *J. K.* for life, on condition, that out of the rents thereof he do from time to time keep such estates in repair:" Held, that this did not operate as an execution of the power, and passed that moiety only of which testator was seised in fee. *Denn on the demise of Nowell v. Roake* (in error.) T. 7 G. 4. 720

3. *A. B.* devised land to trustees in trust, to permit his daughter to receive the rents to her own use for her life; and from and after her death, he devised the same "unto the heirs of the body of his daughter, share and share alike, their heirs and assigns for ever." At the time of the

death of the testator, the daughter had one child, and afterwards had eleven others: Held, that the words "heirs of the body," in this will, meant *children*, and that the child born before the testator's death took a vested remainder in fee, subject to open and let in those who might be born afterwards. *Right dem. Shortridge v. Creber*, T. 7 G. 4. 866
4. Testator, by will duly executed, devised as follows: "On the attainment of the age of twenty-one years of the eldest son of *G. H.*, I give my real estate in *P.* to the said son for life, remainder to his first and every other son in strict settlement, and so on to every son of the said *G. H.*, remainder over. The eldest son attained the age of twenty-one, suffered a recovery to the use of himself in fee, and died, leaving a son, who died an infant and unmarried, and three daughters. The second son of *G. H.* attained the age of twenty-one, and left a son, still living: Held, that this son of the second son of *G. H.*, took an estate tail under the will *Le Hunt v. Hobson*, T. 7 G. 4. 803

EASEMENT.

See PLEADING, 9.

EJECTMENT.

See COPYHOLDER, 1.

- Where, in ejectment, *A.* was admitted to defend alone as landlord, and died before the termination of the action, having devised all his real estates to *B.*, and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless *B.* would appear and defend the action as landlord. *Doe dem. Grubb v. Grubb*, E. 7 G. 4. 457
- Where a declaration in ejectment was left at the house of the tenant in possession on *Saturday*, and the tenant afterwards acknowledged that he received it on the following *Sunday* (which was before the essoign day:) Held, that this was not good service. *Doe v. Roe*, T. 7 G. 4. 764

EVIDENCE.

- Extra parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title; and, therefore, if they sue in the ecclesiastical court to be quieted in the possession of such seats, this court will grant a prohibition. *Sembler*, that they cannot establish such a claim even by prescription. *Byerley v. Windus*, H. 6 & 7 G. 4. 1

2. In *assumpsit* for work and labor as an attorney, it was proved that the plaintiff had been retained in the year 1824, to conduct a suit for the defendant in the Court of Common Pleas, and that the bill of costs was incurred in that suit. It appeared that the plaintiff had not taken out any certificate during the year 1814, and four subsequent years. It was proved that he had been admitted an attorney of the Court of King's Bench, in 1792, and had not since that time been readmitted an attorney of that court, but there was no proof that he had not been readmitted in the Court of C. P.: Held, that the plaintiff's having acted as an attorney of the Court of C. P., in 1824, was *prima facie* evidence that he was at that time an attorney of that court, and that it then lay upon the defendant to show that at the time when the bill of costs was incurred the plaintiff was not an attorney of the Court of C. P., by showing that he had not been readmitted in that court. *Pearce v. Whale*, H. 6 & 7 G. 4. 38

3. An attorney entered into a written contract, whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted; no time was expressly fixed for the commencement of the partnership: Held, that no time being expressly appointed, the partnership commenced from the date of the agreement; that parol evidence was properly admitted to show that the person taken into partnership was not an attorney at the time when the agreement was executed; but that it could not be received to show that the agreement was not to take effect until he should be duly admitted, for that would make the agreement different from that which it purported to be, viz., an agreement for a present partnership. *Williams v. Jones*, H. 6 & 7 G. 4. 108

4. The statute of limitations is a bar to an action of trover, commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period.

The declaration was filed generally, as of *Michaelmas* term: Held, that the defendant might give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill." *Granger v. George*, H. 6 & 7 G. 4. 149

5. Where a declaration on a policy of assurance on goods, averred that it was effected in the names of the plaintiffs, as agents, and that A., B., C. and D. were interested in the goods to the full amount

insured, and that the policy was effected on their account and for their sole use and benefit, A. being called as a witness for the plaintiffs, was objected to, and thereupon they gave in evidence a deed poll executed by A., before the commencement of the action, whereby he released to the plaintiffs all actions which he might have by reason of the policy, or for any moneys to be recovered by them from the underwriters. They also gave in evidence an indenture, executed by A. after the commencement of the action, whereby (after reciting that plaintiffs had effected the policy; that A., B., C., and D., were the persons interested; that actions had been commenced in the names of the plaintiffs; and that they being desirous of an indemnity against the costs, the Court of C. P. had ordered A., B., C., and D. to indemnify, and that L. and R. had agreed to do it) A., B., C., and D., in consideration thereof and of 10s., assigned to L. and R. all their interest in the policy, and all the benefit to be derived therefrom, and all moneys to be recovered in the said actions, to and for their own exclusive use and benefit;" Held, that A. was, at all events, still liable to the attorney employed to bring the action, and therefore incompetent.

Semble, That the assignment to L. and R. was illegal, as maintenance. *Bell v. Smith and Others*, (in error,) H. 6 & 7 G. 4. 189

6. Declaration stated, that one A. was seised in fee of a messuage or inn, and yard thereto adjoining, and by indenture demised the same to the plaintiff for a term of years, which was undetermined; that the defendant was possessed of a certain other yard next to an² adjoining the premises of the plaintiff, as tenant thereof to A. B.; and that the defendant and his landlord granted to A., his heirs and assigns, license and authority to make and construct, at the costs of A., a certain gutter or drain from and out of the said messuage or inn, into and across, and out of a certain part of the yard of the defendant, unto and into the yard of the plaintiff: and that A., his heirs and assigns, and his farmers and tenants, occupiers of the messuage and yard, should have the foul water collected in the scullery of the said messuage or inn, to run and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the yard of the defendant, unto and into the yard of the plaintiff, for so long time as need and occasion should require for the convenient occupation of the messuage or its appurtenances. Breach, that defendant, without notice, obstructed the drain. Another count stated the grant to be for so long time as

- the defendant should be and continue in possession or occupation of the said last-mentioned land, or so long as the same should be requisite for the convenient occupation of the messuage. It appeared in evidence that the license to construct and continue the drain was by parol : Held, that as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed. *Hewlings v. Shippam*, H. 6 & 7 G. 4. 221
7. Whether a conviction of a waterman for carrying in his boat upon the river *Thames* more persons than are allowed by law, must be founded upon testimony given upon oath, *quare*. That point being doubtful, the Court refused a *mandamus* to compel a magistrate to enforce the conviction. *Rex v. Broderip*, Esq., H. 6 & 7 G. 4. 239
8. Declaration stated that the plaintiff agreed to let, and *A. B.* agreed to take, the milking of thirty cows, for the sum of 7*l.* 10*s.* per annum per cow, from the 14th of *February*, the rent to be paid quarterly, in advance, on the 14th of *February*, the 14th of *May*, the 14th of *August*, and the 14th of *November*, and the defendant agreed to pay the rent at the times therein mentioned. The plaintiff then averred performance of the agreement by him, and that *A. B.* took the milking of the thirty cows, and alleged as a breach the non-payment by the defendant of the rent, which became due on the 14th of *November*. It appeared in evidence at the trial, that in *May* it was agreed between the plaintiff and *A. B.*, the latter having then thirty-two cows, that the plaintiff instead of taking away two at that time, should be at liberty to take four at the fall of the year, and it appeared that between the 4th and the 20th of *October* the plaintiff did take away four cows, leaving *A. B.* after that period less than thirty. It was proved, that this alteration in the mode of using the cows made no substantial difference as to profit or loss : Held, by *Bayley and Horryd*, J.s., *Littledale* J. dissentient, first, that this was an entire contract for the letting of thirty cows, neither more nor less ; and, secondly, that the plaintiff in this action, against a surely, was bound to prove a literal performance of that contract, that he had not done so, inasmuch as he had shown that during part of the year he had allowed *A. B.* to have the milking of twenty-eight cows only. *Whitcher v. Hall*, H. 6 & 7 G. 4. 269
9. Declaration stated that the plaintiff distrained certain goods for 97*l.* 10*s.* rent ; that the tenant made his plaint to the defendant, then being sheriff of the county of C., praying that the goods might be replevied ; that thereupon the defendant being sheriff took a replevin bond from the tenant, and two sureties conditioned for the appearance of the tenant at the next county court, and *for his prosecuting his suit with effect*, which he had commenced against the plaintiff and her bailiffs for taking the goods, and for making a return of the goods distrained, if a return should be adjudged. It then stated, that the sheriff replevied and delivered the goods to the tenant : that the latter appeared at the next county court of the sheriff, and there levied his plaint against the plaintiff and her bailiffs, for taking and detaining his goods and chattles, &c. which plaint afterwards, to wit, on the 25th of *March*, 1828, was duly removed out of the county court of the *said sheriff of the county of C.* into the court of great sessions, by a writ of *re. fa. lo.* It then stated the declaration in the suit in replevin, the avowry and cognizance for rent in arrear, and that such proceedings were therupon had, that it was considered by the Court that the tenant should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, and that the defendants in replevin should go thereof without day, and that they should have a return of the goods. And after reciting that it was the duty of the defendant as sheriff to take care of the replevin bond, the present declaration alleged, that the tenant did not make a return of the goods according to the condition of the writing obligatory, but therein made default, whereby the bond became forfeited. Breach, that the defendant lost the bond, whereby the plaintiff was damnified. At the trial it appeared, that, in *December*, 1822, when the replevin bond was taken, the defendant was sheriff of the county of C., but that at the time when the plaint was removed out of the county court, he had ceased to be sheriff : Held, that this was no variance, the substance of the allegation being, that the plaint was removed out of the county court in which it was levied, and that having been proved by the record of the judgment in the replevin suit. It appeared that the jury, after finding that the rent in arrear was 97*l.* 10*s.*, and assessing the damages besides costs, at the prayer of the plaintiff and her bailiffs, according to the statute 17 *Car. 2.* c. 7, proceeded to inquire of the arrears of rent, and the value of the distress, and found the arrears to be 97*l.* 10*s.*, and the value of the distress to be the same. Besides the common law judgment, as stated in the declaration, there was a judgment under the statute 17 *Car. 2.* c. 7, that the defendants should recover against the plaintiff in replevin 97*l.* 10*s.*, and another sum si.

costs, and that the defendants should have execution thereof. There was also a prayer by the defendants in replevin, for a writ of *J. fa.* to the sheriff, and averment that it was granted to them, and it was proved that a *J. fa.* in fact issued, to which the sheriff returned *nulla bona*, but it was not proved that *any writ de retorno habendo had been issued*: Held, that the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with success, that being a breach within the meaning of the words "prosecuting with effect," and, therefore, that the plaintiff in this action had sustained an injury, and was entitled to recover, although no *writ de retorno habendo* had been issued.

Held also, that although the plaintiff had elected to proceed under the statute 17 Car. 2, c. 7, still he was not confined to his execution under that statute, but might also proceed against the sureties upon the replevin bond, or against the sheriff for his negligence in the loss of it.

Held, also, that assuming the plaintiff had not proved the breach alleged in the declaration, yet as it appeared that there had been a breach of the condition of the bond by reason of the plaintiff in replevin not having prosecuted his suit with effect, the plaintiff was entitled to recover, although a breach in that respect was not formally assigned. *Perron v. Benet*, H. 6 & 7 G. 4. 284

10. A probate stamp is *prima facie* evidence that the executor has received assets to the amount covered by the stamp. *Foster v. Blakelock, Executor*, E. 7 G. 4. 328

11. Where, in ejectment against a devisee, the question turned on the sanity of the testator at the time of making the will: Held, that an executor who took a pecuniary interest under the will was a competent witness to support it. *Doe dem. Wood and Another v. Teige and Others*, E. 7 G. 4. 335

12. In case against the sheriff for a false return to a *J. fa.*, the declaration stated, that by the judgment of the court, the plaintiff recovered against *A. B.* 391, which were adjudged to him for his damages by him sustained as well by occasion of his not performing certain promises and undertakings as for his costs, &c. At the trial, it appeared by the judgment produced in evidence, that as to all the counts in the declaration except the first, a *remittitur* was entered, and that the damages were given for the non-performance of the promise and undertaking in that count mentioned: Held, that this was a fatal variance. *Edwards v. Lazarus and Another*, E. 7 G. 4. 339

13. Where in *assumpsit* for goods sold and delivered, to which the general issue was

pledged, a witness called by the plaintiff to prove the defendant's liability, admitted on the *voir dire* that he (witness) was jointly liable: Held, that this did not render him incompetent. *Blackett v. Wier*, E. 7 G. 4. 365

14. In *assumpsit* by an administratrix upon a promissory note given to her intestate, it was averred in the declaration that administration of all and singular the goods and chattels of the intestate was duly granted by the bishop of C. Plea, that the plaintiff never had been nor was administratrix of all and singular the goods and chattels of the intestate in manner and form as she had alleged in her declaration, and issue being joined on this plea, the letters of administration granted by the bishop of C., were produced by the plaintiff, but it was also proved, that the intestate at the time of his death had *bona notabilia* in another diocese in a different province, and no evidence was given as to the residence of the defendant at the death of the intestate: Held, first, that the letters of administration were not void, inasmuch as the other dioceses in which the intestate had *bona notabilia* was in a different province.

Held, secondly, that the only question raised upon the issue was, whether the letters of administration were duly granted by the bishop of C., and that it was no part of the issue whether the defendant at the death of the intestate resided within the diocese of C. The fact of his residence elsewhere, if relied upon, ought to have been specially pleaded. *Stokes v. Bate*, E. 7 G. 4. 491

15. A register of baptism *per se* is no evidence of the place of birth of the party baptised. *The King v. North Petherton*, E. 7 G. 4. 508

16. Where an order of removal is appealed against, and is quashed generally by the sessions, the appellant on the trial of another appeal may show by evidence the distinct ground upon which the former order was quashed. *The King v. The Inhabitants of Wheatslock*, E. 7 G. 4. 511

17. In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it: Held, that it was not necessary for the plaintiff to call the subsisting witness to prove the execution of the lease. It was averred in the declaration, that the defendant continued in possession until the end of the term, and whilst he was in possession as such assignee suffered the premises to be out of repair. The proof was, that he had ceased to be assignee

- before the expiration of the term: Held, that this was not any variance. *Burnell and Others, Executors, v. Lynch*, T. 7 G. 4. 589
18. In an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias*, the sheriff proved that he had seized all the goods of the debtor under a *fieri facias* in another suit, before the plaintiff's writ was delivered to him. The plaintiffs in answer proved that the judgment upon which the first execution was sued out, was entered up upon a warrant of attorney fraudulently executed by the debtor in order to defeat the plaintiff's execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff, on the first day of the next term, was served with a rule to return the writ of *fieri facias* under which he had first levied. He did not give any notice to the plaintiffs by whom the second *fieri facias* had been sued out, that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff, at whose suit the first *fieri facias* had been sued out: Held, that this was misconduct in the sheriff, and rendered him liable to the plaintiffs in the second execution. *Quare*, whether the sheriff, if not guilty of such negligence or misconduct, would have been liable to the action. *Warmoll and Another v. Young*, T. 7 G. 4. 660
19. Where in ejectment the plaintiff gave evidence of some acts of ownership exercised upon the land in dispute by the lessor's ancestor, and of a fine levied by him about the same time: and the defendant proved some acts of ownership by the vicar, and gave evidence which tended to show that the land was formerly part of the church-yard; the judge refused to leave it as a question to the jury, whether the parties to the fine had any estate of freehold, but told them that the fine was a conclusive bar to the vicar. On error, held, that this was wrong, and the judgment was reversed. An adverse possession for twenty years is not a bar to a rector or vicar, except as against the same incumbent who submitted to such possession. *Runcorn v. Doe on the demise of J. Cooper* (in error,) T. 7 G. 8. 696
20. Where in case against a carrier for the loss of goods delivered to him at *Dublin* to be conveyed to *Liverpool*, it was objected for the defendant, that unless the goods were proved to be duly entered at the Custom-house, the importation was illegal, and the contract with the carrier void: Held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered. *Sims v. Dixon and Others*, T. 7 G. 4. 758
21. *Seable*, that the owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be owner of the soil. *Duke of Somerset v. Fogwell*, T. 7 G. 4. 875
22. In an action by *A.*, his wife, and *B.*, the declaration stated, that the plaintiffs had agreed to let to the defendant certain lands; that the defendant became tenant to the plaintiffs, and in consideration that the plaintiffs had promised the defendant to perform all things in the agreement by them to be performed, the defendant promised, &c. The agreement given in evidence, purported to be made by an agent for the wife of *A.* and *B.* only, but *A.* had subsequently received rent from the tenant: Held, that the consideration was not proved as alleged, inasmuch as *A.* was not bound by the agreement before the receipt of rent, and therefore was not a joint contractor *ab initio*. The second count stated, that the defendant was tenant to the plaintiffs, and in consideration had promised to use the lands in a husbandlike manner. The proof was, that he had agreed to farm the land in a husbandlike manner, to be kept constantly in grass: Held, that this also was a variance. *Saunderson v. Griffiths*, T. 7 G. 4. 909

EXECUTION.

See BANKRUPT, 5, 8. *SHERIFF*, 1.

FINE.

See EVIDENCE, 19.

FISHERY.

Where a subject is owner of a several fishery in a navigable river, where the tide flows and refluxes, granted to him (as must be presumed) before *Magna Charta*, by the description of "*separatus piscariæ*," that is an incorporeal and not a territorial hereditament, and a term for years in it cannot be created without deed. *The Duke of Somerset v. Fogwell*, T. 7 G. 4. 875

FORFEITURE.

See ASSIGNMENT.

Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold: Held, that at the expiration of the two years the copyholder might maintain an ejectment for the land, against one who had ousted him, inasmuch as the pardon restored his compe-

tency, and the estate would not vest in the lord without any act done by him. *Doe d. Evans v. Evans*, T. 7 G. 4. 584

FORGED CHECK.

Where a check, drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum : Held, that he could not charge the customer for any thing beyond the sum for which the check was originally drawn. *Hall and Another v. Fuller and Others*, T. 7 G. 4. 750

FRAUDS, STATUTE OF.

See BROKER.

1. The note or memorandum in writing of the bargain, in the case of a sale of goods for the price of 10*l.* or upwards, required by the statute 29 Car. 2, c. 3, s. 17, must state the price for which the goods were sold. *Ellmore v. Kingacote*, T. 7 G. 4. 583
2. A verbal agreement made on the 25th of September for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the fourth section of the statute of frauds, but a sale of goods, wares, and merchandizes within the seventeenth section. *Evans v. Roberts*, T. 7 G. 4. 629

FREIGHT.

By a charter party, the freighter of a ship agreed to pay for her 200*l.* per month for six months certain, and so in proportion for any longer time that she might be in his employ. The ship was to be kept in repair by the owner. Before the termination of the voyage for which the ship was chartered, certain repairs were necessary, which occupied a period of twenty-eight days : Held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight. *Ripley v. Seafie*, H. 6 & 7 G. 4. 167

FREEHOLD IN FUTURO.

See DEED, 5.

HIGHWAYS. *See RATE.*

INCLOSURE ACT.

1. An inclosure act authorised the com-

missioners to stop up old roads in the parish, besides those over the lands to be inclosed, provided it were not done without the concurrence of two justices. *Semble*, that under this clause the concurrence of two justices was necessary to warrant the stopping up of any part of a public footway which passed through an old inclosure. By the 41 G. 3, c. 169, s. 8, the commissioners are authorized to set out and appoint the public carriage roads and highways, through and over the lands and grounds to be inclosed, and to divert, turn, and stop up any of, the roads and tracks upon and over all or any part of the said lands and grounds : provided, that in case the commissioners shall be empowered by any local act to stop up any old or accustomed road passing or leading through any part of the old inclosures in such parish, the same shall in no case be done without the concurrence and order of two justices : Held, that under this section the commissioners were authorized to stop up or divert footways as well as carriage roads ; and that the proviso at the end of the section was not confined to carriage roads, but extended to every species of ways ; and, therefore, where the commissioners were empowered by the local inclosure act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held, that in order effectually to stop up a public footway, passing partly over the lands to be inclosed, and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices, and no such order or concurrence having been obtained, it was held, that a footway which the commissioners ordered to be stopped up, had not been effectually stopped, but continued a public footway. *Logan v. Burton*, E. 7 G. 4. 513

2. Where an inclosure act directed that all great tithes payable to the rector of the parish should be extinguished, and that the commissioners should ascertain the net value of such tithes, and affix a fair clear annual rent or sum of money per acre in lieu of such tithes, and as an adequate compensation for the same to the rector : Held, that the rector was, in respect of such rents, rateable to the repair of the highways. *The King v. Lacey, Clerk*, T. 7 G. 4. 702

INDICTMENT.

See CONSPIRACY.

1. Indictment for perjury alleged that on the trial of an indictment against J. H., defendant, intending to injure J. H., and to cause him to be wrongfully convicted,

appeared as a witness, and was sworn, &c., "and then and there falsely and maliciously gave false testimony against J. H., by falsely depositing," &c., and so the jurors say that defendant committed wilful and corrupt perjury: Held, in arrest of judgment, that this count was bad, for not alleging that defendant *wilfully*, or *corruptly* swore falsely.

- Another count alleged, that at the trial of J. H. he was found guilty, "by means of the false and material testimony of defendant in the first count mentioned;" that a rule *non* for a new trial was granted, and that defendant knowingly, falsely, wilfully, and corruptly made affidavit that the evidence given by him at the trial of J. H. was true, "whereas it was false in the particulars in the first count assigned and set forth." Held, that this count also was bad; for that it should have averred distinctly that defendant was sworn as a witness, and deposed to certain facts at the trial of J. H., instead of leaving it to be taken by *intendit*. *The King v. Stevens*, H. 6 & 7 G. 4. 246
2. An indictment under the 39 G. 3, c. 85, against a servant for embezzlement, must set out specifically some article of the property embezzled; and an indictment charging that the prisoner "took and received, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10*l*., and afterwards embezzled the same," was held bad. *The King v. Flower*, T. 7 G. 4. 736

3. Where a true bill for perjury was found, and the judge at the assizes having refused to try it on account of manifest imperfections in the record, a new bill was preferred, whereupon the defendant was found guilty, but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred a new indictment (for the same offence,) and removed it into this Court by *certiorari*; the Court refused to stay the proceedings upon that indictment; until the prosecutor paid the costs of the former proceedings. *The King v. Tremearne*, T. 7 G. 4. 761

INFANT.

See Bills of Exchange, 2.

INSOLVENT ACT.

Where a party had joined in a bond with the grantor of an annuity to secure the payment of it, and afterwards obtained his discharge under the insolvent act, having duly inserted the bond in his schedule: Held, that he could not be arrested upon the bond for arrears of the annuity afterwards becoming due. *Collins v. Lightfoot*, T. 7 G. 4. 581

INSURANCE.

Upon a policy of insurance upon ship at and from London to New South Wales, and at and from thence to all ports and places in the East Indies or South America, with liberty for the said ship, in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the Channel, Cork in Ireland, Madeira, Cape of Good Hope, St. Helena, and wheresoever the ship might proceed to, as well on this as on the other sides of the Capes of Good Hope and Horn, and for all purposes whatsoever, particularly to trade and sail backwards and forwards, and forwards and backwards: Held, that after the arrival of the ship at New South Wales, she was protected by the policy so long only as she was sailing on a voyage either to South America or to the East Indies, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to South America or to the East Indies. *Bottamley v. Bowell*, H. 6 & 7 G. 4. 910

JUDGMENT, as in a case of Non-suit

See Practice, 16.

JURY.

Where, on the trial of an indictment for perjury, it being necessary to swear talesmen from the common jury panel to serve on the jury, and one J. Williams being called, his son, R. H. Williams, (at the request of his father, and without collusion with the prosecutor or defendant,) appeared for him and was sworn and served on the jury, he not being of age, nor having a qualification by estate, nor being on any panel: Held, that there was a mistrial, and that a rule obtained for a new trial must be made absolute. *The King v. Tremearne*, H. 6 & 7 G. 4. 254

JUSTICES.

1. Upon an appeal against an order for the allowance of overseers' accounts: a magistrate, a rated inhabitant of the parish, cannot vote either on the determination of the appeal, or on a question as to granting a case for the opinion of this Court. *The King v. Gudridge and Others*, E. 7 G. 4. 453
2. The 13 G. 3, c. 78, s. 48; requires that the accounts of the surveyors of the highways should be laid before one justice, and if he refuses to allow them, they are to be taken before the justices at petty sessions, where such parts as are objected to by the one justice are to be examined, and to be allowed or disallowed as the

Justices think fit: Held, that the justices at petty sessions have no original jurisdiction over the accounts; and an order having been made by them for the allowance of a surveyor's accounts, which had not been previously laid before one justice, the Court granted a *ceteriorari* to remove it, and quashed the order. *The King v. The Justices of Somersetshire*, T. 7 G. 4. 816

LANDLORD AND TENANT:

See BANKRUPT, 2; DEED, 6. LEASE.

- 1 Tenant from year to year at a rent payable half yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year. Before the next half year expired, the landlord let the premises to another tenant, who occupied the same: Held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant. *Hall v. Burgess*, E. 7 G. 4. 332
- 2 Land belonging to a parish was occupied by A., and he paid rent to the churchwardens. They executed a lease of the same land for a term of years to B., and gave A. notice of the lease. In an action for use and occupation by B. against A.: Held, that A. was not estopped by having paid rent to the churchwardens from disputing B.'s title, and that the latter could not derive a valid title from the churchwardens. *Phillips v. Pearce*, E. 7 G. 4. 433

LARCENY.

The statute 3 G. 4 c. 38 s. 2, enacts, that if any servant shall steal any money from his master, and shall be convicted thereof, and be *entitled to the benefit of clergy*, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted and entitled to benefit of clergy, shall be transported for fourteen years: Held, that a servant convicted of petit larceny was not within the meaning of this statute, and that he was subject to be transported for seven years only. *The King v. Ellis*, E. 7 G. 4. 395

LEASE.

- 1 In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it: Held, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease. The lessee,

by deed poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee: Held, that the lessee might maintain an action upon the case founded in tort against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. *Burnett, and Others, Executors, v. Lynd*, T. 7 G. 4. 589

- 2 Where a lease contained a proviso for re-entry if the lessee committed waste to the value of 10s., and the lessor re-entered and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10s. value, and substituted others of a different description: Held, that the waste contemplated in the proviso, was waste producing an injury to the reversion; and that it was a question for the jury, whether, under all the circumstances, such waste to the value of 10s. had been committed. *Doe dem. Earl of Darlington v. Bond, and Others*, T. 7 G. 4. 555

LIBEL.

See PLEADING, 6.

LICENSE.

See EVIDENCE, 6. PLEADING, 9.

LIMITATIONS, STATUTE OF.

- 1 The statute of limitations is a bar to an action of trover, commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period. The declaration was filed generally, as of Michaelmas term: Held, that the defendant might give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill." *Granger v. George*, H. 6 & 7 G. 4. 149
- 2 A declaration stated that the plaintiff had contracted with A. B. to lend him the sum of 3000L at interest; the repayment, with interest, to be secured by a warrant of attorney and certain mortgages of freehold and leasehold premises,

provided they should be found to be a sufficient security for the same; that the plaintiff retained defendant as an attorney, to ascertain whether they would be a sufficient security; that the defendant accepted such retainer, and that it became his duty to use due care and diligence to ascertain whether the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.* and interest. Breach, that defendant did not use due care and diligence in that behalf, but wholly neglected so to do, and, on the contrary, falsely represented to the plaintiff, that the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.*, with interest, whereupon the plaintiff lent the 3000*l.* to A. B.; that they were not a sufficient security, by reason whereof the plaintiff had wholly lost the interest due and payable on the said sum of 3000*l.*, amounting to a large sum, to wit, the sum of 1000*l.*, and was likely wholly to lose the said principal sum of 3000*l.* At the trial it appeared, that in the year 1814, the defendant had been retained by the plaintiff to ascertain whether the warrant of attorney and mortgages were a sufficient security for the 3000*l.* and interest, and that at that time he represented they were so. In the year 1820, (the interest to that time having been regularly paid.) it was discovered that the warrant of attorney and mortgages were not a sufficient security: Held, that the misconduct or negligence of the attorney constituted the cause of action, and that the statute of limitations began to run from the time when the defendant had been guilty of such misconduct, and not from the time when it was discovered that the securities were insufficient. *Howell v. Young*, H. 6 & 7 G. 4. 259

3. Where, in ejectment, A. was admitted to defend alone as landlord, and died before the termination of the action, having devised all his real estates to B., and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless B. would appear and defend the action as landlord. *Doe dem. Grubb v. Grubb*, E. 7 G. 4. 457

LUNATIC.

Where a tradesman supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before and at the time when the goods were ordered and supplied: Held, that this was not a sufficient defence to an action for the

price of the goods, the tradesman at the time when he received the orders and supplied the articles not having any reason to suppose that the defendant was a lunatic. *Baxter and Another v. The Earl of Portsmouth*, H. 6 & 7 G. 4. 170

MANDAMUS.

Whether a conviction of a waterman for carrying in his boat upon the river *Thames* more persons than are allowed by law, must be founded upon testimony given upon oath, *querre*.

That point being doubtful, the Court refused a *mandamus* to compel a magistrate to enforce the conviction. *Rex v. Broderip*, Esq., H. 6 & 7 G. 4. 239

MARKET.

The king granted to A. that he, his heirs and assigns, should have and hold a market in a place therein described, and within certain specific limits there, for the buying and selling of all kinds of vegetables, fruits, flowers, roots, and herbs. The grantee of the market had, for his own profit, permitted part of the space, within the limits described, to be used for other purposes than those specified in the grant. The remaining part of the space, within which the market was to be held by the terms of the grant, became insufficient for the public accommodation, and there was not, on ordinary occasions, space within the market for carts and wagons resorting thither with vegetables, &c. Held, that the lord of the market could not maintain an action against an individual for selling vegetables in the neighborhood of his market, and thereby depriving him of toll, even at a time when there was room in the market, without showing that, on the day when the sale took place, he gave notice to the seller that there was room within the market. *Prince and Another v. Lewis and Another*, E. 7 G. 4. 363

MARRIAGE.

A child born in *Scotland*, of unmarried parents, domiciled in that country, and who afterwards intermarry there, is not by such marriage rendered capable of inheriting lands in *England*. *Doe dem. Birthistle v. Vardill*, E. 7 G. 4. 438

MASTER AND SERVANT.

Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a

horse belonging to a third person : Held, by Abbott, C. J., and Littledale, J., that the owner of the carriage was not liable to be sued for such injury. *Bayley and Holroyd Js. dissentientia. Laugher v. Pointer*, T. 7 G. 4. 547

MERGER.

4. was lessee of premises for a term of twenty-one years, which would expire at *Michaelmas*, 1809. In December, 1799, A. took a further lease of the same premises for sixty years, to commence from *Michaelmas* 1809. The lessor died in December, 1800, and devised the premises in question to A., the lessee, for his life. By lease and release, A. in 1806 conveyed his life estate to B. Held, that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life. *Doe dem. Rawlings and Others v. Walker and Others*, H. 6 & 7 G. 4. 111

NOTICE OF APPEAL.

See APPEAL.

OVERSEER.

See APPEAL, 2.

OUTLAWRY.

Where, in error, to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *exigi facias*, the plaintiff in error was beyond seas ; and defendant pleaded, that before the awarding and issuing of the *exigi facias*, plaintiff in error of his fraud and covin, and in order to defeat defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of England, and of such his fraud and covin voluntarily remained in parts beyond the seas until after the outlawry, whereupon issue was joined and found for the defendant : Held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error non obstante veredicto. *Bryan v. Wagstaff* (in error,) E. 7 G. 4. 314

OVERSEERS.

A pauper, being casually in the parish of A., met with an accident which disabled her, and which required immediate medical assistance. The constable of that parish improperly removed her to her own (which was the adjoining) parish, and sent for the surgeon of that parish to attend her : Held, that it was the duty of the parish officers of A. to

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have taken the pauper to the nearest convenient house in A., and to have provided medical attendance there, and that they could not, by improperly removing her to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them, and that they were therefore liable to pay the surgeons bill. *Tomlinson v. Bentall*, T. 7 G. 4. 739

PARDON.

See COPYHOLDER.

PARTNERSHIP.

1. An attorney entered into a written contract, whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted ; no time was expressly fixed for the commencement of the partnership : Held, that no time being expressly appointed, the partnership commenced from the date of the agreement. *Williams v. Jones*, H. 6 & 7 G. 4. 108
2. A., B., and C. were in partnership in trade. A. retired from the firm, and notice of that fact was given to D., a creditor of the firm, and that B. and C. continued the business, and assumed the funds, and charged themselves with the debts of the partnership. The balance due to D. was transferred to his credit by the new firm, and D. was informed of this transfer, and assented to it. He afterwards drew upon the new firm for a part of this balance, and they accepted and paid his bills. The new firm having become insolvent, it was held, that C. continued liable for the debt due to D. from the old firm. *David v. Ellice*, H. 6 & 7 G. 4. 196
3. Where A. the keeper of a coach office, and a part-owner in several coaches, made a contract with B. for the carriage of parcels which he was in the habit of sending from that office to various places : Held, that this bound the owners of all the coaches in which A. was a part-owner, and as well those who became partners after the making of the contract as those who were so before. *Hobby and Others v. Mears and Others*, E. 7 G. 4. 504

PAVEMENT COMMISSIONERS.

See BANKRUPT, 6, 7.

PAYMENT.

1. A., on the 18th of March, 1894, paid into the Totness country bank a quantity of notes of a bank at Dartmouth to bear interest from that day. The Totness bankers sent the notes early on the following morning to the Dartmouth bank. Upon the re-

ceipt of them there, the latter, according to their usual course of dealing with the *Tolness* bankers, gave them credit in account for the amount of the notes. The course of business between the two banks was, that if the *Tolness* bank received notes of the *Dartmouth* bank in the course of the day, they sent the notes on the following morning to the *Dartmouth* bank. If the *Dartmouth* bank received notes of the *Tolness* bank, they, at the close of the business of the day, sent them to the *Tolness* bank. If the balance of the day was in favor of either bank, the amount was paid by a bill upon their respective agents in London. The *Dartmouth* bank continued to pay their notes until the evening of the 19th: Held, that as between *A* and the *Tolness* bankers, the taking of credit in account for the amount of the *Dartmouth* notes was equivalent to payment to the *Tolness* bankers, and, therefore, that *A* was entitled to recover the amount from them. *Gillard v. Wise*, H. 6 & 7 G. 4.

2. *A*, being indebted to *B*, the latter agreed to accept the amount by instalments, *C*, undertaking to guarantee the payment of them. On the day after the first instalment became due, *C* remitted to *B*, the amount partly in bills not then due, and partly in bank notes. *B* wrote, acknowledging the receipt of the bills and notes, and said, they should be placed to *A*'s account: Held, that although he was not bound to accept the remittance so made, yet having done so, he had thereby waived all objection to the time when it was sent, or the manner in which it was made up, and that he could not afterwards maintain an action against *A* upon the ground of his having failed to pay the first instalment. *Skippon and Another v. B. Cason*, E. 7 G. 4. 378

PENAL ACTION.

The 3 G. 4, c. 126, s. 65, enacts, "That no trustee of any turnpike road shall have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act; nor shall any such trustee let out for hire any wagon, wain, cart, &c., or any horse, &c., for the use of any turnpike road for which he shall act as a trustee, nor by himself or any other person for or on his account directly or indirectly receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act during the time he shall be acting as a trustee of such road, and that every trustee so offending shall for every such offence forfeit 100£." Sect. 143 enacts, "That if the penalty,

shall exceed the sum of 20£, it shall be recoverable by action of debt in any of the superior courts, and the plaintiff, if he recover in any such action, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that twenty-one days notice be given to the party offending previous to the commencement of such action, and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed." One *A* had contracted with the trustees of a turnpike road to make certain improvements on the road, and he agreed to perform the same for a specific sum. One of the trustees afterwards agreed with *A* to let him his horses and cart at the rate of 5s. per day, and he did so let them, and they were used on that part of the road which was agreed to be improved by *A*: Held, that the trustee was liable to the penalty imposed by section 65 of the act.

In the notice of action, it was not stated that the defendant, at the time when he let his cart and horse to hire, was a trustee acting in execution of the act: Held, that the notice was, therefore, bad.

Held, also, that a party omitting to give the notice required by act of parliament was barred, not merely of his right to recover the costs of his action, but of his right of action altogether. *Bawdy v. White*, H. 6 & 7 G. 4. 125

PERJURY.

See *Insolator*, 1.

PLEADING.

1. Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title; and, therefore, if they sue in the ecclesiastical court to be quieted in the possession of such seats, this court will grant a prohibition: *Smede*, that they cannot establish such a claim even by prescription: *Byerley v. Wards*, H. 6 & 7 G. 4.
2. The 3 G. 4, c. 126, s. 65, enacts, "That no trustee of any turnpike road shall have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act; nor shall any such trustee let out for hire any wagon, wain, cart, &c., or any horse, &c., for the use of any turnpike road for which he shall act as a trustee, nor by himself or any other person for or on his account directly or indirectly receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act during the time he shall be acting as a trustee of such road, and that every trustee so offending shall for every such offence forfeit 100£."

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The declaration was filed generally, as of Michaelmas term: Held, that the defendant might give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill." *Granger v. George*, H. 6 & 7 G. 4: 149

Where a commission of bankrupt issued against a person then in custody at the suit of the petitioning creditor, and who afterwards applied to the Court of K. B., and obtained his discharge under the 49 G. 3, c. 121, s. 14, on the ground that he had become bankrupt, and that his detaining creditor had proved under the

commission: Held, that he could not, in an action against the assignees, dispute the validity of the commission. *Watson v. Wace*, H. 6 & 7 G. 4: 153

5. Where a tradesman supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before and at the time when the goods were ordered and supplied: Held, that this was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders and supplied the articles not having any reason to suppose that the defendant was a lunatic. *Baxler and Another v. The Earl of Portsmouth*, H. 6 & 7 G. 4: 170
6. The first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition. *Stockdale v. Onslow*, H. 6 & 7 G. 4: 173
7. Words spoken of an innkeeper imputing insolvency are actionable, although at the time when they were spoken, an innkeeper was not subject to the bankrupt laws. *Whittington v. Gladwin*, H. 6 & 7 G. 4: 180

8. In an action against the bank of England, the declaration stated that the plaintiff was lawfully possessed of certain 3 per cent. annuities in the care of the defendants, and standing in their books in the name of the plaintiff, for the purpose, amongst other things, of paying him all the dividends which might accrue due in respect of the stock, whilst the same should not be transferred in the said books with the authority of the plaintiff, and that the plaintiff was entitled to the stock, and that it had not been transferred in the books to any person by his order or authority, and thereupon it became the duty of the defendants to pay to the plaintiff the dividends whilst the same was not transferred, yet the defendants, although requested, had not paid them: Held, upon error, that this declaration was bad, on the ground that it did not appear that the dividends had ever been issued by government to the bank, and that until they were issued, it was not the duty of the bank to pay them. *The Governor and Company of the Bank of England v. Davis (in error.)* H. 6 & 7 G. 4: 185
9. Declaration stated, that one A. was seized in fee of a messuage or inn, and yard thereto adjoining, and by indenture demised the same to the plaintiff for a term of years, which was undetermined; that the defendant was possessed of a certain other yard next to and adjoining the premises of the plaintiff, as tenant thereof to A. B.; and that the defendant and his landlord granted to A., his heirs and as-

signs, license, and authority to make and construct, at the costs of *A.*, a certain gutter or drain from and out of the said messuage or inn, into and across, and out of a certain part of the yard of the defendant, unto and into the yard of the plaintiff; and that *A.*, his heirs and assigns, and his farmers and tenants, occupiers of the messuage and yard, should have the foul water collected in the scullery of the said messuage or inn, to run and flow from and out of the same, through and along the said gutter or drain, into, upon, over, across, and out of the said part of the yard of the defendant, unto and into the yard of the plaintiff, for so long time as need and occasion should require for the convenient occupation of the messuage or its appurtenances. Breach, that defendant, without notice, obstructed the drain. Another count stated the grant to be for so long time as the defendant should be and continue in possession or occupation of the said last-mentioned land, or so long as the same should be requisite for the convenient occupation of the messuage. It appeared in evidence, that the license to construct and continue the drain was by parol: Held, that as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed. *Hewlings v. Shippam*, H. 6 & 7 G. 4. 291

10. Indictment for perjury alleged, that on the trial of an indictment against *J. H.*, defendant, intending to injure *J. H.*, and to cause him to be wrongfully convicted, appeared as a witness, and was sworn, &c., "and then and there falsely and maliciously gave false testimony against *J. H.*, by falsely depositing," &c., and so the jurors say, that defendant committed wilful and corrupt perjury: Held, in arrest of judgment, that this count was bad, for not alleging that defendant *wilfully* or *corruptly* swore falsely.

Another count alleged, that at the trial of *J. H.* he was found guilty, "by means of the false and material testimony of defendant in the first count mentioned;" that a rule nisi for a new trial was granted, and that defendant knowingly, falsely, wilfully, and corruptly made affidavit that the evidence given by him at the trial of *J. H.* was true, "whereas it was false in the particulars in the first count assigned and set forth." Held, that this count also was bad, for that it should have averred distinctly that defendant was sworn as a witness, and deposed to certain facts at the trial of *J. H.*, instead of leaving it to be taken by intendment. *The King v. Stevens*, H. 6 & 7 G. 4. 246

11. Declaration stated that the plaintiff

agreed to let, and *A. B.* agreed to take the milking of thirty cows, for the sum of 7*l.* 10*s.* per annum per cow, from the 14th of February, the rent to be paid quarterly, in advance, on the 14th of February, the 14th of May, the 14th of August, and the 14th of November, and the defendant agreed to pay the rent at the times therein mentioned. The plaintiff then averred performance of the agreement by him, and that *A. B.* took the milking of the thirty cows, and alleged as a breach the non-payment by the defendant of the rent, which became due on the 14th of November. It appeared in evidence at the trial, that in May it was agreed between the plaintiff and *A. B.*, the latter having then thirty-two cows, that the plaintiff, instead of taking away two at that time, should be at liberty to take four at the fall of the year; and it appeared, that between the 4th and the 20th of October, the plaintiff did take away four cows, leaving *A. B.* after that period less than thirty. It was proved, that this alteration in the mode of using the cows made no substantial difference as to profit or loss: Held, by *Bayley* and *Hobroyd*, Jr., *Littledale*, J., dissentiente, first, that this was an entire contract for the letting of thirty cows, neither more nor less; and, secondly, that the plaintiff in this action, against a surety, was bound to prove a literal performance of that contract, that he had not done so, inasmuch as he had shown that during part of the year he had allowed *A. B.* to have the milking of twenty-eight cows only. *Whitcher v. Hall*, H. 6 & 7 G. 4. 369

12. Declaration stated that the plaintiff distrained certain goods for 9*l.* 10*s.* rent, that the tenant made his plaint to the defendant, then being sheriff of the county of *C.*, praying that the goods might be replevied; that thereupon the defendant being sheriff took a replevin bond from the tenant, and two sureties conditioned for the appearance of the tenant at the next county court, and *for his prosecuting his suit with effect*, which he had commenced against the plaintiff and her bailiffs for taking the goods, and for making a return of the goods distrained, if a return should be adjudged. It then stated, that the sheriff replevied and delivered the goods to the tenant, that the latter appeared at the next county court of the sheriff, and there levied his plaint against the plaintiff and her bailiffs, for taking and detaining his goods and chattles, &c. which plaint afterwards, to wit, on the 25th of March, 1823, was duly removed out of the county court of the *said sheriff of the county of C.*, into the court of great sessions, by a writ of *re. fa. lo.* It then stated the declaration in the suit in replevin, the avowry and cognizance for

rent in arrear; and that such proceedings were thereupon had, that it was considered by the Court that the tenant should take nothing by his writ, but that he and his pledges, to prosecute, should be in mercy, and that the defendants in replevin should go thereof without day, and that they should have a return of the goods. And after reciting that it was the duty of the defendant, as sheriff, to take care of the replevin bond, the present declaration alleged, that the tenant did not make a return of the goods according to the condition of the writing obligatory, but therein made default, whereby the bond became forfeited. The breach was, that the defendant lost the bond, whereby the plaintiff was damnified. At the trial it appeared, that, in December, 1822, when the replevin bond was taken, the defendant was sheriff of the county of C., but that at the time when the plaintiff was removed out of the county court, he had ceased to be sheriff: Held, that this was no variance, the substance of the allegation being, that the plaintiff was removed out of the county court in which it was levied, and that having been proved by the record of the judgment in the replevin suit, it appeared that the jury, after finding that the rent in arrear was 97*L.* 10*s.*, and assessing the damages besides costs, at the prayer of the plaintiff and her bailiffs, according to the statute 17 Car. 2, c. 7, proceeded to inquire of the arrears of rent, and the value of the distress, and found the arrears to be 97*L.* 10*s.*, and the value of the distress to be the same. Besides the common law judgment, as stated in the declaration, there was a judgment under the statute 17 Car. 2, c. 7, that the defendants should recover against the plaintiff in replevin 97*L.* 10*s.*, and another sum for costs, and that the defendants should have execution thereof. There was also a prayer by the defendants in replevin, for a writ of *fit. fa.* to the sheriff, and averment that it was granted to them; and it was proved that a *fit. fa.* in fact issued, to which the sheriff returned *nulla bona*, but it was not proved that *any writ de retorno habendo had been issued*: Held, that the replevin bond had become forfeited in consequence of the plaintiff in replevin not having prosecuted his suit with success, that being a breach within the meaning of the words "prosecuting with effect," and, therefore, that the plaintiff in this action had sustained an injury, and was entitled to recover, although no *writ de retorno habendo* had been issued.

Held, also, that although the plaintiff had elected to proceed under the statute 17 Car. 2, c. 7, still he was not confined to his execution under that statute, but might also proceed against the sureties upon the replevin bond, or against the

sheriff for his negligence in the loss of it.

Held, also, that assuming the plaintiff had not proved the breach alleged in the declaration, yet as it appeared that there had been a breach of the condition of the bond, by reason of the plaintiff in replevin not having prosecuted his suit with effect, the plaintiff was entitled to recover, although a breach in that respect was not formally assigned. *Perrers v. Bevan*, H. 6 & 7 G. 4. 284

13. Where, in error, to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *exig. facias*, the plaintiff in error was beyond seas; and defendant pleaded, that before the awarding and issuing of the *exig. facias*, plaintiff in error of his fraud and covin, and in order to defeat defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of *England*, and of such his fraud and covin, voluntarily remained in parts beyond the seas until after the outlawry, whereupon issue was joined and found for the defendant: Held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error, non obstante veredicto. *Bryan v. Wagstaff* (in error.) E. 7 G. 4. 314
14. A bailiff employed by an attorney to execute writs, may maintain an action against him for the fees usually paid on such occasions. *Foster v. Blakelock, Executor*, E. 7 G. 4. 328
15. In case against the sheriff for a false return to a *fit. fa.*, the declaration stated, that by the judgment of the court, the plaintiff recovered against A. B. 39*L.*, which were adjudged to him for his damages, by him sustained, as well by occasion of his not performing certain promises and undertakings as for his costs, &c. At the trial, it appeared by the judgment produced in evidence, that as to all the counts in the declaration, except the first, a *remittitur* was entered, and that the damages were given for the non-performance of the promise and undertaking in that count mentioned: Held, that this was a fatal variance. *Edwards v. Lucas and Another*, E. 7 G. 4. 339
16. Where an indenture was made between "A. for and on behalf of B. on the one part, and C. on the other part." A. being thereunto authorized by writing under B.'s hand, but not under seal, and A. executed the deed in his own name: Held, that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C., to and with B. *Berkeley v. Hardy*, E. 7 G. 4. 355
17. A horse-dealer cannot maintain an action upon a contract for the sale and

1. warranty of a horse made by him upon a Sunday. *Fennell v. Ridder*, E. 7 G. 4. 406
2. Where in covenant against an assignee of a lease, the plaintiff declared that all the right, &c., of the lessee vested in the defendant by assignment, and that afterwards the premises were out of repair, and defendant pleaded in bar, that for one period he was possessed of one-sixth of the premises, as tenant in common with A., B., and C., and for another period, of one-third as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment: Held, that the plea was bad in substance, as it could not be a bar to the whole action; that it was bad in form also, as it merely confessed that defendant had possession of part of the premises, and not that he was assignee. *Semble*, that the defendant should have pleaded in abatement, and should have shown how the other persons became tenants in common with him. *Merceron v. Doweon*, E. 7 G. 4. 479
19. Trespass for breaking and entering the plaintiff's dwelling-house, and remaining there until the plaintiff paid him a large sum of money, to wit, &c. Justification under a *fit. fa.* to the sheriff of S., and a warrant thereupon to the defendant, as bailiff, directing him to levy ——. Replication, that before the said writ and warrant were fully executed, the defendant demanded and received 3l. 10s. more than he was authorised to levy. On demurrer: Held, that the replication was bad, inasmuch as the facts alleged in it did not make out that the defendant was a trespasser *ab initio*. *Shoreland v. Gavett*, E. 7 G. 4. 485
20. In *assumpsiō*, by an administratrix upon a promissory note given to her intestate, it was averred in the declaration that administration of all and singular the goods and chattels of the intestate was duly granted by the bishop of C. Plea, that the plaintiff never had been, nor was administratrix of all and singular the goods and chattels of the intestate in manner and form as she had alleged in her declaration; and issue being joined on this plea, the letters of administration granted by the bishop of C., were produced by the plaintiff; but it was also proved, that the intestate, at the time of his death, had *bona notabilia* in another diocese in a different province; and no evidence was given as to the residence of the defendant at the death of the intestate: Held, first, that the letters of administration were not void, inasmuch as the other diocese in which the intestate had *bona notabilia* was in a different province. Held, secondly, that the only question raised upon the issue was, whether the letters of administration were duly granted by the bishop of C., and that it was not part of the issue, whether the defendant at the death of the intestate resided within the diocese of C. The fact of his residence elsewhere, if relied upon, ought to have been specially pleaded. *Stukes, Administratrix, v. Bate*, E. 7 G. 4. 491
21. The assignee of a rent may maintain debt for arrears of the rent. *Allen v. Bryan*, E. 7 G. 4. 512
22. Debtor on bond conditioned for the performance of an award to be made on a day therein named. One of the terms of the submission was, that the arbitrator should examine the witnesses produced by the parties in difference. Plea, that the arbitrator made several appointments for proceeding with the reference, and examined witnesses produced by the plaintiff, and occupied the whole of the time of the meetings respectively in so doing; that plaintiffs, on the day when the time for making the award expired, closed their case, and defendant was called upon to enter upon his defence; that at that time an insufficient time remained for the defendant to bring forward and examine his witnesses; i.e. he requested the arbitrator to allow him reasonable time to bring forward and examine his witnesses, which the arbitrator refused, without the consent of the plaintiffs, and which consent the plaintiffs, although requested by the defendant, refused to grant, and the arbitrator refused to allow the defendant any further time, although he had several material witnesses to examine, of which the arbitrator and the plaintiffs had notice: Held, upon general demurrer, that this plea was bad. *Grazebrook v. Davies*, E. 7 G. 4. 534
23. Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person: Held, by *Abbott*, C. J., and *Littledale*, J., *Bayley* and *Hornbyd Js. dissentient*, that the owner of the carriage was not liable to be sued for such injury. *Laugher v. Poiner*, T. 7 G. 4. 547
24. Lessee, by deed poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee: Held, that the lessee might maintain an action upon the case founded in tort

against *A.*, for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. It was averred in the declaration, that the defendant continued in possession until the end of the term, and whilst he was in possession as such assignee suffered the premises to be out of repair. The proof was, that he had ceased to be assignee before the expiration of the term : Held, that this was not any variance. *Burnett and Others, Executors, v. Lynch*, T. 7 G. 4. 589

25. Replevin. Avowry that the defendant demised the close in which, &c. (amongst others) to *A. B.*, and because the cattle were there, he distrained them for rent arrear. Plea in bar, that the cattle were not levant and couchant upon the close in which, &c.: Held on demurrer, that the plea was bad, first, for not showing how the cattle came upon the land; secondly, and for not stating that they were not levant and couchant upon any part of the lands demised. *Jones v. Powell*, T. 7 G. 4. 647

26. An indictment under the 39 G. 3, c. 85, against a servant for embezzlement, must set out specifically some article of the property embezzled; and an indictment charging that the prisoner "took and received, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10*l.*, and afterwards embezzled the same," was held bad. *The King v. Flower*, T. 7 G. 4. 736

27. Where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him : Held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that the seller could not before that act had been done, maintain an action for goods sold and delivered.

Sembler, that an action for goods bargained and sold could not have been maintained per *Littledale J. Simmons v. Swift*, T. 7 G. 4. 857

28. In an action by *A.*, his wife, and *B.*, the declaration stated, that the plaintiffs had agreed to let to the defendant certain lands; that the defendant became tenant to the plaintiffs, and in consideration that the plaintiffs had promised the defendant to perform all things in the agreement by them to be performed, the defendant promised, &c. The agreement given in evidence, purported to be made by an agent for the wife of *A.* and *B.* only, but *A.* had subsequently received rent from the tenant: Held, that the consideration was

not proved as alleged, inasmuch as *A.* was not bound by the agreement before the receipt of rent, and therefore was not a joint contractor *ab initio*. Another count stated, that the defendant was tenant to the plaintiffs, and in consideration had promised to use the lands in a husbandlike manner. The proof was, that he had agreed to farm the land in a husbandlike manner, to be kept constantly in grass : Held, that this also was a variance. *Saunderson v. Griffiths*, T. 7 G. 4. 909

POOR, CASUAL.

See Overseers.

POOR-RATE.

1. By an act of parliament a company was established for lighting the town of *B* with gas, and they were authorized, with the consent of certain commissioners (appointed under another act of parliament passed for lighting and paving the town of *B*.) to break the ground and lay their pipes in the streets of *B*. The company having so laid their pipes for the purpose of conveying the gas, were held to be rateable to the poor in respect of the land occupied by their pipes, and to the extent of the increased value of the land in consequence of its being used by them for the purpose of conveying the gas. *The King v. The Brighton Gas Light and Coke Company*, E. 7 G. 4. 466

2. By a canal act of the 31 G. 3, c. 31, s. 77, it was enacted, that the company should be rated to all parochial taxes in respect of their lands, &c., in the same proportion as other lands lying near the same should be rated, and as the same lands would be rateable in case the same were the property of individuals in their natural capacity. By a subsequent act of the 38 G. 3, c. 31, s. 20, it was enacted, that the company should be rated to all parochial taxes in respect of the lands used by them for the purposes of the said navigation, in the same proportion as other lands and buildings adjoining or lying near the canal should be rated; but it was further enacted, that it should be lawful for the company to agree with any owner of lands adjoining their lands, taken for the purpose of the said navigation, for an exemption from all rates and taxes in respect of such lands, and for charging the same upon adjoining lands of such persons, and in all such cases the parochial taxes, rates, &c., which might be thereafter charged upon or payable in respect of the lands so taken for the purposes of the said navigation, should be rated and charged upon such adjoining lands, and upon the own-

and occupiers thereof, and the lands of the company should be exempted and discharged therefrom :

Held, first, that by the 31 G. 3, c. 31, s. 77, the company were not liable to be rated for the land used for the purposes of the canal according to its improved value:

Held, secondly, that the 77th section of the 31 G. 3, was not repealed by the 20th section of the 38 G. 3, and that the company were not liable to be rated for the improved value of the land. *The King v. The Inhabitants of St. Peter the Great, Worcester*, E. 7 G. 4. 473

3. Where a poor-rate was imposed upon a lighthouse, together with the duties and contribution money payable in respect of ships passing by the same (and the lighthouse was occupied by a servant of the owner) and was situated in the parish, but the duties were collected out of the parish: Held, that these duties did not constitute part of the annual profits of the house or land where the light was placed, and were not rateable to the poor. *The King v. Coke*, T. 7 G. 4. 797

4. Where the owner and occupier of an iron-stone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose: Held, that he was not rateable to the poor in respect of the engine. *The King v. The Chapelwardens and Overseers of the Township of Bilston*, T. 7 G. 4. 851

POWER OF APPOINTMENT.

See DEED, 7.

Where A. B., seised in fee of one moiety of certain premises in the county of S., and tenant for life, with power of appointment by deed or will of the other moiety, devised as follows: "I give and devise all my freehold estates in L. and county of S., or elsewhere, to my nephew J. K. for life, on condition, that out of the rents thereof he do from time to time keep such estates in repair." Held, that this did not operate as an execution of the power, and passed that moiety only of which testator was seised in fee. *Denn on the demise of Nowell v. Roake* (in error), T. 7 G. 4. 720

PRACTICE.

1. After judgment by default against one of two defendants, the plaintiff may, upon the trial of an issue joined by the other defendant, elect to be nonsuited. *Murphy v. Doulan and Marshall*, H. 6 & 7 G. 4. 178
2. A plaint in replevin cannot be removed from a county court in Wales into this

court by *certiorari*. *Edwards v. Bowen and Another*, H. 6 & 7 G. 4. 206

3. Where in trespass against parish officers for distraining for poor's rates, it appeared that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause the court stayed the proceedings until he gave security for costs. *Tenant v. Brown and Others, Jones v. Brown and Others*, H. 6 & 7 G. 4. 208

4. Sheriff arrested A. B. on the 13th of November, upon a writ returnable the 15th, and suffered him to go at large without giving a bail-bond, and afterwards returned *cepi corpus*. Bail above were put in on the 17th of December, and on the same day A. B. was rendered, but notice of render was not given until the 13th of January. An action against the sheriff for the escape was commenced on the 19th of December. The Court stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion. *Brookhouse v. The Sheriff of Derbyshire*, H. 6 & 7 G. 4. 244

5. Where a defendant convicted upon an indictment for a libel was committed to prison at the instance of the prosecutor, who would not afterwards bring him up for judgment, the court, at the prayer of the defendant, passed judgment in the prosecutor's absence. *The King v. Boltz*, E. 7 G. 4. 334

6. On moving to set aside an attachment against the sheriff, it is sufficient to entitle the affidavit, *Rex v. Sheriff of _____*, without naming the cause, although it is convenient to do so.

An exception to bail must be entered in the bail book, and *semble*, that written notice of it must be given to the defendant's attorney. *Rex v. The Sheriff of Middlesex*, E. 7 G. 4. 369

7. Where a cause is referred by a Judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a Judge's order, on moving for an attachment for not performing the award, it must be shown that the order enlarging the time was made by consent. *Halden v. Glasscock*, E. 7 G. 4. 390

8. A plaintiff cannot declare *de bene esse* upon a *lata sit* returnable on the last general return of a term. *Wilson v. George*, E. 7 G. 4. 454

9. Where, in ejectment, A. was admitted to defend alone as landlord, and died before the termination of the action, having devised all his real estates to B., and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the court gave him leave to sign judgment against the casual ejector in the old suit and issue execution there-

- on, unless *B.* would appear and defend the action as landlord. *Doe dem. Grubb v. Grubb*, E. 7 G. 4. 457
10. Where the Court, after verdict for the plaintiff, granted a new trial without mentioning the costs, and the plaintiff discontinued: Held, that the defendant was not entitled to the costs of the trial. *Gray v. Cox*, E. 7 G. 4. 458
11. Where a cause and all matters in difference were referred by order of *Nisi Prius*, and the arbitrator by his award found that nothing is due to the plaintiff: Held, that this must be considered as a finding, that the plaintiff had no right to recover in the action.
- The arbitrator had power to enlarge the time for making his award by indorsement on the order of reference, that order, together with two indorsements enlarging the time, was made a rule of Court: Held, that on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.
- By the order of reference costs were to abide the event; there were two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The Master taxed the whole costs of the cause, and the reference in one sum to the other defendant, by whom payment was demanded of the plaintiff. The Court refused to grant an attachment for non-payment of those costs. *Query*, whether the Master had power to tax costs for the two defendants separately? *Dickins v. Jarvis and Smith*, E. 7 G. 4. 528
12. Where an award under the 9 & 10 W. 3, c. 15, was made after the *essouye day*, but before the *quarto die post*: Held, that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term next following. *In the matter of Burr*, T. 7 G. 4. 668
13. Where an appearance is entered for a defendant, and a declaration filed pursuant to the 12 G. 1, c. 29, no demand of pleia is necessary, *Free v. Mason*, T. 7 G. 4. 763
14. Where a declaration in ejectment was left at the house of the tenant in possession on *Saturday*, and the tenant afterwards acknowledged that he received it on the following *Sunday* (which was before the *essouye day*:) Held, that this was not good service. *Doe v. Roe*, T. 7 G. 4. 764
15. Upon a general demurrer to a plea of *nil debet* to an action upon a bond, the Demurrer Book is to be made up by the plaintiff's attorney, and not to be filed with the clerk of the papers. *Herbert v. Taylor*, T. 7 G. 4. 766
16. One of several joint defendants may obtain a rule for judgment as in a case of a nonsuit. *Jones v. Gibson and Smith*, T. 7 G. 4. 768
17. A summons for better particulars of the plaintiff's demand was obtained by the defendant four days before the time for pleading expired. The plaintiff's attorney did not attend till the third summons, and the order being then refused, and the time originally allowed for pleading having expired, signed judgment for want of a plea: Held, that as the delay was occasioned by the plaintiff's attorney, the judgment was signed too soon, and was, therefore irregular. *Glover v. Watmore*, T. 7 G. 4. 769
18. Where a rule or summons for staying the plaintiff's proceedings obtained by the defendant is discharged, the latter is bound to take his next proceeding within the day on which such rule or summons is disposed of. *Hughes v. Walden*, T. 7 G. 4. 770

PRESCRIPTION.

See PROHIBITION.

PRINCIPLE AND AGENT.

It was agreed between *A.* resident in *London*, and *B.*, who resided in the *West Indies*, that the former should accept bills drawn upon him by *B.* to a specified amount, upon *A.*'s having bills of lading filled up to his order for coffee, sugar, cotton, and rum, and that after deducting his (*A.*) advances, charges, and commissions, the balance was to be paid to *C.*, who was a merchant resident in *London*, and for whom *B.* acted as agent in the *West Indies*. *B.* shipped goods with a bill of lading filled up to *A.*'s order. At the time when the goods arrived, *C.* had become bankrupt. *A.* demanded the goods, but the captain having wrongfully refused to deliver them, he brought trover against the captain. Before any assignees were chosen under *C.*'s commission the cause was referred to arbitrators, but they not having made any award, the cause was tried, and *A.* recovered the proceeds of the goods. The assignees of *C.* having brought *assumpsit* for money had and received to recover the proceeds of the goods: it was held, that *A.* was authorised by the bill of lading to act for the benefit of all concerned, and to do all that was necessary to obtain possession of the goods, and there being nothing to show that a reference was an improper step, it was held that *A.* was entitled to deduct the costs of the reference as well as of the cause. *Curtis and Another, Assignees, v. Barclay*, H. 6 & 7 G. 4. 141

PROHIBITION.

1. Extra parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title; and, therefore, if they sue in the ecclesiastical court to be quieted in the possession of such seats, this court will grant a prohibition. *Somble*, that they cannot establish such a claim even by prescription. *Byerley v. Windus, and others*, H. 6 & 7 G. 4. 1
2. The stat. 27 G. 3, c. 44, does not limit the time for proceeding in the ecclesiastical court against clerks upon a charge of fornication, if deprivation be the object of the suit; and, therefore, where a suit was instituted in that court against a clerk, charging (amongst other things) fornication committed more than eight months before the commencement of the suit: Held, that a prohibition should go as to proceeding upon that charge for reformation of manners, but that a consultation should be awarded as to proceeding for deprivation. *Free, D. D., v. Burgoyme*, E. 7 G. 4. 400
3. In prohibition a writ of error does not lie from K. B. to the Exchequer Chamber. *Free, D. D. v. Burgoyme*, T. 7 G. 4. 765

PROMISSORY NOTE.

See BANKRUPT, 4. BILL OF EXCHANGE, 1, 2.

RATE.

PEON RATE.

Where an inclosure act directed that all great tithes payable to the rector of the parish should be extinguished, and that the commissioners should ascertain the net value of such tithes, and affix a fair clear annual rent or sum of money per acre in lieu of such tithes, as an adequate compensation for the same to the rector: Held, that the rector was, in respect of such rents, rateable to the repair of the highways. *The King v. Lacey, Clerk*, T. 7 G. 4. 702

REMAINDER.

See DEVISE, 3.

REMOVAL, ORDER OF.

Where an order of removal is appealed against, and is quashed generally by the sessions, the appellant on the trial of another appeal may show by evidence the distinct ground upon which the former order was quashed. *The King v. The Inhabitants of Whealock*, E. 7 G. 4. 511

REPLEVIN, BOND.

See PLEADING, 12.

SETTLEMENT—by Estate.

1. made a parol agreement with B. for the purchase of a cottage and garden for 40*l.* A. took possession, and paid 30*l.* on account, and resided upon the premises. No conveyance was executed. After A. had been in possession twelve months, he sold the property for 49*l.* to C., to whom he gave up the possession. A. afterwards paid the remainder of the purchase money to B.: Held, that A. did not gain any settlement by the purchase of any estate or interest within the statute 9 G. 1, c. 7, s. 5. *The King v. The Inhabitants of Llanillio Grossenny*, E. 7 G. 461

SETTLEMENT—by Birth.

See EVIDENCE, 15.

SHERIFF.

See COSTS, 2.

In an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias*, the sheriff proved that he had seized all the goods of the debtor under a *fieri facias* in another suit, before the plaintiff's writ was delivered to him. The plaintiffs in answer proved that the judgment upon which the first execution was sued out, was entered up upon a warrant of attorney fraudulently executed by the debtor in order to defeat the plaintiff's execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff, on the first day of the next term, was served with a rule to return the writ of *fieri facias* under which he had first levied. He did not give any notice to the plaintiffs by whom the second *fieri facias* had been sued out, that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff, at whose suit the first *fieri facias* had been sued out: Held, that this was misconduct in the sheriff, and rendered him liable to the plaintiffs in the second execution.

Quare, whether the sheriff, if not guilty of negligence or misconduct, would have been liable to the action. *Warrall and Another v. Young*, T. 7 G. 4. 880

SHIP.

The 53 G. 3, c. 159, s. 1, is to be construed as if the words, "with all her appur-

"lances," had been inserted after "ship or vessel," as in sect. 7.

Whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owner, constitutes a part of the ship and her appartenances within the meaning of the 53 G. 3, c. 159, and the owner is liable to the extent of the value thereof for damage done to another vessel in the manner described by that act. *Gale v. Laurie and Others*, H. 6 & 7 G. 4. 156

SLANDER.

Words spoken of an innkeeper imputing insolvency are actionable, although at the time when they were spoken, an innkeeper was not subject to the bankrupt laws. *Whittington v. Gladwin*, H. 6 & 7 G. 4. 180

SPECIAL SESSIONS.

The notices of holding a special sessions for the purpose of diverting a public highway, must be given to the justices of the peace of the county acting within the district, by the high constable of the hundred. *The King v. The Justices of Surrey*, H. 6 & 7 G. 4. 241

STAMP.

By an instrument under seal, A. agreed to take and hire of B. certain premises at a certain yearly rent, but no time was fixed for the commencement or determination of the interest. It was also agreed that A. should take at a valuation to be made on a future day, the fixtures, furniture, and stock in trade on the premises. The instrument had a stamp of 11. 10s. impressed upon it: Held, that it was only an agreement for a lease, and that the stamp was not sufficient. *Sembie*, It should have been a stamp of 11. 15s., the instrument being "a deed not otherwise charged" in the schedule to the 55 G. 3, c. 184. *Clayton and Others v. Burtenshaw and Another*, H. 6 & 7 G. 4. 41

SURETY.

See INSOLVENT ACT.

TITHES.

See RATE.

TOLL.

See MARKET; I.

... By a turnpike act certain tolls were imposed upon carriages drawn by horses, another toll upon horses not drawing, and other tolls upon oxen, &c. There was a

proviso, that all persons having once paid the toll for their carriages, horses, and cattle, returning the same day with the same carriages, horses, and cattle, should pass toll free. By a subsequent act, reciting that it was expedient to increase the tolls, the provisions in the former act, except with certain alterations, were re-enacted. One of the alterations was, that the former tolls should cease, and that instead thereof there should be paid for every horse or beast of draught drawing a carriage, sixpence. After the passing of the latter act, four horses drawing a stage-coach passed through one of the toll gates in the morning, and the same four horses, drawing a different stage-coach, belonging to the same proprietor, repassed through the same gate in the evening: Held, that no second toll was payable. *Fearnley and Others v. Morley*, H. 6 & 7 G. 4. 25

2. By a turnpike act, a second toll was imposed upon every horse or other beast drawing any carriage, &c., a certain other toll upon every horse not drawing, and other tolls upon every drove of oxen, &c. There was a proviso, that no collector should take more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle passing once in the same day through the same or any of the gates on the said roads, such person producing a ticket denoting that such toll had been paid on that day for or in respect of such horse, beast, or other cattle: Held, that a second toll was not payable in respect of the same horses passing once and repassing once in the same day, but drawing a different carriage, belonging to the same proprietor. *Jackson v. Curwen*, H. 6 & 7 G. 4. 31

TREES.

See DEED, 6.

TRESPASS.

A lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber: Held, that as tenant for life or years would have been entitled to them, if they had been blown down, and was entitled to the ususfruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them. *Channon v. Patesh*, T. 7 G. 4. 997

TROVER.

The statute of Limitations is a bar to an action of trover, commenced more than six years after the conversion, although

the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period. *Granger v. George*, H. 6 & 7 G. 4. 149

VARIANCE.

See PLEADINGS, 11, 12, 15, 24, 28.
EVIDENCE, 8, 9, 12, 22

VENDOR AND VENDEE.

1. A. being indebted to B., the latter agreed to accept the amount by instalments, C. undertaking to guarantee the payment of them. On the day after the first instalment became due, C. remitted to B. the amount partly in bills not then due, and partly in bank notes. B. wrote, acknowledging the receipt of the bills and notes, and said they should be placed to A.'s account: Held, that although he was not bound to accept the remittance so made, yet having done so, he had thereby waived all objection to the time when it was sent, or the manner in which it was made up, and that he could not afterwards maintain an action against A. upon the ground of his having failed to pay the first instalment.

At the time of making the said agreement, A. contracted to sell and deliver to B. a large quantity of bark. He delivered a small part only, and failed to complete his contract. B. never returned the part delivered: Held, that A. was entitled to set off the value of that part against B.'s demand. *Shipton and Another v. B. Casson*, E. 7 G. 4. 378

2. A horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a *Sunday*. *Fennell and Another v. Ridder*, E. 7 G. 4. 406

3. Where a broker, having made a contract, entered it in his book, but did not sign it, and afterwards signed and delivered, bought and sold notes to the contracting parties, materially differing from each other: Held, that there was no valid contract in writing to bind the parties. *Grant and Others v. Fletcher and Another*, E. 7 G. 4. 436

4. Where a contract was made between A. and B., whereby A., having a quantity of apples, agreed to sell his cider to B. at a certain price per hogshead, to be delivered at T. at a future time, and to lend such pipes as he had, for the use of the cider to be manufactured on his (A.'s) premises, and to be paid for before it was removed; and A., in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by B. to manufacture the cider on A.'s premises; and before the cider was completely manufac-

tured, it was seized by the excise-officers, because the place where it was deposited had not been entered, and was condemned in the Exchequer as B.'s property, together with the casks. In *assumpsit* for goods sold and delivered brought by A. against B., it appeared that the word *cider*, at the place where the contract was made, meant the juice of the apples as soon as it was expressed, and it was thereupon held, that the contract must be construed to have been for the sale of cider in that sense of the word, and that the property passed to B. as soon as the apple juice was delivered to his servant. Secondly, that it was B.'s duty to enter the premises, and as through his default it became impossible for A. to deliver the goods at *Tolness*, the failure to do so did not bar his action. Thirdly, that A. might recover in this action the price of the casks lent to the defendant. *Studdy v. Sanders and Another*, T. 7 G. 4. 628

5. A verbal agreement made on the 25th of September for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the fourth section of the statute of frauds, but a sale of goods, wares, and merchandizes within the seventeenth section. *Evans v. Roberts*, T. 7 G. 4. 893

6. Where the owner of a stack of bark entered into a contract to sell it at a certain price *per ton*, and the purchaser agreed to take and pay for it on a day specified; and a part was afterwards weighed and delivered to him: Held, that the property in the residue did not rest in the purchaser until it had been weighed, that being necessary, in order to ascertain the amount to be paid; and that the seller could not before that act had been done, maintain an action for goods sold and delivered.

Seemle, that an action for goods bargained and sold could not have been maintained, per *Littledale J. Simmons v. Swift*, T. 7 G. 4. 857

WALES.

See CERTIORARI, I.

WARRANT OF ATTORNEY.

See ANNUITY, 1. SHERIFF.

1. Where a warrant of attorney was given with a defeasance, stating it to be given "as a security for 4000*l.* and lawful interest thereon: Held, that it was to be construed as continuing security, and not merely as a security for money then due. *Woolley and Others, Assignees, v. Jennings and Another*, E. 7 G. 4. 165

2. A bond, upon the face of it, appeared to

be conditioned for the payment of a sum certain; but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed, that it should be lawful for the obligees in the bond to commence an action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees, on demand of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breaches, or executing a writ of inquiry: Held, first, that this was a bond substantially conditioned for the performance of an agreement within the 8 & 9 W. 3, c. 11, s. 8, and that the obligees, therefore, ought to have assigned breaches. Secondly, that the indenture, by virtue of which the judgment was entered up, was, in legal effect a cognovis actionem within the meaning of the third section of the 3 G. 4, c. 39, or if

not, that it was a contrivance to defeat the provisions of that statute, and the indenture not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the court, upon an application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn. *Hurst v. Jennings*, T. 7 G. 4. 650

WASTE.

See LEASE 2.

WITNESS.

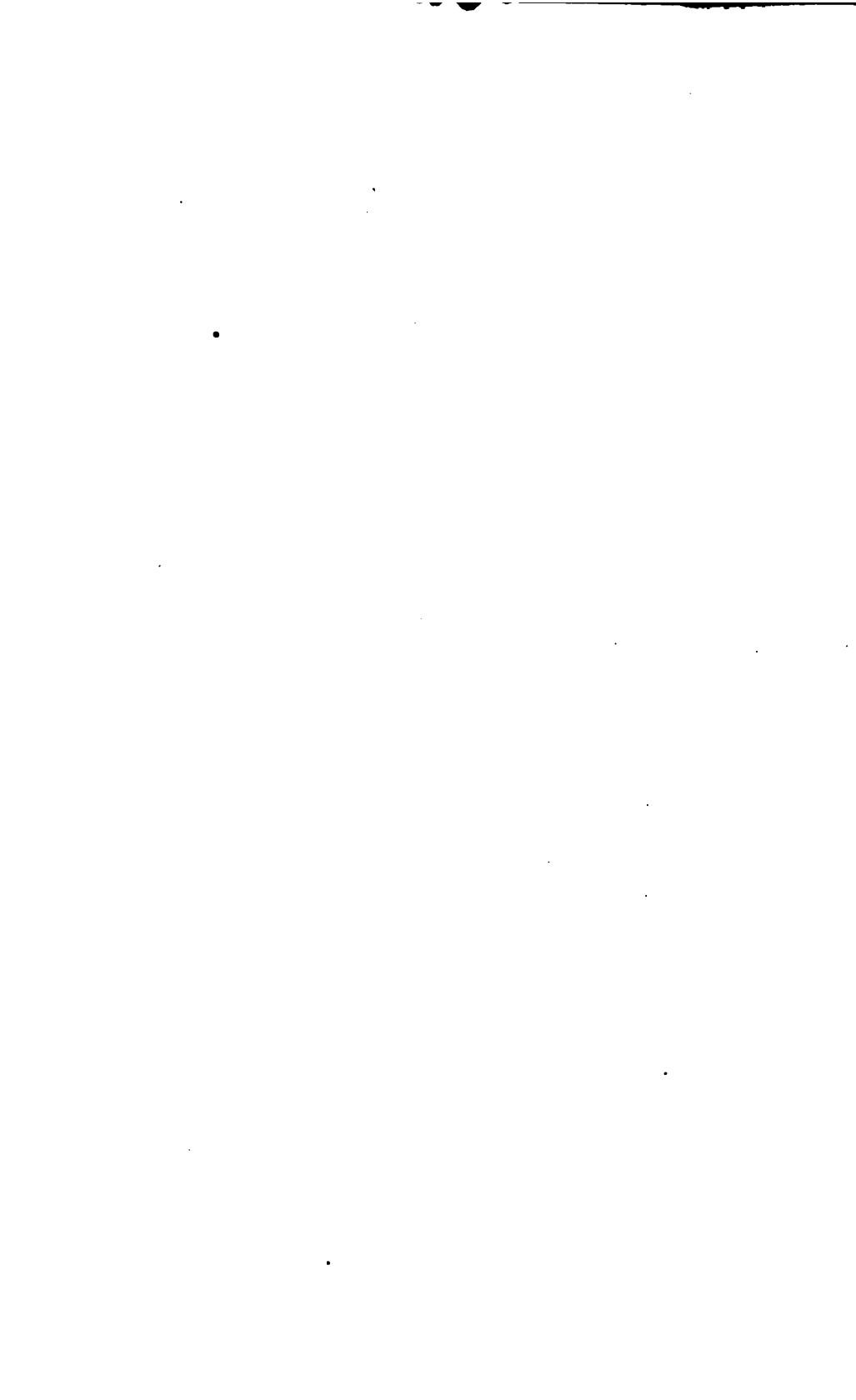
See EVIDENCE, 5, 11.

WRIT OF ERROR.

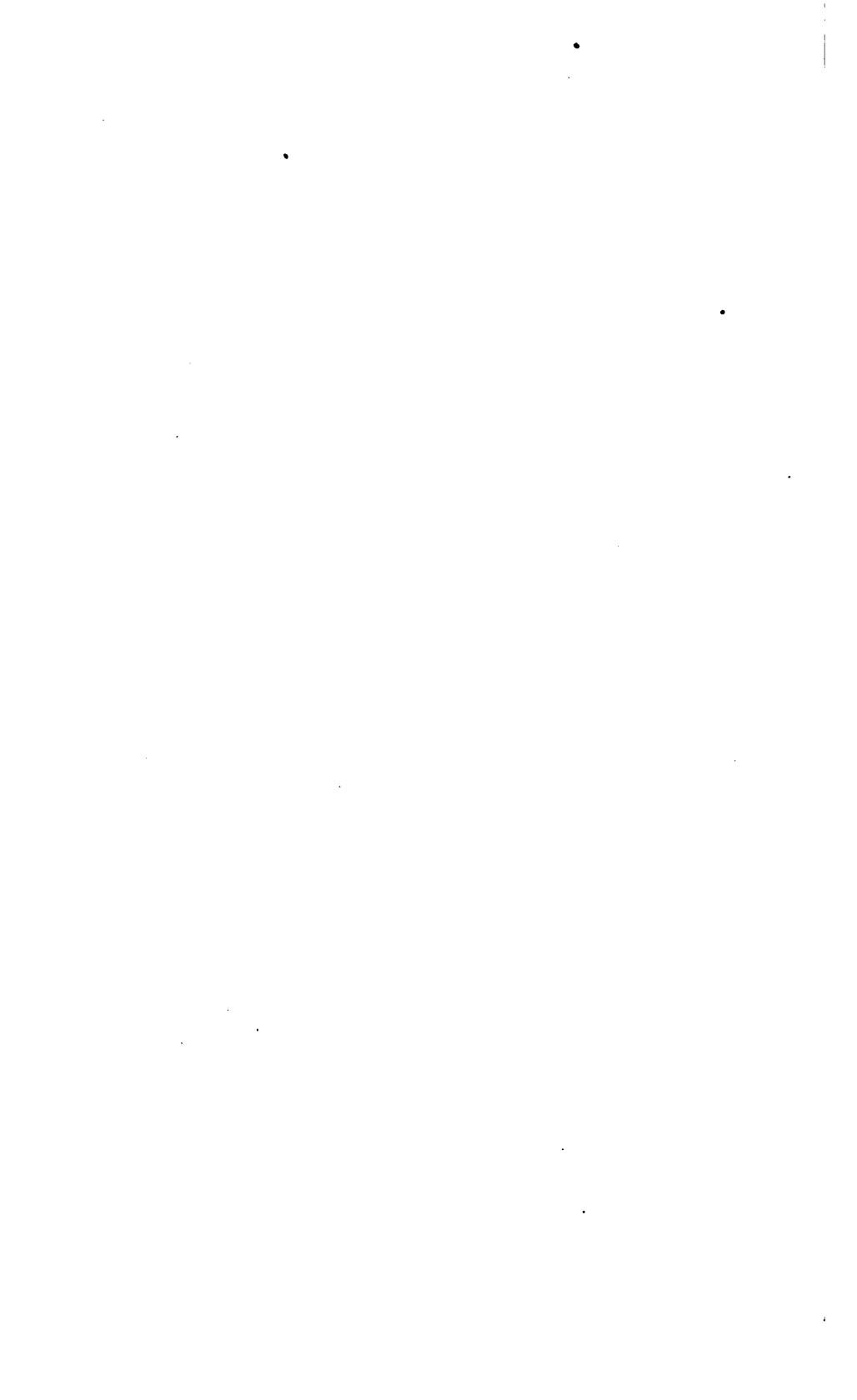
In prohibition a writ of error does not lie from K. B. to the Exchequer Chamber. *Free, D. D. v. Burgoyne*, T. 7 G. 4. 765

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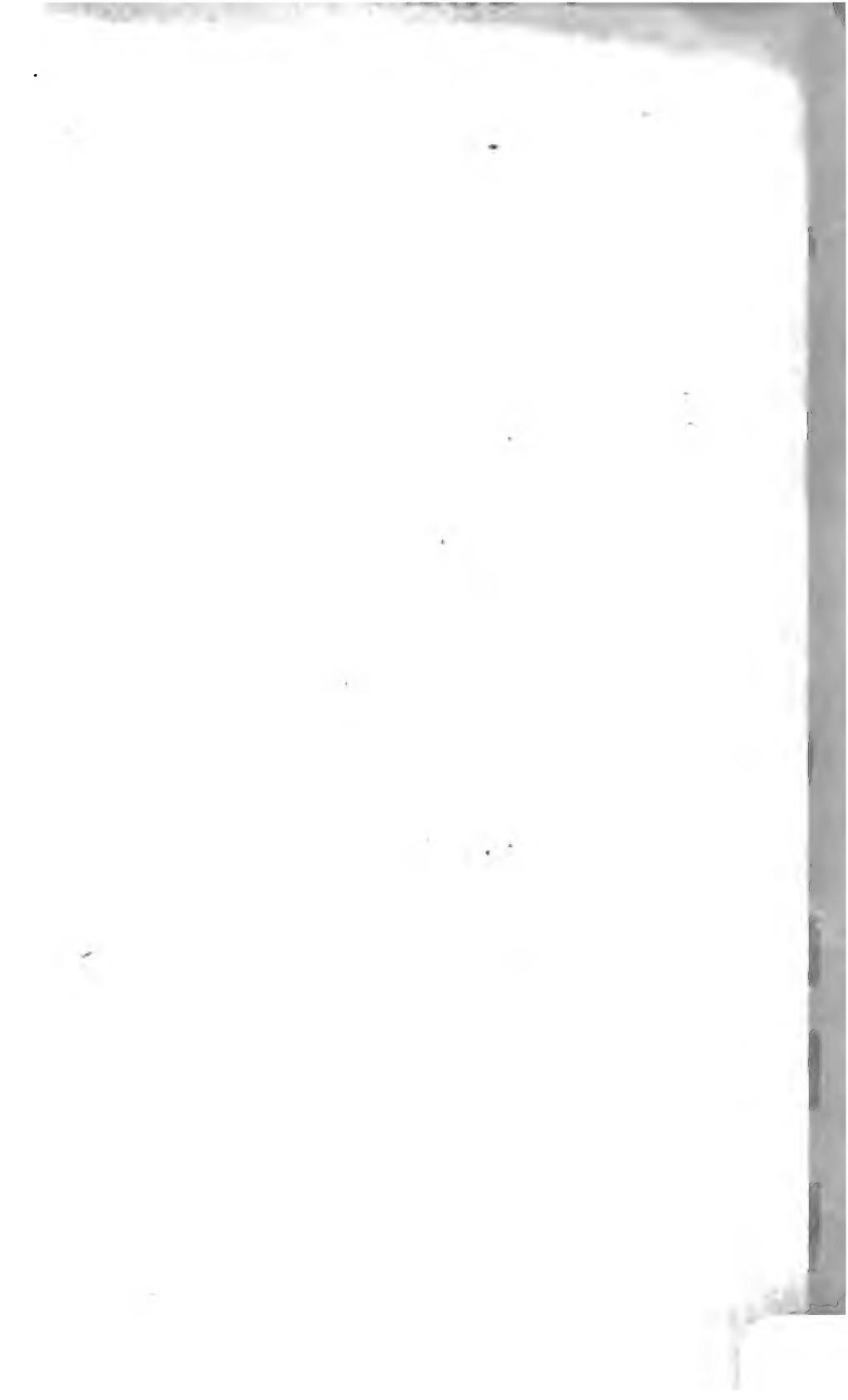


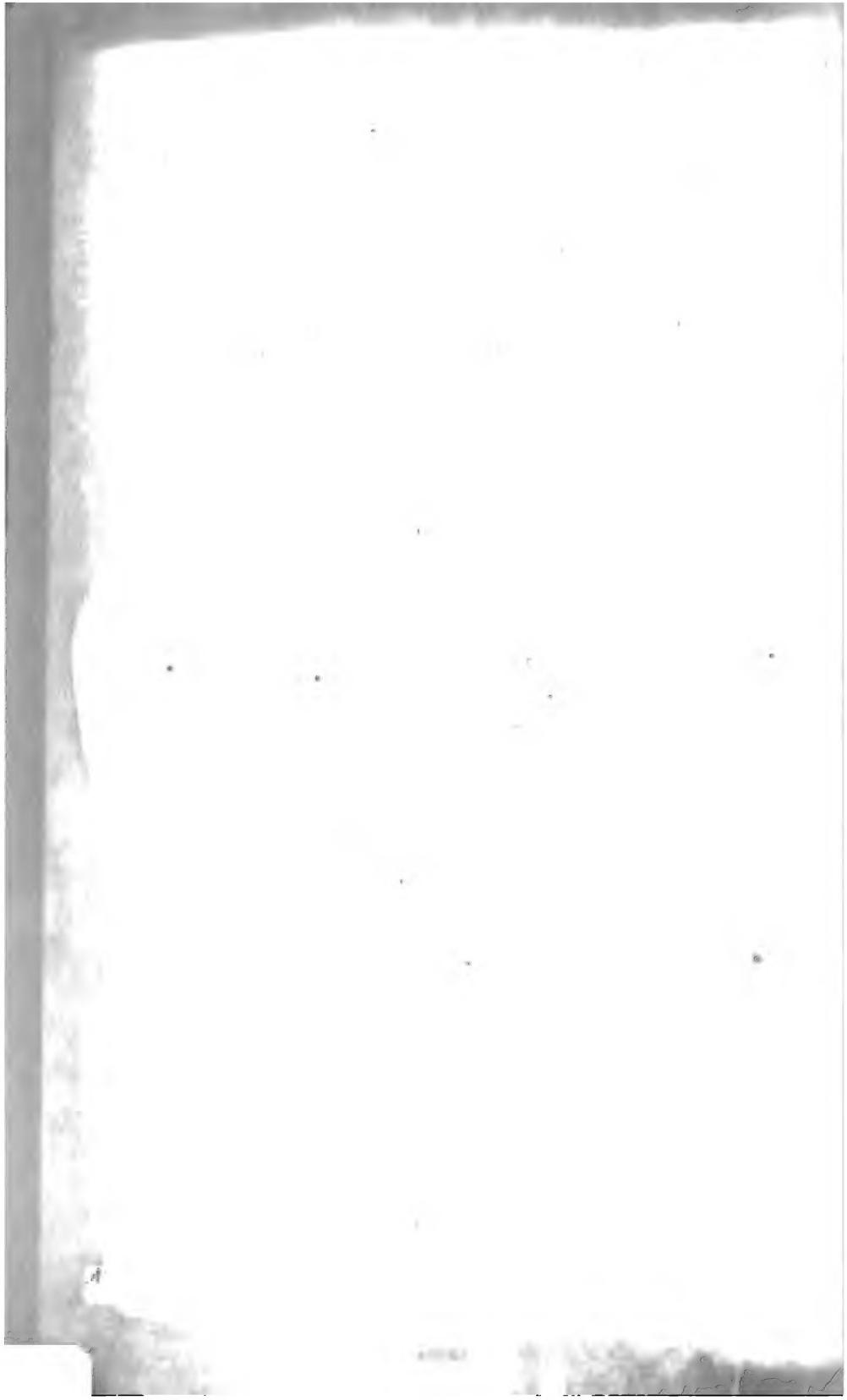












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